Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Patten, Woolvin
—direct (Obenour) 303
—cross (Mead) 319
—redirect (Obenour) 328
—recross (Mead) 332
—direct (Mead) 1690
—cross (Obenour) 1699
—redirect (Mead) 1705

Pinch, Morton
—direct 1714
—cross 1719

Rankin, Robert B.
—direct 1665
—cross 1672
—redirect 1689

Renstrom, Edward O.
—direct 1233
—cross 1257
—redirect 1267
—recross 1273

Riedel, Arthur Maurice
—direct 1350
—cross 1357

Rockwell, W. A.
—direct 969
—recalled, direct 1159

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Rylander, Robert
—direct 953

Schaefer, Henry
—direct 1730
—cross 1732

Schneiderman, Harry
—direct 1292
—cross 1297

Seelbach, Walter George
—direct 200
—recalled, direct 1186

Seijas, Army A.
—direct 334, 484, 624
—cross 665, 684, 773, 845
—redirect 842, 850

Singer, Avery J.
—direct 1162
—cross 1176

Tingle, John A.
—direct 886
—cross 902
—redirect 906
—recross 908

Walsh, John R.
—direct 225
—cross 237

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Whittle, George V.

—direct (Obenour) 243
—cross (Mead) 283
—redirect (Obenour) 298
—recross (Mead) 301
—direct (Mead) 1706
—cross (Obenour) 1709
—redirect (Mead) 1712
—recross (Obenour) 1713

Zimmerman, Loris

—direct 1656
—cross 1662
—redirect 1664

Verdict 99

VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]

WILLIAM R. FORMAN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1959
CERTIORARI GRANTED MAY 4, 1959

No. 15324

United States
Court of Appeals
for the Ninth Circuit

WILLIAM R. FORMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

(In Four Volumes)

VOLUME I.

(Pages 1 to 448, inclusive).

Appeal from the United States District Court for the Western District of Washington, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit of John S. Obenour in Opposition to Motion to Quash Subpoena Served on Al Forman 72

Appeal:

Certificate of Clerk to Transcript of Record on 107

Notice of 105

Order Transferring Records and Exhibits on 106

Statement of Points on (USCA)..... 1880

Certificate of Clerk to Transcript of Record.. 107

Indictment 3

Instructions Requested by Defendant Forman 78

Judgment and Commitment..... 104

Minute Orders:

Dec. 7, 1953—Arraignment and Plea..... 19

Apr. 10, 1956—Denying Motion to Dismiss Count XV of the Indictment..... 66

Aug. 15, 1956—Allowing Defendant Forman 15 Days to File Motion in Arrest of Judgment, etc. 98

Motion for Arrest of Judgment..... 103

Motion for Mistrial..... 92

Motion of Defendant Forman for Separate Trial on Count XV..... 57

Motion of Defendant Forman to Dismiss Count XV of the Indictment:

Filed January 25, 1954..... 21

Filed February 15, 1956..... 64

Motion of Plaintiff to Return Count XV to the Southern Division..... 61

Motion to Quash and/or Modify Subpoena Duces Tecum 67

Affidavit of Albert Forman..... 69

Names and Addresses of Attorneys..... 1

Notice of Appeal..... 105

Objection to the Introduction of Evidence and Motion for Judgment of Acquittal..... 76

Order Denying Motion for Arrest of Judgment, Renewal of Motion for Judgment of Acquittal and for a New Trial..... 103

Order Denying Motion to Quash Subpoena Duces Tecum Served on Albert Forman.... 76

Order Directing Return of Count XV to the Southern Division 63

Order Granting Motion for a Separate Trial on Count XV, etc..... 59

Order on Motions Against Indictment..... 58

Order Transferring Files, Records and Exhibits to Court of Appeals..... 106

Renewal of Motion for Judgment of Acquittal and in the Alternative, Motion for a New Trial 101

Statement of Points on Which Appellant Intends to Rely (USCA)..... 1880

Suggestion of Defendant Forman That Court Was Without Jurisdiction..... 62

Transcript of Court's Oral Remarks in the Matter of Convening of the Grand Jury, Feb. 3, 1953..... 22

Transcript of Proceedings in the Matter of Qualifying Grand Jury, Feb. 26, 1953..... 24

Transcript of Proceedings and Testimony.... 111

Argument by Mr. Billinghurst..... 1764

Exceptions of Defendant to Instructions... 1823

Instructions to the Jury..... 1782

Motions for New Trial and Sentencing..... 1826

Motion for Mistrial at Close of Plaintiff's Testimony 1653

Opening Statement by Mr. Obenour..... 112

Opening Statement by Mr. Mead..... 126

Witnesses:

Arnold, Wendell H.

—direct 1033

—cross 1043

Baldwin, Harry D.

—direct 1176

—cross 1184

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Barovic, Mike
—direct 1723

Brown, Oliver Paul
—direct 191

Burdick, Donald R.
—direct 139
—cross 167
—redirect 168, 186
—recross 169

Carlson, Harry W.
—direct 1326, 1330
—cross 1330

Clodfelter, Warren
—direct 1336
—cross 1346
—redirect 1348

Conway, James P.
—direct 1191
—cross 1211
—redirect 1222
—recross 1231

Crawford, Kenneth R.
—direct 925
—cross 947
—redirect 951

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Crawford, Robert Thomas
—direct 909
—cross 916
—redirect 920

Cuttone, Vito
—direct 1019

Endersby, Thelma
—By the Court 1383, 1387
—By Mr. Mead 1385
—By Mr. Obenour 1388
—direct (Obenour) 1421
—cross (Mead) 1439
—redirect (Obenour) 1442
—recross (Mead) 1444

Esfeld, Sol
—direct 977
—cross 1008
—redirect 1011

Forman, Albert
—direct 1396
—cross 1415
—redirect 1418, 1421
—recross 1420

Forman, Dorothy
—direct 1720
—cross 1721

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Gordon, Robert B.
—direct 239

Harvey, Lucy H.
—direct 187

Heberling, George Adolph
—direct 1111
—cross 1144
—redirect 1151
—recross 1157

McCusker, Matt W.
—direct 1739
—cross 1750
—redirect 1759

Meyer, William F.
—By the Court 1371
—By Mr. Obenour 1379, 1390
—By Mr. Mead 1383
—direct 1445
—cross 1459
—redirect 1461
—recross 1464

Meyers, Arnold J.
—direct 1049
—cross 1087
—redirect 1109
—recross 1111

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Michael, John J.
—direct 1012
—cross 1017

Morin, Henry T.
—direct 1304
—cross 1318
—redirect 1323

Morton, Edward F. Jr.
—direct 198

Nilsson, Chester
—direct 1725
—cross 1726
—redirect 1729

Oftedal, Willard A.
—direct 1188
—recalled, direct 1465
—cross 1501
—redirect 1531

O'Leary, Edward J.
—direct 1540
—cross 1589
—redirect 1625
—recross 1640

Parrott, Charles Richard
—direct 960

for the calendar year 1944 for and on behalf of the Bremerton Amusement Company, the United Amusement Company, and the United Amusement Company of Bremerton purporting to reflect the receipts and income of these partnerships, although they then and there well knew that because of the diversion of receipts described in subparagraphs 1 to 8, inclusive, the books from which these returns were prepared understated the true receipts and income of such partnerships.

13.

That on or about March 1, 1946, in Seattle, Washington, Armador A. Seijas and William R. Forman caused to be prepared partnership returns for the calendar year 1945 for and on behalf of the United Amusement Company and the United Amusement Company of Bremerton purporting to reflect the receipts and income of these partnerships, although they then and there well knew that because of the diversion of receipts described in subparagraphs 1 to 8, inclusive, the books from which these returns were prepared understated the true receipts and income of such partnerships.

14.

On or about March 15, 1943, Armador A. Seijas and William R. Forman in Tacoma, Washington, filed with the Collector of Internal Revenue for the Collection District of Washington partnership information returns for and on behalf of Bremerton Amusement Company, United Amusement Company, American Amusement Company, and United

Amusement Company of Bremerton for the calendar year 1942, which partnership returns they then and there well know understated the true receipts and income of such partnerships by approximately $15,470.55.

15.

On or about March 15, 1944, Armador A. Seijas and William R. Forman in Tacoma, Washington, filed with the Collector of Internal Revenue for the Collection District of Washington partnership information returns for and on behalf of Bremerton Amusement Company, United Amusement Company, American Amusement Company, and United Amusement Company of Bremerton for the calendar year 1943, which partnership returns they then and there well knew understated the true receipts and income of such partnerships by approximately $33,042.98.

16.

On or about March 15, 1945, Armador A. Seijas and William R. Forman in Tacoma, Washington, filed with the Collector of Internal Revenue for the Collection District of Washington partnership information returns for and on behalf of Bremerton Amusement Company, United Amusement Company, and United Amusement Company of Bremerton for the calendar year 1944, which partnership returns they then and there well knew understated the true receipts and income of such partnerships by approximately $50,648.75.

17.

On or about March 15, 1946, Armador A. Seijas

	Original	Print
Proceedings in U.S.C.A. for the Ninth Circuit	1922	1923
Minute entry of argument and submission (omitted in printing)	1922	1923
Minute entry of order directing filing of opinion and filing and recording of judgment (omitted in printing)	1923	1923
Opinion, Pope, J.	1924	1923
Judgment	1935	1935
Minute entry of order directing filing of opinion on petition for rehearing	1936	1936
Per curiam opinion on appellee's petition for rehearing, October 27, 1958	1937	1936
Minute entry of order directing filing of opinion on petition for rehearing	1940	1938
Per curiam opinion on appellant's petition for rehearing, February 26, 1959	1941	1939
Clerk's certificate (omitted in printing)	1944	1940
Plaintiff's Exhibits:		
No. 2—U. S. Individual Income Tax Return for Calendar Year 1945 for Army A. Seijas (Betty L.)	1945	1941
No. 31—U. S. Individual Income Tax Return for Calendar Year 1945 for William R. Forman	1950	1946
No. 41—Report of Examining Officer (Internal Revenue Agent) on William R. Forman containing Statement of Total Tax Liability, Preliminary Statement, Item Adjustments, Computation of Income Tax—Individual for Calendar Years 1944 and 1945, Schedule No. 3 for Calendar Year 1945 (Excerpts from)	1955	1951
No. 42—Letter from Internal Revenue Agent to Army A. Seijas re deficiency in tax return for 1945, Reexamination Report, Statement of Total Tax Liability, Preliminary Statement, Schedule Nos. 2 & 3 for Calendar Year 1945 (Excerpts from)	1964	1960
No. 43—Letter from Internal Revenue Agent to Army A. Seijas re deficiency tax return for 1944 & 1945, Statement of Total Tax Liability, Preliminary Statement, Schedule Nos. 2, 3, 4, 5, 6 for Calendar Years 1944 & 1945 (Excerpts from)	1970	1966
No. 74—Letter from Whittle & Whittle, C.P.A. to Army A. Seijas, dated December 28, 1951 with Comparative Net Worth Statement for the years, 1941 through 1949 and Statement Setting Forth Determination of Cash Used and Remaining from Net Income and Increase in Net Worth for the years 1942 through 1948	1980	1976

	Original	Print
Plaintiff's Exhibits:—Continued		
No. 139-A—Testimony of Mr. Army Seijas taken January 11, 1952	1994	1990
No. 139—Supplemental testimony of Mr. Army Seijas taken January 28, 1952	2008	2007
No. 143—Testimony of William R. Forman taken March 11, 1953	2016	2017
Order allowing certiorari	2021	2023

NAMES AND ADDRESSES OF ATTORNEYS

GEORGE W. MEAD, Esq.,
1211 Public Service Building,
Portland, Oregon

S. J. BISCHOFF, Esq.,
902 Cascade Building,
Portland, Oregon

METZGER, BLAIR & GARDNER,
HILTON B. GARDNER,
JAMES E. O'HERN,
523 Tacoma Building,
Tacoma, Washington

Attorneys for Appellant William R. Forman

CHARLES P. MORIARTY, Esq.,
United States Attorney

JOHN S. OBENOUR, Esq.,
Assistant United States Attorney

CHAS. W. BILLINGHURST,
Assistant United States Attorney

324 Federal Building,
Tacoma, Washington

Attorneys for Appellee

In the United States District Court, Western District of Washington, Southern Division

Criminal Action No. 16275

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARMADOR A. SEIJAS, also known as ARMY A. SEIJAS, and WILLIAM R. FORMAN,

Defendants.

INDICTMENT FOR VIOLATIONS OF SECTION 145(b), INTERNAL REVENUE CODE (26 U.S.C., SECTION 145(b)), AND SECTION 371, NEW CRIMINAL CODE (18 U.S.C., SECTION 371)

The grand jury charges:

* * * * *

(Counts I to XIV of the indictment charge defendant Seijas only with fourteen substantive offenses of attempted tax evasion and are not involved in this appeal.)

Count XV.

The grand jury further charges:

That during the years 1941 to 1945, inclusive, Armador A. Seijas, also known as Army A. Seijas, and William R. Forman, in partnership with themselves and in some instances with others, operated pinball machines and other coin-operated gaming and amusement devices in the Western District of

Washington, and particularly, in Kitsap County, Washington, under an arrangement whereby these coin-operated devices were maintained by the partnership in taverns and other locations and the funds taken from those machines by the collectors were divided on a percentage basis between the partnership and owners of such locations. At various times various portions of this business were conducted by said partners, Armador A. Seijas, also known as Army A. Seijas, and William R. Forman, under the following styles: Bremerton Amusement Company, United Amusement Company, American Amusement Company, and United Amusement Company of Bremerton.

That beginning on or about February 1, 1942, and continuously thereafter until about April 15, 1953, in the Western District of Washington, and particularly in the City of Seattle, Washington, said Armador A. Seijas, also known as Army A. Seijas, and William R. Forman did willfully and unlawfully combine, conspire, confederate, and agree together, and with each other, and with other persons to the grand jurors unknown, to defraud the United States and to commit offenses against the United States, more specifically, to-wit:

A. To violate Section 54 of the Internal Revenue Code, 26 U.S.C., Section 54, and the rules and regulations promulgated thereunder (particularly Section 29.54-1 of Regulations 11 promulgated by the Commissioner of Internal Revenue) by willfully and knowingly keeping and causing to be kept for and on behalf of the partnerships named above

records for the years 1942 to 1945, inclusive, which did not accurately reflect the true receipts and income of the afore-mentioned partnerships.

B. To violate Section 1001 of the New Criminal Code, 18 U.S.C., Section 1001, and Section 3809 of the Internal Revenue Code, 26 U.S.C., Section 3809, by knowingly and willfully filing and causing to be filed with the Collector of Internal Revenue for the Collection District of Washington, at Tacoma, Washington, numerous false and fraudulent information returns in the name of the afore-mentioned partnerships which greatly understated the receipts and income of said partnerships and understated the partners' distributive share of such income.

C. To violate Section 145(b) of the Internal Revenue Code, 26 U.S.C., Section 145(b), by knowingly and willfully attempting to defraud and evade a large portion of the income taxes owed by Armador A. Seijas and his wife, Betty L. Seijas, and others to the United States for the years 1942 to 1945, inclusive, upon their share of the unreported income of the afore-mentioned partnerships.

D. To violate Section 1001 of the New Criminal Code, 18 U.S.C., Section 1001, and Section 145(b) of the Internal Revenue Code, 26 U.S.C., Section 145(b), by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the

aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive.

That in furtherance of said conspiracy, and during the existence thereof, one or more of the said defendants as hereinafter mentioned by name did the following specific acts:

Overt Acts

1.

On or about February 1, 1942, and on numerous dates thereafter, in Seattle, Washington, Armador A. Seijas and William R. Forman instructed Arnold J. Meyers not to record in his regular collection or receipt book the full amounts of money collected by said Arnold J. Meyers out of pinball machines owned by said Armador A. Seijas and William R. Forman in certain specified taverns and other locations in Kitsap County.

2.

On or about February 1, 1942, in Seattle, Washington, and on numerous dates thereafter, Armador A. Seijas and William R. Forman instructed Arnold J. Meyers and other collectors to turn in to the bookkeeper of the afore-mentioned partnerships collection or receipt slips which for the reason stated in subparagraph 1 omitted a large portion of the receipts actually taken from the partnerships' pinball machines and other coin de-

vices at the location which the slip purported to cover.

3.

On or about February 1, 1942, in Seattle, Washington, and at numerous dates thereafter, Armador A. Seijas and William R. Forman instructed Arnold J. Meyers and other collectors to turn over to either Armador A. Seijas or William R. Forman personally money taken from the partnerships' pinball machines at the locations mentioned in subparagraphs 1 and 2 but not accounted for on the regular collection slips.

4.

From about February 14, 1942, to December 27, 1945, in Seattle, Washington, Armador A. Seijas and William R. Forman caused to be entered in the regular books of the afore-mentioned partnerships only the receipts shown on the regular collection slips or receipt books of the collectors, and caused to be omitted from such books additional receipts which were delivered to them personally.

5.

On some five hundred dates between February 14, 1942, and December 27, 1945, in Seattle, Washington, either Armador A. Seijas or William R. Forman received from Arnold J. Meyers and others a total of approximately $153,964.88 taken from the partnerships' pinball machines in the form of cash, together with an informal list of the locations from which this cash had been collected and the amounts collected at each location.

6.

On each and every occasion mentioned in subparagraph 5, in Seattle, Washington, Armador A. Seijas and William R. Forman concealed from the bookkeeper and caused to be omitted from the regular books of their business the additional receipts from the pinball machines which were personally delivered to them by the collectors.

7.

During the period from about February 14, 1942, to December 27, 1945, Armador A. Seijas kept a private diary containing a detailed and accurate account of the money collected from the partnerships' pinball machines and delivered personally to either him or William R. Forman.

8.

At regular intervals during the period from February 1, 1942, to December 27, 1945, in Seattle, Washington, Armador A. Seijas and William R. Forman divided the currency which had been turned over to them personally by the collectors and recorded such division in the diary mentioned in subparagraph 7.

9.

On diverse dates during the years 1942 to 1945, inclusive, Armador A. Seijas leased safety deposit boxes in San Francisco, California, Portland, Oregon, Seattle, Washington, and other places to the grand jurors unknown.

10.

That on or about March 1, 1943, in Seattle, Wash-

ington, Armador A. Seijas and William R. Forman caused to be prepared partnership returns for the calendar year 1942 for and on behalf of the Bremerton Amusement Company, the United Amusement Company, the American Amusement Company, and the United Amusement Company of Bremerton purporting to reflect the receipts and income of these partnerships, although they then and there well knew that because of the diversion of receipts described in subparagraphs 1 to 8, inclusive, the books from which these returns were prepared understated the true receipts and income of such partnerships.

11.

That on or about March 1, 1944, in Seattle, Washington, Armador A. Seijas and William R. Forman caused to be prepared partnership returns for the calendar year 1943 for and on behalf of the Bremerton Amusement Company, the United Amusement Company, the American Amusement Company, and the United Amusement Company of Bremerton purporting to reflect the receipts and income of these partnerships, although they then and there well knew that because of the diversion of receipts described in subparagraphs 1 to 8, inclusive, the books from which these returns were prepared understated the true receipts and income of such partnerships.

12.

That on or about March 1, 1945, in Seattle, Washington, Armador A. Seijas and William R. Forman caused to be prepared partnership returns

and William R. Forman in Tacoma, Washington, filed with the Collector of Internal Revenue for the Collection District of Washington partnership information returns for and on behalf of the United Amusement Company and the United Amusement Company of Bremerton for the calendar year 1945, which partnership returns they then and there well knew understated the true receipts and income of such partnerships by approximately $54,802.60.

18.

On or about March 15, 1943, in Tacoma, Washington, Armador A. Seijas filed or caused to be filed with the Collector of Internal Revenue for the Collection District of Washington individual income tax returns on behalf of himself and his wife, Betty L. Seijas, for the calendar year 1942, reporting therein as his distributive share of the income of the Bremerton Amusement Company, United Amusement Company, American Amusement Company, and United Amusement Company of Bremerton only his distributive share of the income of the partnerships as reflected in their information returns, whereas, he then and there well knew that during the year 1942 he received additional income in the amount of $7,735.27 which had been diverted from the regular books and information returns of these partnerships by the means described in subparagraphs 1 through 9, inclusive.

19.

On or about March 15, 1944, in Tacoma, Washington, Armador A. Seijas filed or caused to be filed with the Collector of Internal Revenue for the

Collection District of Washington individual income tax returns on behalf of himself and his wife, Betty L. Seijas, for the calendar year 1943, reporting therein as his distributive share of the income of the Bremerton Amusement Company, United Amusement Company, American Amusement Company, and United Amusement Company of Bremerton only his distributive share of the income of the partnerships as reflected in their information returns, whereas, he then and there well knew that during the year 1943 he received additional income in the amount of $16,521.49 which had been diverted from the regular books and information returns of these partnerships by the means described in subparagraphs 1 through 9, inclusive.

20.

On or about March 13, 1945, in Tacoma, Washington, Armador A. Seijas filed or caused to be filed with the Collector of Internal Revenue for the Collection District of Washington individual income tax returns on behalf of himself and his wife, Betty L. Seijas, for the calendar year 1944, reporting therein as his distributive share of the income of the Bremerton Amusement Company, United Amusement Company, and United Amusement Company of Bremerton only his distributive share of the income of the partnerships as reflected in their information returns, whereas, he then and there well knew that during the year 1944 he received additional income in the amount of $25,324.38, which had been diverted from the regular books and information returns of these partnerships by the

means described in subparagraphs 1 through 9, inclusive.

21.

On or about March 15, 1946, in Tacoma, Washington, Armador A. Seijas filed or caused to be filed with the Collector of Internal Revenue for the Collection District of Washington individual income tax returns on behalf of himself and his wife, Betty L. Seijas, for the calendar year 1945, reporting therein as his distributive share of the income of the United Amusement Company and the United Amusement Company of Bremerton only his distributive share of the income of the partnerships as reflected in their information returns, whereas, he then and there well knew that during the year 1945 he received additional income in the amount of $27,401.30 which had been diverted from the regular books and information returns of these partnerships by the means described in subparagraphs 1 through 9, inclusive.

22.

On or about September 1, 1945, in Seattle, Washington, Armador A. Seijas and William R. Forman caused to be presented to an officer and employee of the Treasury Department of the United States for use in connection with his official verification of the information returns of the United Amusement Company, the United Amusement Company of Bremerton, the American Amusement Company, and the Bremerton Amusement Company for the years 1942 and 1943 the regular books and records of these partnerships for such years, although they

then and there well knew that such records understated the true receipts and income of such partnerships by approximately $48,513.53.

23.

On or about January 20, 1947, in Seattle, Washington, Armador A. Seijas and William R. Forman caused to be presented to an officer and employee of the Treasury Department of the United States for use in connection with his official verification of the information returns of Bremerton Amusement Company, United Amusement Company, and United Amusement Company of Bremerton for the years 1944 and 1945 the regular books and records of these partnerships for such years, although they then and there well knew that such records understated the true receipts and income of such partnerships by approximately $105,451.35.

24.

On or about December 1, 1948, in Seattle, Washington, Armador A. Seijas presented or caused to be presented to an officer and employee of the Treasury Department of the United States for use in connection with his official reexamination of the information returns of the United Amusement Company, the United Amusement Company of Bremerton, and the Bremerton Amusement Company for the years 1944 and 1945 the regular books and records of these partnerships for such years, although he then and there well knew, as stated in subparagraph 23, that such books and records greatly understated the true receipts and income of such partnerships.

25.

On or about October 28, 1944, in Portland, Oregon, William R. Forman concealed from an officer and employee of the Treasury Department of the United States engaged in an official examination of his and his wife's returns for the calendar years 1942 and 1943 that he received income from his afore-mentioned partnerships with Armador A. Seijas in addition to that shown on the information returns filed by said partnerships.

26.

On or about September 1, 1948, in Seattle, Washington, William R. Forman concealed from an officer and employee of the Treasury Department of the United States engaged in an official examination of his and his wife's personal income tax returns for the years 1944 and 1945 that during those years he received income from the afore-mentioned partnerships with Armador A. Seijas in addition to that shown on the information returns filed by said partnerships.

27.

On or about September 1, 1944, in Seattle, Washington, Armador A. Seijas concealed from an officer and employee of the Treasury Department of the United States engaged in an official examination of his and his wife's personal income tax returns for the years 1942 and 1943 that during those years he received income from the afore-mentioned partnerships with William R. Forman in addition to the amounts shown on the information returns filed by said partnerships.

28.

On or about October 1, 1947, in Seattle, Washington, Armador A. Seijas concealed from an officer and employee of the Treasury Department of the United States engaged in an official examination of his and his wife's personal income tax returns for the years 1944 and 1945 that during those years he received income from the afore-mentioned partnerships with William R. Forman in addition to the amounts shown on the information returns filed by said partnerships.

29.

On or about September 1, 1948, in Seattle, Washington, William R. Forman concealed from an officer and employee of the Treasury Department of the United States engaged in an official re-examination of his and his wife's personal income tax returns for the year 1945 that during that year he received income from the afore-mentioned partnerships with Armador A. Seijas in addition to the amounts shown on the information returns filed by said partnerships.

30.

On or about September 1, 1948, in Seattle, Washington, Armador A. Seijas concealed from an officer and employee of the Treasury Department of the United States engaged in an official re-examination of his and his wife's personal income tax returns for the years 1944 and 1945 that during those years he received income from the afore-mentioned partnerships with William R. Forman in addition to the amounts shown on the information returns filed by said partnerships.

31.

On or about December 29, 1951, in Seattle, Washington, Armador A. Scijas submitted to officers and employees of the Treasury Department of the United States a false statement of his assets and liabilities as of December 31, 1945, which statement concealed the fact that he had on hand on December 31, 1945, a very large amount of currency representing his share of the diverted and unreported receipts of the afore-mentioned pinball partnerships.

32.

On January 11, 1952, in Seattle, Washington, Armador A. Scijas stated and represented to officers and employees of the Treasury Department of the United States engaged in an official examination of his income tax liability that he sincerely believed his income for the years 1942 to 1945, inclusive, had been correctly reported on the returns mentioned in subparagraphs 18 to 21, inclusive, whereas, he then and there well knew that his income tax returns for the years 1942 to 1945, inclusive, greatly understated his income for those years by omitting therefrom pinball receipts in the amount of approximately $76,982.44 which had been delivered to him personally.

33.

On January 11, 1952, in Seattle, Washington, Armador A. Scijas stated to officers and employees of the Treasury Department of the United States engaged in an official investigation of his and his wife's income tax liabilities that he had no knowledge concerning the source of a large amount of

unexplained assets and funds which were discovered in his possession, whereas, in truth and in fact, as he then and there well knew, a large portion of these funds and assets represented diverted receipts of the pinball business which he and William R. Forman operated during the years 1942 to 1945, inclusive.

All in violation of Section 371, New Criminal Code; 18 U.S.C., Section 371.

A True Bill.

/s/ DWIGHT E. ALDERMAN
Foreman

s/ CHARLES P. MORIARTY
United States Attorney

s/ J. S. OBENOUR
Assistant United States Attorney

[Endorsed]: Filed Nov. 19, 1953.

[Title of District Court and Cause.]

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 7th day of December, 1953, the Honorable George H. Boldt, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

ARRAIGNMENT AND PLEA

Now on this 7th day of December, 1953, this cause comes on before the Court. Each of the defendants is present in court in proper person. John S. Obe-

nour, Asst. U. S. Attorney is present on behalf of the government. Defendant Seijas stands before the Court with his Counsel Harry Sager of the firm, Henderson, Thompson, Carhahan & Gordon. The defendant Seijas is now arraigned and states that his true name is Army A. Seijas and the name Armador Seijas is not his true name. The defendant states that he has been furnished with a copy of the Indictment, is familiar with same and waives the reading of the Indictment. Mr. Sager now upon inquiry of the Court states that the defendant is ready to proceed and enter plea. The defendant now enters a plea of Not Guilty to each and all of the counts, i.e., 1 to 15, inclusive. The Court now accepts said plea and the same is ordered entered.

Defendant William R. Forman now appears before the Court with his counsel George W. Mead of Portland, Oregon and James E. O'Hern of local counsel. Defendant Forman is now arraigned, and states that his true name is as shown above. Upon inquiry of the Court, Mr. Mead advises the defendant is now ready to proceed *with entered* his plea. Defendant Forman states that he has been furnished with a copy of the indictment, is familiar with the charge, and waives the reading of same. The defendant now enters a plea of Not Guilty to Count 15 of the indictment. The Court now accepts the plea and directs that it be entered. The Court continues the matter for trial date.

Harry Sager now requests that he be allowed time to note certain motions concerning the above entitled cause. Whereupon, Mr. Mead joins in the

request. By direction of the Court, each counselor is allowed fifty days to accomplish this.

Mr. Sager now asks the Court's permission to present a blanket order allowing the defendant to depart the jurisdiction of the court at some several times, rather than an individual order for each occasion. Whereupon the Court directs that the record show that this procedure is approved.

Each of the aforenamed defendants are now permitted to continue under their present bond.

[Title of District Court and Cause.]

MOTION OF DEFENDANT WILLIAM R. FORMAN TO DISMISS COUNT XV OF THE INDICTMENT

Comes now defendant William R. Forman and moves for an Order dismissing Count XV of the indictment on the ground:

(a) Count XV of the indictment fails to state facts sufficient to charge an offense under Title 18 U.S.C., Section 371, or any offense.

(b) The alleged offense is barred by the Statute of Limitations.

(c) Count XV of the indictment is duplicitous in that it alleges, in effect, four separate and distinct conspiracies to violate separate and distinct offenses defined by separate Acts of Congress which are governed by different Statutes of Limitations.

In the event the Court should hold that the count is not duplicitous, said defendant moves for an

order striking from Count XV of the indictment, paragraphs A and B thereof as surplusages pursuant to Rule 7 (d) of the Federal Rules of Criminal Procedure.

Dated: January 25, 1954.

METZGER, BLAIR & GARDNER
/s/ By A. E. BLAIR
/s/ S. J. BISCHOFF
/s/ GEORGE W. MEAD
Attorneys for Defendant
William R. Forman

Acknowledgment of Service Attached.

[Endorsed]: Filed Jan. 25, 1954.

In the District Court of the United States, Western District of Washington, Southern Division

In the Matter of the Convening of the Grand Jury and Issuance of a Grand Jury Venire.

TRANSCRIPT OF COURT'S ORAL REMARKS

in the above matter by the Honorable William J. Lindberg, United States District Judge, on the 3rd day of February, 1953, at Tacoma, Washington.

Appearances: J. Charles Dennis, Esq., United States Attorney, United States Courthouse, Seattle, Washington, appeared on behalf of the Government.

(Whereupon, the following proceedings were had, to-wit:) [1]*

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* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Mr. Dennis: May it please the Court, at this time there is no Grand Jury in the Southern Division, Western District of Washington. At this time I move that a Grand Jury be convened and let it be qualified on some date in February. The 26th would be the one most satisfactory to the Government.

The Court: Let the record, upon the motion of Mr. Dennis, United States Attorney, and it appearing to the Court that it is necessary to call a Grand Jury for the United States District Court for the Western District of Washington, Southern Division, the Court now therefore, directs the Clerk to draw from the jury box containing the names of more than four hundred qualified persons, seventy-five persons to serve as Grand Jurors until discharged by the Court, such service not to exceed the period of eighteen months from the date on which said jurors report.

The Clerk is directed to issue a Grand Jury Venire forthwith returnable on Thursday, February 26, 1953, at the hour of nine-thirty a.m., directing said jurors to appear in Room 316, United States Customhouse and Courthouse at Tacoma, Washington.

(Whereupon, the Clerk drew from the jury box seventy-five names which were orally announced.)

The Court: Is there anything further before the [2] Court, Mr. Clerk?

(Whereupon, other matters were considered.)

Certificate

I, Adele U. Douds, official reporter for the within-entitled court, hereby certify that the foregoing is

a full and complete transcript of matters therein set forth.

/s/ ADELE U. DOUDS [3]

In the District Court of the United States, Western District of Washington, Southern Division

In the Matter of Qualifying Grand Jury.

TRANSCRIPT OF PROCEEDINGS

in re convening and qualifying of the Grand Jury by the Honorable John C. Bowen, United States District Judge, on the 26th day of February, 1953, ten o'clock a.m., at Tacoma, Washington.

Appearances: J. Charles Dennis, Esq., United States Attorney, United States Courthouse, Seattle, Washington; and John E. Belcher, Esq., Assistant United States Attorney, United States Courthouse, Seattle, Washington, appeared on behalf of the Government.

(Whereupon, the following proceedings were had, to-wit:)

The Court: I ask the Clerk to call the names of the persons who are expected to be here today in the capacity as grand jurors and as your names are called please answer "here" in an audible voice so I will know you are present.

Clerk: Jens Adolphsen.

Juror Adolphsen: Here.

Clerk: Dwight E. Alderman.

Juror Alderman: Here.

Clerk: Linnea E. Anderson.

Juror Anderson: Here.
Clerk: Theo W. Becker.
Juror Becker: Here.
Clerk: Charles A. Campbell.
Juror Campbell: Here.
Clerk: Walter R. Canedy.
Juror Canedy: Here.
Clerk: George D. Everett.
Juror Everett: Here.
Clerk: Sarah Gallagher.
Juror Gallagher: Here.
Clerk: William T. Grubb.
Juror Grubb: Here.
Clerk: Bernard V. Gunderson.
Juror Gunderson: Here.
Clerk: Grace L. Hinman. [2]
Juror Hinman: Here.
Clerk: Julia Jasprica.
Juror Jasprica: Here.
Clerk: George J. Jeffries.
Juror Jeffries: Here.
Clerk: Marvin J. Johnson.
Juror Johnson: Here.
Clerk: Homer F. King.
Juror King: Here.
Clerk: Rose Larsen.
Juror Larsen: Here.
Clerk: Helen M. Ludeman.
Juror Ludeman: Here.
Clerk: Doris C. McKendry.
Juror McKendry: Here.
Clerk: Raymond T. McKenzie.

Juror McKenzie: Here.
Clerk: Cecilia Mentzer.
Juror Mentzer: Here.
Clerk: Winifred L. Myers.
Juror Myers: Here.
Clerk: Grace M. Orgon.
Juror Orgon: Here.
Clerk: Gladys M. Rhoades.
Juror Rhoades: Here. [3]
Clerk: Ruth T. Ruff.
Juror Ruff: Here.
Clerk: Jack E. Wagner.
Juror Wagner: Here.
Clerk: James G. Walker, Jr.
Juror Walker: Here.
Clerk: Wm. C. Wheeler, Jr.
Juror Wheeler: Here.
Clerk: And Donald H. Zeek.
Juror Zeek: Here.

The Court: Will all of those persons who have answered "here" please rise and be sworn. Raise your right hand each of you.

(Sworn.)

The Court: You may be seated. I wish to discuss with you your qualifications and after I have completed that an opportunity will be given each and all of you to state any reasons, if you have any, why you believe you should not be required to serve as grand jurors. At the outset I think I should say that it is contemplated that those who will be accepted as the grand jury, and each and every one of the members of such grand jury will be subject to

call at any time during a period of eighteen months, beginning approximately today and it is with reference to your availability to act as grand jurors during all of that [4] period that we are presently concerned and not merely your availability to act as grand jurors during this particular first or initial session to be held during the term of your service.

There are systems of law involved in your qualifications: first, is the law of the United States of America as contained in acts of Congress; and second, the law of the State of Washington relating to the qualifications of jurors themselves is involved by express provision of the Congressional enactment.

First, as to the federal or Congressional qualifications, you are advised that any citizen of the United States who has attained the age of twenty-one years and resides within the judicial district—that means the Western District of Washington, Southern Division—is competent to serve as a grand juror unless one, that person has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty, unless that person is unable to read, write, speak and understand the English language; unless that person is incapable by reason of mental or physical infirmities to render efficient jury service and unless that person is incompetent to serve as a grand juror by the law of the state in which the District Court is held and that means the State of Washington. [5]

Does any one of you know of any reason among those stated why you would not be eligible to serve as a grand juror in this Court?

Not hearing any reason among those expressly stated I now advise you concerning the provisions of the State of Washington law touching this subject of your qualifications and that law provides no person shall be competent to serve as a juror—meaning a grand juror among other kinds—in the Superior Courts of the State of Washington, and that also applies to this Court—unless that person is an elector and a taxpayer of the State of Washington. Elector means a voter and that includes, one of the necessary qualifications of a voter is that he must be a citizen of the United States and of this state and that he is a taxpayer. If your answers on your questionnaires sent back are true I tell you that you are taxpayers in the meaning of this state statute.

May I ask each and all of you if all of those statements you made in writing on that printed form of questionnaire and which printed form after being filled in by you appears to have been signed by you, are those statements all true as you verily believe? May I ask each and all of you that. I understand your answer is in the affirmative, and I say you are a taxpayer within the meaning of that law, and is it true that all of you have been in the habit of voting at general elections in this state? [6]

The Jurors: Yes.

The Court: Is it true, and then, do you wish me

to understand that you are citizens and that you are electors in this state in that sense?

The Jurors: Yes.

The Court: Unless, I think probably having interrupted so lengthily maybe I should read the preamble to these conditions——

No person shall be competent to serve as a grand juror in the state courts, and therefore in this Court, unless such person is a resident of the county in which he is called for service for more than one year preceding the time of such call.

Is it true as to all of you, each and all of you, that you were and have been a resident of the county in which you were called for this service for more than one year prior to the call?

The Jurors: Yes.

The Court: I understand you to believe you have been such a resident. Unless such person be over the age of twenty-one years. Is it true that each and all of you are over the age of twenty-one years?

The Jurors: Yes.

The Court: I so understand. Unless you are in full possession of your faculties and are of sound mind. [7] Does any one of you know of any physical or mental impairment or nervous condition which in any way impairs your ability to act as a grand juror in this Court? The impairment of physical faculties include impairment of hearing and eyesight in particular among others. Does any one of you know of any condition of impairment in your hearing or your sight which is not reasonably compensated by such use as you may have of me-

chanical aid such as use of glasses, or in respect to your hearing, such as use of hearing aids. Any one of you who feels that his hearing or eyesight is deficient in some way that is not reasonably compensated in the manner I have mentioned? I understand that you are not aware of any physical impairment hindering your service as a grand juror.

Has any one of you a nervous ailment or emotional stress of any sort that in any way tends to interfere with what you believe to be the normal business and occupation of your lives? I understand that you believe there is no disqualification in respect to your situation with, in connection with any of the details I have mentioned.

Also, unless such person be able to read and write the English language. Now in respect to any and all of those qualifications, both as stated in the Federal or Congressional law or in the state statutes which I have discussed—is any one of you aware of any disqualification which you may have in respect to rendering this grand jury [8] service?

Not hearing any I understand that you believe that you possess those necessary and indispensable qualifications of the Federal and state laws relating to your qualifications. Now the law provides that as to exceptions and exclusions of persons from serving as grand jurors that the following persons shall be exempt from jury service: One, members in active service in the armed forces of the United States. Two, members of the fire or police departments of any state, district, territory, possession or subdivision thereof. Three, public officers in the ex-

cutive, legislative or judicial branches of the government of the United States or any state, district, territory or possession or subdivision thereof, who are actively engaged in the performance of their official duties.

Does any one of you know of any such statutory exception which may apply to you? Hearing none I understand that you do not claim exemption on the ground that you have any one of those statutory bases for being so excused.

Then in addition to being exempted for the reasons, or any one of them stated, the law further provides as to exclusion or excuse, or being excused from service, that a district judge, such as I am, for good cause may excuse or exclude from grand jury service any person called as a grand juror. That is the substance and effect of the provision of [9] the law. Also, any class or group of persons may for the public interest be excluded from the grand jury panel, or may be excused from service as grand jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstructions or delay in the fair and impartial administration of justice.

Also, the law provides that no citizen shall be excluded from service as a grand juror in any court of the United States on account of race or color. Also the law expressly provides that in any district court such as this is— strike that. That doesn't apply to grand jury. What I started to say applies to trial jury or petit jury service only.

The time now has arrived when it is appropriate for me to—for you to let me know if you have any reasons why you believe you should be excused from this grand jury service and then upon your letting me know of any such reasons they will be considered and I say to each and all of you that we have to have a grand jury. We expect this grand jury to be convened today to be subject to call and subsequent or reconvened sessions of the grand jury as the business of the Court may require. In my experience, and particularly in recent times as one of the judges of the Court, the grand jury sessions at Tacoma have been rather infrequent, have [10] not been often enough to really be a great burden on the grand jurors in my opinion. There may have been some individual instances where at the time the grand jury was held, or the reconvened session was held that some added inconvenience was experienced, but the sessions have not occurred perhaps oftener than about, on the average about every four or five months, even if that often at Tacoma, but that is based for what new information it may be. The Court cannot guarantee that we would not have to call you to come back next week or any other time soon or late. We just can't tell at this time and we never can tell a long time in advance. Many people feel that these current times in our country are visited with some considerable stress. We never can say in advance that grand jury sessions will not be needed oftener in the future than they have been in the past but whatever information the past experience may be to you. I state for that

purpose. There are, I believe, twenty-eight persons present and we have to have twenty-three and we cannot accept in the present session any more than twenty-three persons.

It would be appropriate for you, any one of you who may feel that you should for any reason, sufficient in your belief, be excused to let me know and the Court will consider any request. I believe that the percentage of women in attendance compared with the percentage of men in attendance [11] is a little larger than it sometimes is but there is nothing requiring women to be excused and nothing for the Court to excuse men. Is there any one of the ladies who feels that she, considering the prospects of her future relationships at home or in her occupational activity, that she would like to be excused? I also believe there are quite a number of women in attendance from the city of Tacoma. Would it be desirable that any woman who resides in Tacoma would like to be excused? Mrs. Mentzer, I believe you and I had some discussion yesterday about your situation. Do you feel that you would be just as well satisfied if you were excused?

Juror Mentzer: I would be just as well satisfied but I can be here if I have to be.

The Court: I think in view of what has been said already and what I know of the situation among you, I believe it would be fair, considering others, that Mrs. Mentzer be excused. We do not expect to have to call you, Mrs. Mentzer, but we might have to in the future in case a number of the grand jurors become ill or for some unavoidable reason it

becomes absolutely impossible for them to serve in any session, we might have to ask you to come back and in that event we reserve the right to do so. But pending those conditions you may be excused and I ask now, so that there will be no mistake about who will be accepted, if you will be good enough to take a seat in some other location in the [12] room, I think it might accommodate. We appreciate your appearing and attending this morning and wish we could have the assistance of all.

Is there any other lady who would like to be excused?

Juror Hinman: I would, your Honor.

The Court: Mrs. Hinman. Yes. Mrs. Hinman has told me of expected necessity of her going to the state of Texas for some family reason and if there is no other matter appearing to the contrary now the Court will excuse Mrs. Hinman, and I want to thank her for appearing.

That will leave the Court an opportunity to excuse three other persons. Is there some gentleman who wishes to make a statement about it?

Juror King: Your Honor, I have no desire to avoid service but I have made definite arrangements from April 12, to go to Hawaii from April 12 for one month, a trip we planned and made all arrangements—I thought I should tell you that.

The Court: May I hear the statements of the other persons?

Juror Grubb: I believe my hearing is a little bit off.

The Court: What is your name?

Juror Grubb: William Grubb.

The Court: Where do you reside? [13]

Juror Grubb: I am a Northern Pacific man. I live out in South Tacoma and my hearing is off at times and I don't think that I could catch it all. Some people talk quite low and——

The Court: I think the grand jury room is not likely to be subject to that trouble. Mr. Dennis, the grand jurors sit pretty near the witnesses do they not?

Mr. Dennis: They sit around the table just like this.

Juror Grubb: Yes, I could hear that way.

The Court: Very well. Have you ever acted as a grand juror in the Federal Court before?

Juror Grubb: Yes, a year and a half ago.

The Court: Where?

Juror Grubb: Up here. I got called up here but the case was excused.

The Court: That was to try a case was it not?

Juror Grubb: I think it was, yes.

The Court: A year and a half?

Juror Grubb: Maybe two years ago, I don't exactly remember now.

Mr. Dennis: Grand jury room?

Juror Grubb: No, this room.

The Court: Petit jury?

Juror Grubb: I got burnt in this ear many years ago [14] and it has always affected me. An acetylene spark came in and has always given me trouble.

The Court: I will say to Mr. Grubb that I am sorry to find that you have had that experience and

also the experience of being called here as a juror within a year and a half. That may make a stronger case for your request to be excused. I think, I don't believe your hearing is sufficiently impaired to justify excusing you but the fact that you were called as a juror in this Court within the time you estimate, believing as I do on your statement that it was within a reasonably short time ago, about a year and a half, I will consider your situation further. Was there someone else who wished to mention a request?

Juror Canedy: Walter R. Canedy.

The Court: How do you spell?

Juror Canedy: C-a-n-e-d-y.

The Court: Where do you reside?

Juror Canedy: 1022 South 60th.

The Court: Do you live in Tacoma?

Juror Canedy: Yes, I do.

The Court: Let the gentleman sit in another part of the room.

Mr. Grubb, I am going to excuse you. Mr. Grubb, you may be excused. Will you sit in another part of the room, please? [15]

Juror Grubb: Thank you, your Honor.

The Court: Now Mr. Canedy, will you state your situation?

Juror Canedy: I work with a partner, scaffolding, roofing and they have to work on ladders. It doesn't put a hardship on me but it does on my partner.

The Court: Why?

Juror Canedy: Well, it's dangerous to work that way alone.

The Court: Can't he or someone employing the two of you find a supply workman a few days?

Juror Canedy: Just finding, doesn't work that way.

The Court: Well, was there any health reason or any other?

Juror Canedy: No.

The Court: Have you any expectation of being out of the state?

Juror Canedy: Well we work all over the state, we get sent out on jobs in any part of Washington here.

The Court: Is there any member of your family or of your wife's family who might be in a position, in a condition of health that would require you, interfere with your employment in order to render necessary assistance to such person? [16]

Juror Canedy: No.

The Court: The Court will consider your matter further. The other gentleman, what is your name?

Juror Campbell: My name is Charles Campbell.

The Court: Mr. Campbell.

Juror Campbell: My trouble is transportation and——

The Court: Where do you live?

Juror Campbell: I live at LeGrande, Washington.

The Court: Did anyone get in touch with you yesterday?

Juror Campbell: Yesterday?

The Court: Yes.

Juror Campbell: No.

The Court: I expect someone tried to and wasn't able to reach you because you probably had already left. What time did you leave home yesterday?

Juror Campbell: Yesterday?

The Court: Yes.

Juror Campbell: I left this morning and drove down.

The Court: You have some employment with the University of Washington?

Juror Campbell: Yes.

The Court: Your employment is not daily is it—it's only in the summer time? [17]

Juror Campbell: No. I work continually the year around at the University of Washington.

The Court: Which day, what are your duties?

Juror Campbell: Maintenance foreman and operator of heavy equipment.

The Court: What kind of equipment and what is being done with that equipment?

Juror Campbell: We are trying to build a sawmill.

The Court: Build a sawmill?

Juror Campbell: Yes.

The Court: How long have you been engaged?

Juror Campbell: I have been there 5 years.

The Court: I see from your questionnaire that you mention some connection with some forest service activity.

Juror Campbell: We have a forestry department of the University of Washington, next month is 40

students coming there, they have a school there which they educate 40 forestry students.

The Court: Do you have good health?

Juror Campbell: Yes, my health is fairly good, yes.

The Court: Have you ever had any serious illness with respect to any of your organs, your liver, lungs, or heart or kidneys?

Juror Campbell: No. [18]

The Court: Any member of your family in bad health?

Juror Campbell: My daughter, she lives next door, that is all.

The Court: Who did you say that is?

Juror Campbell: My daughter.

The Court: Is she a married person?

Juror Campbell: Yes, she is married.

The Court: Is there anything else you wish to say?

Juror Campbell: I said it was transportation. The bus doesn't run so I could be down here at nine thirty in the morning.

The Court: You could come the night before if you had to?

Juror Campbell: Yes, I could come and stay over night but as far as bus driving and my car would break down I just won't be here.

The Court: In staying in Tacoma do you wish, if you——

Juror Campbell: I live in——

The Court: If you had to stay in Tacoma what do you do about lodging here?

Juror Campbell: I don't know.

The Court: Have you stayed all night here lately? [19]

Juror Campbell: No.

The Court: Would you have to stay at a hotel?

Juror Campbell: Stay at a hotel or drive back and forth.

The Court: How many miles?

Juror Campbell: 35 miles.

The Court: 35 miles?

Juror Campbell: Yes.

The Court: I will consider your situation further. Is there anyone else who wishes to mention anything?

Juror Becker: I don't want to get off this jury but I want to mention again in case my trouble gets, should anything happen to get bad, I wonder if I could get off then.

The Court: So we will be doubly certain, will you repeat your name?

Juror Becker: Becker, Theo W. Becker.

The Court: Is your situation which you have in mind as much occupational inconvenience as health and family relationships? What do you believe to be the real reason why you mention what you do?

Juror Becker: I have a liver trouble and when I am home with my wife why she keeps me on a diet so I get along very nicely. I am a retired druggist.

The Court: Retired?

Juror Becker: Yes, and I have no other excuse to make. [20]

The Court: How old are you?

Juror Becker: Sixty-nine, but I just mention that eating here at the eating houses if something should happen that I would get ill from it if I could get off then.

The Court: Thank you, Mr. Becker, I will consider your matter further. Is there anyone else who wishes——

Juror McKendry: Is it true when you say jurors are called for eighteen months we cannot leave?

The Court: No, there isn't any prohibition of your going about your own affairs but if I knew that you now expect to be out of the state for six months or that you have some condition in your family or business that you believe now is going to call you out of the state for a long period of time I wish to know about it.

Juror McKendry: There is a bare possibility that I might be moving to California some time this next summer or fall.

The Court: What is your name?

Juror McKendry: Doris McKendry.

The Court: Will you explain that a little bit farther, if you feel at liberty to do so.

Juror McKendry: Yes, my husband is working down there and if he continues to do so of course I shall move down there but it is contingent on several possibilities at the present time and it is rather indefinite. I am not planning it but there is [21] a very definite possibility.

The Court: How long has he been working down there?

Juror McKendry: Since last August.

The Court: Very well, I will consider that. Is there anyone else? I thought there was someone else who wished to make a statement. Mr. Zeck, is there anything you wish to add in addition to what you have already said?

Juror Zeck: No, I don't think I can. I explained to you about all I could.

The Court: Yours is occupational convenience is it not?

Juror Zeck: That is right.

The Court: You have a one man's garage business?

Juror Zeck: That is right.

The Court: In Summer?

Juror Zeck: It isn't a one-man garage, but it is just a—it is pretty necessary that I be there to run.

The Court: It is your business?

Juror Zeck: That is right.

The Court: Is it conducted in Summer?

Juror Zeck: That is right.

The Court: How long have you been engaged in that business?

Juror Zeck: Since 1924. [22]

The Court: How do you spell your name?

Juror Zeck: Z-e-e-h.

The Court: That is sufficient unless you wish to state—is there any health reason affecting any member of your family that gives you any concern?

Juror Zeck: Not that I know of at the present time.

The Court: Have you ever had any serious illness in the last ten years?

Juror Zech: Not especially.

The Court: That is sufficient unless you wish to say——

Mr. Campbell, have you ever had any serious trouble yourself with health?

Juror Campbell: No, not of my health, no.

The Court: How long have you been living in LeGrande community?

Juror Campbell: About 10 years.

The Court: Before that where did you reside?

Juror Campbell: At Elbe.

The Court: Elbe?

Juror Campbell: Yes.

The Court: Were you a timber worker part of that time?

Juror Campbell: Yes, I worked in the woods.

The Court: That is all I wish to ask now.

There are two more which the Court can conveniently excuse. I feel certain in my own mind that—did you wish to say something?

Juror Gunderson: If this jury can be filled without me I'd like to be excused.

The Court: What is the reason you have in your mind?

Juror Gunderson: I am manager of a retail clothing store.

The Court: Where?

Juror Gunderson: Tacoma.

The Court: The store may stay open for business without your personally being there every hour, may it not, Mr. Gunderson?

Juror Gunderson: Yes, but it is an inconven-

ience. Like I stated first, if it could be filled why I would like to be excused.

The Court: Is there anyone else who feels there is any family or occupational conditions that you want to mention?

Juror Adolphsen: I am in good health. I couldn't relate any more to you than I have already done before.

The Court: Your wife's illness is arthritis?

Juror Adolphsen: Yes, she has a crippled arm and we are a one-man grocery store down there so if it's possible, [24] I'd like to be excused, but that is the only reason I offer.

The Court: I have already considered that. Unless there is something else that you have to state why I will act upon what has already been told me.

The Court feels it is more necessary to avoid the contingency which Mrs. McKendry mentions than to grant the requests of the others at this time so the next one excused will be Mrs. McKendry and I wish she would take position somewhere else in the room.

That leaves 24. There is one more to be excused. I believe that from what I have heard up to this time that the issue lies between Mr. Canedy and Mr. Campbell. Considering the possibilities of the effect of possible weather at all seasons and of the fact that it seems to me more convenient to Mr. Canedy to serve than it is to Mr. Campbell, the Court is inclined to excuse Mr. Campbell and respectfully as I have to do, deny the request of Mr. Canedy. So Mr. Campbell is excused from the pres-

ent session and will kindly sit in some other portion of the room, and I ask you all to remain until the Court makes another statement.

Now we have 23 left—is that your understanding, Mr. Clerk?

The Clerk: That is correct, your Honor, 23.

The Court: Are you sure of that? [25]

The Clerk: Quite sure.

The Court: I wish to count the number to be sure of it, please.

The Clerk: Do you wish me to call the rolls of the ones that are left that would give us 23?

The Court: I wish you to answer "here" again as your names are called and I wish you would—Mr. King, would you kindly take a seat here in this back row and will the lady here in front take this chair and will the other gentlemen who have previously answered "here" fill up these vacant chairs.

I ask the Clerk to call your names of those present who are left and not excused and answer "here" as your names are called.

The Clerk: You wish me to count?

The Court: I am going to keep track.

The Clerk: Jens Adolphsen.

Juror Adolphsen: Here.

The Clerk: Dwight E. Alderman.

Juror Alderman: Here.

The Clerk: Linnea E. Anderson.

Juror Anderson: Here.

The Clerk: Theo W. Beeker.

Juror Beeker: Here.

The Clerk: Walter R. Canedy. [26]

Juror Canedy: Here.
The Clerk: George D. Everett.
Juror Everett: Here.
The Clerk: Sarah Gallagher.
Juror Gallagher: Here.
The Clerk: Bernard V. Gunderson,
Juror Gunderson: Here.
The Clerk: Julia Jasprica.
Juror Jasprica: Here.
The Clerk: George J. Jeffries.
Juror Jeffries: Here.
The Clerk: Marvin J. Johnson.
Juror Johnson: Here.
The Clerk: Homer F. King.
Juror King: Here.
The Clerk: Rose Larsen.
Juror Larsen: Here.
The Clerk: Helen M. Ludeman.
Juror Ludeman: Here.
The Clerk: Raymond T. McKenzie.
Juror McKenzie: Here.
The Clerk: Winifred L. Myers.
Juror Myers: Here.
The Clerk: Grace M. Orgon.
Juror Orgon: Here. [27]
The Clerk: Gladys M. Rhoades.
Juror Rhoades: Here.
The Clerk: Ruth T. Ruff.
Juror Ruff: Here.
The Clerk: Jack E. Wagner.
Juror Wagner: Here.
The Clerk: James G. Walker.

Juror Walker: Here.

The Clerk: William C. Wheeler, Jr.

Juror Wheeler: Here.

The Clerk: Donald H. Zech. Z-e-c-h.

Juror Zech: Here.

The Court: Then there are 23 of you who have just answered "here" and before the Court accepts those 23 as grand jurors to constitute the grand jury during the remainder of this term and for the period of time for which you were summoned, I wish to give all of those who have been held in answering the charge an opportunity to challenge any one or all of these grand jurors. I wish to advise all of such persons of their right to challenge any one or all of these jurors who have just answered "here" in response to the calling of their names just a moment ago and the last time the names were called.

The attorney for the Government or a defendant who has been held to answer in the District Court may challenge [28] the array of grand jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law and may challenge an individual grand juror on the ground that the grand juror is not legally qualified.

Challenges shall be made before the administration of the oath to the grand jurors and shall be tried by the Court. Does the attorney for the Government wish to exercise any challenge?

Mr. Belcher: No, your Honor.

The Court: Does anyone else among those mentioned by the Court wish to state any challenge

against the array of the grand jurors or any one or any individual grand juror among them? If so, I will hear the statement of your challenge at this time.

That right of challenge applies to each and all of those persons in custody of the Marshal and each and all of those persons including the attorney for the Government and any and all defendants who has or have been held to answer in the District Court—that means this Court—any charge which is or may be pending against you.

Hearing no challenge the Court does adyise those grand jurors who names have just been called and who have just answered "here," those 23 persons are now accepted and the Court does now accept each and all of them as the grand jurors and as the grand jury during the period of time [29] mentioned in your summons. We ask all of those who were in attendance in response to jury summons to await further direction of the Court. We have a pause for a moment.

The Court does now accept and does order enrolled as members of the grand jury for each and all of those persons who have just answered "here" being 23 in number, those whose names were called for the second time and answered "here," to serve as grand jurors, and the grand jury of this Court until discharged by the Court, such grand jury service not to exceed the period of 18 months from the date on which said jurors report, namely, this date, and the Court does now direct that each and all of those grand jurors just mentioned do now

rise and that each of you raise your right hand and be sworn as such grand jury.

(Sworn.)

The Court: I wish to say to each and all of the other grand jurors who were excused from among those who were to be accepted but those who are excused from rendering grand jury service, you are excused subject to call. If it becomes so necessary in the future for the Court to have your assistance as grand jurors or any one of you as a grand juror, the Court will get in touch with you and have you advised of it. The Court would like it if you find it convenient to remain where you are and hear the Court's instructions to the other grand jurors who have been accepted as the [30] grand jury at this time. It might be of some assistance to you in the future. You are not required to do so but I think it would be useful because of your future service if you do remain until the grand jury, which is the 23 persons accepted and sworn as the grand jury, retire to consider the business to come before the grand jury.

Members of the grand jury, it is now my duty to instruct you as to the law relating to your duties. You have been selected in accordance with law to serve as grand jurors at the present term of this Court and during the period of time already mentioned. You come from your several communities. You are familiar with the situations in your respective localities and any information you may have concerning violations of the laws of the United States you should lay before the body of the grand

jury for its information to be considered with the testimony and the witnesses who may appear before you.

It is your duty to inquire into the public offenses against the laws of the United States committed for trial within the Southern Division of the Western District of Washington, and where the evidence brought before you warrants, present them to the Court by indictment. These public offenses embrace such matters as will be brought before you by the attorney for the Government or such offenses as you may otherwise be advised, are suitable for your [31] consideration. You will note that I have emphasized offenses against the United States. This grand jury, being a grand jury of the United States District Court, is not concerned with matters which concern and are connected with offenses against the state law, the laws of the state of Washington. This grand jury has no jurisdiction to consider any matter which does not concern the laws of the United States.

You of course understand that government can only be maintained by the enforcement of its laws. A disregard of law would soon result in anarchy. The purpose and function of the grand jury is to consider alleged violations of law and if the evidence presented unexplained convinces the grand jury that the law has been violated, then a true bill should be found and returned to the Court so that the parties may be brought to answer thereto.

It is neither your province nor mine to determine the policy of any law. The Congress determines

that policy and after a law is enacted it is everyone's duty to conform his acts in accordance with the provisions of the law, and he may not for any reason or purpose personal to himself or because of any dislike or disrespect which he may have for any law, violate it or confederate with others to bring about a violation of it.

The law is no respecter of persons or wealth or position, high or low, rich or poor. All stand on the same basis [32] with respect to the law. It is the duty of every officer of this Court, of which each of you is one, to consider that the function with which he is invested by the Constitution and the law is limited by the extent of his oath and commission and power and he must remember that not merely power is delegated to him but also trust is reposed in him.

A juror may not consider his wishes but only the obligations which the law and his oath impose, and he must always remember that when entering the secret chamber of the grand jury he does not enter alone to do as he pleases but that he is clothed with, and with him enters as his accessory, the law and the Constitution, and the restraints of religion, equity, honor and good conscience, all passion, hatred, fear, envy, and all private likes and dislikes must be laid aside and weight given to the grand jurors' oath in the light of law and of good conscience.

You will therefore inquire into and true presentment make of all public offenses against the United States committed or triable within this Southern

Division of the Western District of Washington of which you shall have or can obtain legal evidence. This applies to both organized and unorganized crime.

It is possible that some cases might be by stipulation of the parties primarily of concern to the Northern Division of this Court will be presented to this grand jury and you [33] would have authority to consider that matter but that would be by special arrangement. The normal instance of jurisdiction of this grand jury is to consider charges relating to offenses occurring within the Southern Division of this Court. I wish to impose upon you that all investigations before your body will be and must be absolutely secret.

You have just sworn that you will keep your own counsel and that of your fellows and of the Government and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you or the name of any person who may have been under investigation or anything that you or any other grand juror may have said or the manner in which you or any other grand juror may have voted on any matter before you.

You can readily see the object of this legal requirement. If jurors were permitted to reveal what transpires in the grand jury room persons who had violated the laws of the United States would thereby obtain warning in advance and thus avoid arrest, or the Government would be put to large expense to locate them, or possibly they would

escape punishment, and an officer of the Court or of the law who would thereby disclose information either consciously or unconsciously would be violating the law and his oath.

This requirement is also intended as a protection to the grand jurors themselves, for if one juror should reveal [34] how his fellow jurors voted or repeated what they or any of them said while in the grand jury room, that might and probably would cause them to incur the enmity of those against whom charges were presented and thereby jurors may be made to suffer material loss.

The secrecy of the grand jury room is also designed to protect the innocent from injury. Sometimes it happens that an innocent person is charged with crime and the matter presented to the grand jury and even though an indictment is not found against such person and he or she may be entirely blameless, still if it became generally known that a charge had been made against him he might thereby suffer irreparable harm or the same experience might be had by members of his family and needless and irreparable injury would be done to him or other members of his family.

While it is the duty of the grand jury to return indictments against those against whom legal evidence is produced of the commission of crime, it is the sacred duty of the grand jurors to protect those against whom charges were made which are unsupported by legal evidence. The duty is just as strong to protect the good name of all law abiding persons as it is to return indictments against

those violating the law. You are not bound to hear evidence for the defendant but it is your duty to weigh all the evidence submitted to you and when you have reason to believe that [35] other evidence within your reach might explain away the charge you should order such evidence to be produced before you.

You may at all reasonable times ask the advice of the judge of this Court. Normally, however, the United States Attorney will be your advisor and in all probability you will have no occasion to apply to the Judge of the Court for such advice. The attorney for the Government will appear before you for the purpose of giving information or advice relating to any matter cognizable by you and maybe interrogate witnesses before you whenever he or you think it necessary, but no other person is permitted to be present during your sessions excepting witnesses under examination or an interpreter needed or a stenographer for the purpose of taking down the evidence, and no person may be permitted to be present during expression of your opinions while the grand jury is deliberating or voting.

Your foreman may cause the United States Attorney to issue subpoenas for the attendance of witnesses or interpreters before you, and may administer oaths and affirmations to witnesses. Any witness disobeying any subpoena so issued is punishable as for contempt of court. An indictment cannot be returned by the grand jury without the concurrence of at least 12 grand jurors. When so

found it must be endorsed a true bill and the indictment must then be signed by your [36] foreman and by the attorney for the Government.

It will require sixteen of your number to constitute a quorum for transacting any business at any session of the grand jury and it will require twelve, as I have just stated, of the grand jurors to agree upon an indictment. When an indictment is found it must be presented by your foreman in your presence to the Court. After it has been signed by your foreman and by the attorney for the Government. If sixteen of your number do not agree in finding an indictment against a defendant who has been held to answer any charge transmitted to you, such charge must be returned to the Court with an endorsement thereon signed by your foreman that no true bill is found. Thereupon such charge should be dismissed.

I will appoint from among your number Mr. Dwight E. Alderman fram Vancouver, Washington, as your foreman and Mr. Homer F. King of Tacoma, Washington, as your deputy foreman. Is there any objection on the part of either of these gentlemen to so serve?

Juror King: No, sir.

Juror Alderman: No.

The Court: During the absence of the foreman the deputy foreman shall act as the foreman. You will immediately upon retiring elect a clerk who will keep minutes of the proceedings. These will be delivered to the United States [37] Attorney at the conclusion of your session or destroyed as may

be found necessary. The foreman or another juror appointed by him shall keep a record of the number of jurors concurring in the findings of every indictment and shall file that record with the Clerk of the Court, but that record shall not be made public except on order of the Court.

The grand jury and you and each of you twenty-three grand jurors constituting the grand jury will now retire to the grand jury room to begin your deliberations, being now in the conduct of the bailiff. I would like the bailiff to come forward and be sworn.

(Sworn.)

The Court: The grand jury will now retire to the grand jury room being in the conduct of the bailiff.

(Whereupon, the jurors retired to the Grand Jury Room to commence their deliberations at eleven-fifteen o'clock a.m., and other matters were considered.) [38]

Certificate

I, Adele U. Douds, official reporter for the within-entitled Court, hereby certify that the foregoing is a full and complete transcript of matters therein set forth, prepared under my supervision and direction.

/s/ ADELE U. DOUDS

Receipt of Copy Acknowledged.

[Endorsed]: Filed Jan. 25, 1954.

[Title of District Court and Cause.]

MOTION

Comes now the defendant William R. Forman and moves the Court for an Order requiring the plaintiff to elect to try this cause on either Counts IX, X, XI, XII and XIII of the indictment alone or on Count XV of the indictment alone.

In the event that the motion to elect is denied, this defendant moves for an Order directing a separate trial on Count XV of the indictment.

This motion is made under Rule 14 of the Federal Rules of Criminal Procedure on the ground that:

(a) It appears from the face of the indictment that both defendants did not participate in the same acts or transactions or in the same series of acts or transactions constituting the offenses described in the aforesaid counts of the indictment and, therefore, the counts could not lawfully be joined in one indictment under Rule 8 of the Federal Rules of Criminal Procedure, or consolidated for trial under Rule 13 of the Federal Rules of Criminal Procedure; and

(b) The defendant Forman is and will be prejudiced by the joinder of the offenses set forth in the indictment and the joint trial thereof as more particularly shown in the memorandum submitted herewith.

Dated: June 4th, 1955.

METZGER, BLAIR & GARDNER
s/ GEORGE W. MEAD
s/ S. J. BISCHOFF
Attorneys for Defendant
William R. Forman

Acknowledgment of Service Attached.

[Endorsed]: Filed June 8, 1955.

[Title of District Court and Cause.]

ORDER ON MOTIONS AGAINST INDICTMENT

The respective Motions to Dismiss of the defendant Seijas and the defendant Forman, and the Motion to Transfer for Trial, Motion to Require Plaintiff to Elect, Motion to Strike and Motion for Bill of Particulars of the Defendant Seijas, all having come on for hearing before the Court on May 7 and May 12, 1955, the Court having heard argument of respective counsel and being fully advised in the premises, it is now

Ordered that the defendant Seijas Motion to Transfer for Trial, is granted as to Counts I to VIII inclusive and Count XIV, and as to such Counts the Indictment is transferred to the Northern Division of the Western District of Washington for all further proceedings thereon. That the said Motion to Transfer as to Count XV is denied. It is further

Ordered that all the other motions of the respective defendants above referred to are denied.

Dated this 13th day of June, 1955.

/s/ GEO. H. BOLDT
United States District Judge

Presented by:
/s/ J. S. OBENOUR
Assistant United States Attorney

Approved as to form:
/s/ HARRY SAGER
Of Counsel for Defendant Seijas

/s/ A. E. BLAIR
Of Counsel for Defendant Forman

[Endorsed]: Filed June 13, 1955.

[Title of District Court and Cause.]

ORDER

The above cause having come regularly on for hearing on the 13th day of June, 1955 upon the motion of the defendant, William R. Forman, for an order requiring plaintiff to elect to try this cause on either Counts IX to XIII, inclusive, of the Indictment alone, or on Count XV of the Indictment alone, and upon the further motion of said defendant, in the event said motion to elect is denied, for an order directing a separate trial on Count XV of the Indictment; and the Court having heard argument of counsel and being fully advised in the premises, it is

Ordered that the motion of the defendant, William R. Forman, for a trial upon Count XV of the Indictment separate from trial on Counts IX to XIII, inclusive, of the Indictment, be and same is hereby granted.

It Is Further Ordered upon the Court's own motion, and the defendant, William R. Forman, neither moving for nor consenting thereto, that Count XV of the Indictment be and is hereby transferred to the Northern Division of the Western District of Washington for all further proceedings thereon.

Dated this 17th day of June, 1955.

s/ GEO. H. BOLDT
United States District Judge

Presented by:

s/ A. E. BLAIR
Of Counsel for Defendant Forman

Approved as to Form:

/s J. S. OBENOUR
Assistant United States Attorney

s/ HARRY SAGER
Of Counsel for Defendant Seijas

[Endorsed]: Filed June 17, 1955.

[Title of District Court and Cause.]

MOTION TO RETURN COUNT XV TO THE SOUTHERN DIVISION

Comes now the plaintiff, United States of America, by and through its attorneys, the undersigned, and moves the Court for an Order to return Count XV of the Indictment herein to the Southern Division of the Western District of Washington for trial and other proceedings. This Motion is for the reason that the Court did on the 17th day of June, 1955, upon the Court's own motion, and with the defendant William R. Forman neither moving for nor consenting thereto, transfer said Count XV of the Indictment to the Northern Division of the Western District of Washington for all further proceedings.

It is respectfully suggested that said Order being without the consent or request of the defendant Forman, was contrary to the Rules of Federal Procedure particularly Rules 19 and 21 of the Federal Rules of Criminal Procedure.

It is further moved that this Order returning Count XV to the Southern Division shall be made applicable as to both the defendants Forman and Seijas. It is urged that this order should be applicable as to both defendants in accordance with Rule 8 (b), Federal Rules of Criminal Procedure, and also as to Rule 21 (b), that the interests of justice can best be served by a trial of both defendants at a single trial in the Division of the District in which the Indictment was originally returned.

Dated this 20th day of January, 1956.

/s/ CHARLES P. MORIARTY
United States Attorney
s/ CHARLES W. BILLINGHURST
Assistant United States Attorney.

[Endorsed]: Filed Jan. 20, 1956.

[Title of District Court and Cause.]

SUGGESTION OF DEFENDANT

Comes now defendant William R. Forman above named and suggests to the Court that it is without power to entertain the motion of the plaintiff for transfer of Count XV of the indictment to the Southern Division of the Western District of Washington from the Northern Division on the ground and for the reason that this action, so far as Count XV of the indictment is concerned, is now pending in the Northern Division of the Western District of the United States District Court for the District of Washington and consequently this Court is without jurisdiction to entertain this motion.

Dated this 30th day of January, 1956.

METZGER, BLAIR & GARDNER
s/ By JAMES E. O'HERN
/s/ GEORGE W. MEAD
/s/ S. J. BISCHOFF
Attorneys for Defendant William R. Forman.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 30, 1956.

[Title of District Court and Cause.]

ORDER DIRECTING RETURN OF COUNT XV TO THE SOUTHERN DIVISION

The above cause having come on regularly for hearing in Tacoma, in the Southern Division of the Western District of Washington on the 30th day of January, 1956, upon the motion of the Plaintiff, United States of America, for an Order to Return Count XV of the Indictment to the Southern Division for all further proceedings, and the defendant William R. Forman, through his counsel, George W. Mead and James E. O'Hern, having then filed a suggestion that the Court was without jurisdiction to hear the matter in the Southern Division, and the Court then determining that the matter should be heard in the Northern Division of the Western District of Washington, and giving the plaintiff leave to file said motion in the Northern Division did inquire if the parties desired to proceed with the hearing of the motion immediately at Tacoma or to have the matter set over for a subsequent hearing at Seattle, and the defendant Forman, through counsel, then consenting that the matter as filed in the Northern Division be then heard in the Southern Division and the defendant Seijas through counsel consenting thereto, the Court then having heard arguments of counsel and being fully advised, and it appearing that the Order of th Court entered on the 17th day of June 1955, being contrary to the provisions of Rules 19 and 21 of the Federal Rules of Criminal Procedure.

It Is Ordered that the Motion of the plaintiff, United States of America, for transfer of Count XV of the Indictment to the Southern Division of the Western District of Washington for all further proceedings be, and it is hereby granted.

It Is Further Ordered upon the plaintiff's motion that the transfer of Count XV of the Indictment shall pertain to all further proceedings on this count as against both defendants, Armador A. Seijas and William R. Forman.

Done In Open Court this 10th day of February, 1956.

GEO. H. BOLDT
United States District Judge

Presented by:
/s/ J. S. OBENOUR
Assistant United States Attorney

Approved:
/s/ HARRY SAGER
Attorney for Defendant Seijas
/s/ GEORGE W. MEAD
Attorney for Defendant Forman

Certification Attached.

[Endorsed]: Filed February 14, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS COUNT XV OF THE INDICTMENT

Comes now defendant William R. Forman and moves the Court for an Order dismissing Count

XV of the indictment on the ground that the offense described therein could not be prosecuted and/or the case tried as to Count XV in the Southern Division of the United States District Court for the Western District of Washington in that:

(1) Count XV of the indictment alleges that the defendants conducted business during the years 1941 to 1945 in "Kitsap County, (Northern Division) Washington"; that the defendants conspired "in the City of Seattle, (Northern Division) Washington" and alleges that each of the seven overt acts, (24, 26, 29, 30, 31, 32 and 33) committed within the period of six years prior to the filing of the indictment, were each committed in Seattle, Washington; that is to say, the conspiracy and the overt acts were all committed in the Northern Division of the United States District Court for the Western District of Washington and not in the Southern Division thereof.

(2) The Grand Jury, which returned this indictment, was drawn in the Southern Division to consider only offenses alleged to have been committed in the Southern Division and the Grand Jurors were drawn from a panel limited to residents of the Southern Division and the indictment was not returned by a Grand Jury called and empanelled to consider alleged offenses committed throughout the Western Division of the Court and the Grand Jurors were not selected from a panel comprised of residents of the entire Western Division.

This motion is made and based upon the indictment and upon the files and records of this Court,

including the minutes of the proceeding of this Court held on February 3, 1953, upon which day Judge Lindberg directed the Clerk of the Court to draw a venire for a Grand Jury; the list of the Grand Jurors drawn pursuant to said Order showing their places of residence; the Court Reporter's transcript of the Court proceedings on February 3, 1953, and the Court Reporter's transcript of the proceedings of this Court had on February 26, 1953, when the Grand Jury first appeared and were qualified and sworn by Judge Bowen, all of which are on file in this Court.

Dated this 15th day of February, 1956.

METZGER, BLAIR & GARDNER
/s/ By JAMES E. O'HERN
/s/ GEORGE W. MEAD
/s/ S. J. BISCHOFF
Attorneys for Defendant, William R. Forman.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 15, 1956.

United States District Court Western District of Washington Southern Division

Record of Proceedings

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 10th day of April, 1956, the Honorable George H.

Boldt, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 10th day of April, 1956, this matter comes on before the Court for a hearing on the defendant Forman's motion to Dismiss Count XV of the Indictment herein. The matter is called and J. S. Obenour, Assistant U. S. Attorney, on behalf of the United States and A. E. Blair and S. J. Bischoff on behalf of defendant Forman personally appear. Hearing is had and arguments presented, whereupon, the motion is overruled and denied.

[Title of District Cause and Cause.]

MOTION TO QUASH AND/OR MODIFY SUBPOENA DUCES TECUM

Comes now Albert Forman and Defendant William R. Forman and move the Court for an Order quashing the subpoena duces tecum dated June 25, 1956, served upon Albert Forman on June 26, 1956, as it requires Albert Forman to bring with him:

"All records of Forman Brothers, partnership; Green Parrott and First Avenue Theatres, partnership; Film Classics of the Northwest, partnership; and any other partnership records for any other partnerships in which you and William R. Forman have an interest, which reflect the capital investments, earnings and drawings of William R. Forman during the years 1942 to 1950, inclusive.

All ledgers and journals for the years 1942 to 1950, inclusive for any partnerships in which you and William R. Forman individually or with others had any interest or investment."

In the event that the Court should deny this motion, Albert Forman and Defendant William R. Forman move for an Order modifying the subpoena duces tecum in the following respects:

(a) By limiting the same to records and books containing entries and relating to transactions during the years 1941 to 1945 inclusive;

(b) Eliminating the requirement for the production of books and records of: Forman Brothers, partnership; Green Parrott and First Avenue Theatres, partnership; Film Classics of the Northwest, partnership; any other partnership in which William R. Forman and Albert Forman have an interest.

The motions are based on the following grounds:

(a) The production of the records and books referred to in the subpoena and the giving of testimony in relation thereto will violate the Fourth Amendment to the Constitution of the United States in that it will violate the right of Defendant William R. Forman to be secure in his person, houses, papers and effects against unreasonable searches and seizures and will violate the Fifth Amendment to the Constitution of the United States in that the production of the said books and records and the giving of testimony relating thereto will compel Defendant William R. Forman in a criminal case to be a witness against himself.

(b) The subpoena duces tecum is unreasonable and/or oppressive in that it requires the production of "'all records', and 'other partnerships', 'any partnerships' in which you and William R. Forman individually or with others had any interest or investment", and is too broad, vague and indefinite;

(c) The records sought to be produced are wholly immaterial and irrelevant and unrelated to the charges set forth in Count XV of the indictment in the above titled action.

This motion is based on the Fourth and Fifth Amendments to the Constitution of the United States and on Rule 17 (c) of the Federal Rules of Criminal Procedure.

Dated: June 29, 1956.

METZGER, BLAIR & GARDNER
/s By JAMES E. O'HERN
/s/ GEORGE W. MEAD
/s/ S. J. BISCHOFF
Attorneys for Defendant William R. Forman and Witness Albert Forman.

Service of Copy Acknowledged.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon
County of Multnomah—ss.

I, Albert Forman, being duly sworn on oath, de-

pose and say that on June 26, 1956, I was served with a copy of a subpoena duces tecum requiring me to appear before this Court on July 30, 1956, at 9:30 o'clock A.M. to testify in the above entitled action and to bring with me the documents and records described in the motion filed simultaneously herewith.

The records and books of the partnerships described in and named in the subpoena duces tecum contain no entries of any kind relating to the business of the partnerships described in Count XV of the indictment, to-wit: Bremerton Amusement Company, United Amusement Company, American Amusement Company, and United Amusement Company of Bremerton, all of which were allegedly engaged in the maintenance and operation of "coin-operated gaming and amusement devices"; that the partnerships described in the subpoena duces tecum had no relationship to or with the partnerships described in the indictment and were engaged in an entirely different business, to-wit, the operation of moving picture theatres.

Count XV of the indictment alleges that the partnerships named therein were in existence during the years 1941 to 1945. There is no allegation that the said partnerships continued thereafter.

Count XV of the indictment does not allege any conspiracy to evade the income tax of defendant William R. Forman. Insofar as it alleges a conspiracy to evade the payment of income taxes, the indictment charges only conspiracy to evade the income taxes of defendant Seijas and his wife for

the years 1942 to 1945 inclusive "upon their share of the unreported income of the aforementioned partnerships."

The books and records, described in the subpoena duces tecum, are wholly immaterial and irrelevant and unrelated to the allegations set forth in Count XV of the indictment.

Defendant Seijas was not a partner in and had no interest in any of the partnerships described in the subpoena duces tecum except the "Green Parrott and First Avenue Theatres". Defendant Seijas acquired an interest in said partnership in 1945 and his interest was terminated December 31, 1949. The business of the said partnership was wholly unrelated to the business of any of the other partnerships described in the indictment. The books and records of the Green Parrott and First Avenue Theatres partnership contain no entries and recorded no transactions pertaining to the business of the other partnerships named in the indictment.

The records of the several partnerships described in the subpoena duces tecum, are voluminous and consist of many filing cabinets of records and it would be unreasonable and oppressive to require the production of said records in view of the immateriality and irrelevancy thereof.

Each of the partnerships described in the subpoena consists solely of William R. Forman and myself except that Defendant Seijas was a partner in the "Green Parrott and First Avenue Theatre" partnership from 1945 to the end of 1949 and one William Klepper was a partner in the partnership

of Film Classics of the Northwest; that the books, papers and records of the partnerships described in the subpoena are the personal papers and effects of each of the said partners including William R. Forman; that the accounting records, ledgers and journals of the said partnerships referred to in the subpoena for the years 1941 to 1950 are not now and were not at the time of the service of the subpoena on me in my possession or under my control and had not been for several years prior to service of the subpoena on me and said records during said period of time have been and are in the possession of or under the control of Defendant William R. Forman.

/s/ ALBERT FORMAN

Subscribed and sworn to before me this 30th day of June, 1956.

[Seal] /s/ MARY McHENRY

Notary Public for Oregon. My Commission Expires: February 9, 1957

[Endorsed]: Filed July 2, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America
Western District of Washington
Southern Division—ss.

John S. Obenour, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Wash-

ington, and as such, is one of the attorneys for the plaintiff in the above entitled action.

That on Tuesday, June 26, 1956, while acting in his official capacity and in company with Special Agents Edward J. O'Leary and Albert Keeney, he did contact Albert Forman at 10:00 o'clock A.M. on said date at the office of Albert Forman at No. 904, 932 Sixth Avenue, Portland, Oregon.

That he did, along with Special Agents O'Leary and Keeney, introduce himself and advise Mr. Forman that he desired to talk over proposed testimony of Mr. Forman in the forthcoming trial against Mr. Seijas and Mr. William R. Forman.

That at this time Albert Forman was served with a subpoena duces tecum, which called upon Albert Forman to produce certain records at the forthcoming trial in Tacoma. Mr. Forman was advised that the purpose of this interview was to facilitate his proposed testimony in the forthcoming trial against his brother, William R. Forman.

Mr. Forman was asked concerning the records described in the subpoena, and he stated in effect that he had no personal knowledge of these records, but that his employee, Thelma Endersby would have such knowledge. However, he stated that Thelma Endersby was at that time receiving treatment for a sinus condition at a doctor's office and would be unavailable until later in the day. He thereafter answered certain questions pertaining to his own background, after on two occasions inquiring as to the purpose of this interview. On each occasion Mr. Forman was advised of his rights under the sub-

poena and that he did not have to answer questions at that time, but that this was an attempt to facilitate the presentation of his testimony through familiarity of the text of his testimony as between the Government's attorney and Mr. Forman.

That at no time did Mr. Forman declare that the requested documents were unavailable or in the possession of William R. Forman. He stated, however, that after all, his brother was on trial and he didn't want to do anything to hurt him. He then refused to answer further questions without consulting George Mead. He stated that Mr. Mead, the attorney for his brother, was then in New York and that he would attempt to contact him by phone. He then requested that we return at 2:00 p.m. that same afternoon and he would advise us of the results of his conversation with Mr. Mead. The reason given, however, was not the unavailability of the records, but his desire to consult Mr. Mead before he answered any further questions.

That as the Government representatives were leaving the office, Thelma Endersby returned. She advised that she had received medical treatment for a sinus condition and was feeling the effects of such treatment. All three Government representatives were known to Miss Endersby by reason of her previous appearance at Tacoma in the trial of the co-defendant, Mr. Seijas. By reason of this acquaintanceship, a short conversation concerning Miss Endersby's condition was held, at which Mr. Forman was present. Upon inquiry, Miss Endersby stated that she would be able to talk to the Government

agents at 2:00 p.m. as she believed she would have recovered. She was told the purpose of our visit was for the pre-trial examination of the proposed witnesses. She was also served with a subpoena to appear at the forthcoming trial.

At 2:00 p.m. that same date, Obenour, O'Leary and Keeney again visited Mr. Forman's office. On this occasion Miss Endersby was called into Mr. Forman's office. Mr. Forman then advised the Government's agents that he would answer no further questions prior to trial and would furnish no documents. Mr. Forman was asked if he was acting upon advice of counsel. He at first would not answer and upon being asked a second time, declared that he was acting upon his own advice and that he had not been able to contact Mr. Mead. Miss Endersby as asked if that applied to her also, and she stated, "Yes". Miss Endersby had previously answered a similar subpoena and had appeared at the prior trial of defendant Seijas, at which time she produced certain records requested and furnished a transcript of the requested information taken therefrom.

/s/ JOHN S. OBENOUR

Subscribed and sworn to before me this 16th day of July, 1956.

[Seal] /s/ MARION MILLER
Deputy Clerk, United States District Court, Western District of Washington

[Endorsed]: Filed July 16, 1956.

[Title of District Court and Cause.]

MEMORANDUM DECISION

The motion to quash subpoena duces tecum dated June 25, 1956 directed to Albert Forman is denied. Exception allowed.

Dated this 20th day of July, 1956.

/s/ GEO. H. BOLDT
United States District Judge

Certificate of Mailing Attached.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

OBJECTION TO THE INTRODUCTION OF EVIDENCE AND MOTION FOR JUDGMENT OF ACQUITTAL

Comes now defendant William R. Forman and objects to the introduction of any evidence in support of Count XV of the indictment and for a judgment of acquittal on the following grounds, to-wit:

I.

The Court has no jurisdiction of the offense alleged in Count XV of the indictment in that the offense is alleged to have been committed in the Northern Division of the Western District of the United States District Court for the District of Washington and not within the Southern Division of said Court, and the Grand Jury that returned the indictment, was without jurisdiction to return

the indictment because it was impaneled to consider only offenses committed within the Southern Division of said Court and it was not impaneled and empowered to consider offenses committed in the Northern Division of said Court, and on the further ground that the Grand Jury was directed to be drawn, and was drawn, from a panel composed of residents of the Southern Division only and not from residents of the Western District as a whole.

II.

The indictment is void for duplicity in that it joins several separate conspiracies to violate separate statutes, some of which are misdemeanors and some felonies governed by different statute of limitations and providing for different penalties.

III.

The offense charged in the indictment is barred by the statute of limitations.

IV.

The indictment fails to charge an offense under Section 371 of the Criminal Code.

In the event that the Court denies the aforesaid motion and treats Count XV of the indictment as charging a conspiracy to violate Section 145 (b) of the Internal Revenue Code, defendant Forman moves that the Court strike from Count XV of the indictment and remove from consideration of the jury, the allegations set forth in paragraphs A, B and D, pages 14, 15 and 16 of the indictment, and the overt acts numbered 24, 26, 29, 30, 31, 32, and

33, in that they purport to allege overt acts in support of the alleged conspiracies to violate Section 1001 of the Criminal Code and Sections 54 and 3809 of the Internal Revenue Code.

Dated July 30, 1956.

METZGER, BLAIR & GARDNER
s/ By JAMES E. O'HERN
s/ S. J. BISCHOFF
s/ GEORGE W. MEAD

[Endorsed]: Filed July 31, 1956.

[Title of District Court and Cause.]

DEFENDANT WILLIAM R. FORMAN'S REQUESTED INSTRUCTIONS

Defendant William R. Forman requests the Court to give to the Jury the following instructions or the substance thereof. If the Court deems any part of a requested instructed erroneous, defendant requests that the remainder of the instruction be given.

1.

You are instructed that the indictment does not charge the defendants, or either of them, with actual evasion of their tax liability or with the actual attempt to evade their tax liabilities. It charges only a conspiracy to attempt to evade the tax liability of defendant Seijas and his wife.

2.

You are instructed that the indictment charges that the defendants conspired to attempt to evade

the tax liability of the defendant Seijas and his wife only. The indictment does not charge any conspiracy to attempt to evade any tax liability of defendant Forman and/or his wife. You will, therefore, not concern yourselves with any question relating to the tax liability of the defendant Forman and his wife and you are instructed to disregard all evidence relating thereto.

3.

The indictment charges that both defendants were members of four partnerships during the years 1941 to 1945 inclusive. The names of these partnerships are: Bremerton Amusement Company, United Amusement Company, American Amusement Company, United Amusement Company of Bremerton, and it is charged that the defendants conspired to attempt to evade a part of the income tax liability of the defendant Seijas and his wife on income derived from the operation of pin ball machines by the said partnerships during the said four year period. You are instructed that the conspiracy charged in the indictment relates only to the income derived by defendant Seijas and his wife from the pin ball operations of the said four partnerships and the income tax due on the alleged unreported income from that source only during the tax years 1942 to 1945 inclusive. The defendants are not charged with conspiracy to attempt to evade any tax liability resulting from income from any other source or any other period of time. Consequently, in considering whether there was any conspiracy to

attempt to evade tax liability, you will confine your consideration to income derived from that source only and you will disregard all evidence of income from any other source or any other period of time.

4.

You are instructed that in criminal cases, there can be no presumption as to any fact essential to the establishment of the offense. Consequentiy, the burden is on the United States to establish every fact essential to the commission of an offense by evidence which will convince you beyond a reasonable doubt as to such fact.

In this case, the United States must establish beyond a reasonable doubt:

(a) That the defendants Seijas and Forman conspired together to attempt to evade the tax liability of defendant Seijas and his wife; and

(b) That an overt act was committed during the continuance of the conspiracy and in furtherance of its object.

Both of these elements must be established beyond a reasonable doubt. If the United States has failed to establish either of these elements or if you have a reasonable doubt as to either of these elements, your verdict must be not guilty.

5.

You are instructed that if you find that the defendant Forman had no knowledge of the manner in which defendant Seijas reported the income and tax liability of himself and his wife for the years in question and had no knowledge that defendant

Seijas had failed to report any part of his income for the years in question, or that defendant Seijas attempted to evade any part of the tax liability of himself and his wife, you must find the defendant Forman not guilty.

6.

You are instructed that if you find from the evidence that defendant Forman did not commit any act to aid defendant Seijas in any attempt to evade his and his wife's tax liabilities to the United States during the years in question, you must return a verdict of not guilty as to defendant Forman.

7.

You are instructed that if you find that defendant Forman was not a party to the conspiracy charged in the indictment, you must find him not guilty even though you are convinced that defendant Seijas did actually attempt to evade his tax liability or did actually evade his tax liability.

8.

You are instructed that an overt act, as the term is used in the statute defining the offense of "conspiracy," must be an affirmative act that is committed as a step towards and for the specific purpose of accomplishing the object of the alleged conspiracy. That is to say, the act must be committed with the specific intent of accomplishing the object of the conspiracy.

9.

You are instructed that this case does not involve the question whether defendant Seijas did or did not evade any part of his tax liability during the

years in question. The issue is, did defendant Forman conspire with Seijas that Seijas should attempt to evade tax liability? That is to say, did defendant Forman agree to participate with Seijas in the attempted evasion of Seijas' tax liability.

10.

You are instructed that an act committed by either defendant to carry out his own personal and individual purpose and not related to the alleged conspiracy, is not an overt act within the meaning of the statute defining the offense of conspiracy.

11.

You are instructed that the mere fact that defendants Seijas and Forman were partners during the years 1942 to 1945 inclusive, does not make them conspirators.

Acts performed by partners in the ordinary course of their partnership operations, do not constitute overt acts in furtherance of a conspiracy and the mere fact that one partner may attempt to evade, or does evade his own tax liability, does not make his co-partner criminally liable as a conspirator.

A partner can only be held criminally liable for the acts of his co-partner in attempting to evade his tax liability when he has knowledge of the intention and the attempt of the co-partner to evade his tax and conspires with him to accomplish that purpose.

12.

You are instructed that an act committed, or

statement made, by any employee of Forman and Seijas without the knowledge of the defendants and without their specific direction, do not constitute overt acts.

13.

You are instructed that a prosecution for conspiracy to attempt to evade the payment of income taxes due the United States must be prosecuted within six years after the commission of the offense. That is to say, the indictment must be filed in Court within six years after the commission of the offense. The commission of the offense is deemed to be completed on the date of the last overt act committed during the continuance of the conspiracy and in furtherance of its object. You are instructed that the indictment in this case was filed in this Court on November ...., 1953, and if you find that the last overt act, if any, as heretofore defined, was committed prior to November ...., 1947, then the prosecution of the offense charged in the indictment was barred by the statute of limitations and your verdict must be for the defendant Forman.

14.

You are instructed that the burden is upon the United States to establish beyond a reasonable doubt every element that is essential to constitute the crime charged in the indictment, which elements I have heretofore defined to you, and if you find from the evidence that the United States has failed to establish any one of the elements necessary to constitute the offense charged in the indictment as I

have defined them, you must find defendant **Forman** not guilty.

15.

You are instructed that the law presumes each defendant to be innocent until he is proven guilty by the evidence beyond a reasonable doubt. This presumption is not a mere matter of form, but is a substantial right of each defendant and this presumption continues throughout the entire trial and until such time as you have found it has been overcome by the evidence beyond a reasonable doubt.

Thus, a defendant although accused, begins the trial with no evidence against him. The law permits nothing but legal evidence presented before the Jury to be considered in support of a charge against him. The presumption of innocence alone is sufficient to acquit a defendant unless the Jurors are satisfied beyond a reasonable doubt of defendant's guilt from all the evidence in the case.

16.

You are instructed that since the burden is upon the Government to prove the accused guilty beyond a reasonable doubt of every essential element of the offense charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of a witness for the Government. The law does not impose upon a defendant the duty of producing any evidence.

17.

In order to justify a verdict of guilty based in whole or in part upon circumstantial evidence, the facts in the chain of circumstances shown by the evidence, must be consistent with the guilt of the accused and inconsistent with every reasonable supposition of innocence. If the facts and circumstances shown by the evidence are as consistent with innocence as with guilt, the Jury must acquit the defendant Forman.

18.

You are instructed that with respect to the offense charged in this case, proof of specific intent is required before there can be conviction. That is to say, specific intent to conspire to attempt to evade the taxes owed by Seijas and his wife to the Government. Now specific intent means more than a mere general intent to commit an act. The intent required under the statute here involved, is not inherent in the act itself, but must be established beyond a reasonable doubt by the evidence other than the act of the filing of a return that is false.

19.

You are instructed that even if you find that defendant Seijas has attempted or has, in fact, evaded the payment of any part of the income tax due and owing to the Government, you cannot find defendant Forman guilty unless you are further convinced beyond a reasonable doubt that defendant Forman conspired with defendant Seijas that he should attempt to evade his and his wife's tax lia-

bility for the years in question, to-wit, 1942 to 1945 inclusive, by failure to include part of the income derived by him from the operation of the pin ball machines by the four partnerships named in the indictment.

20.

Evidence has been introduced that the defendant Forman was a man of good moral character. You are instructed that if you believe and find from the evidence that defendant Forman was a man of good character, you should take such good character into consideration in passing upon the question of his guilt or innocence for the law presumes that a man of good character is less likely to commit a crime than one whose character is not good. Evidence of good character when considered along with other evidence in the case, may itself create a reasonable doubt which would warrant an acquittal of defendant.

21.

There is evidence in the case that the partnerships, of which defendants were members, were engaged in operating what is commonly called pin ball machines. You are instructed that in the years in question, the operation of pin ball machines was a lawful and legitimate business, licensed by the State and by the Municipalities in which the business was conducted. You are not to draw any inference adverse to the defendants by reason of the fact that they were engaged in that business.

22.

You are instructed that the fact that the co-

defendant Seijas has entered a plea of guilty, is not to be considered by you as any evidence whatsoever in determining whether or not the defendant Forman is guilty. The defendant Forman has the right to have his guilt or innocence determined by the evidence presented against him and not by what has happened with regard to the prosecution against the co-defendant Seijas. You are not to draw any inference adverse to defendant Forman from the fact that defendant Seijas has pleaded guilty to Count XV of the indictment or from the fact that he was previously convicted on several counts charging him with tax evasion.

23.

You are instructed that since defendant Seijas and Forman are charged in Count XV of the indictment as co-conspirators, that defendant Seijas is, as a matter of law, an accomplice and it is the law that you cannot convict the defendant Forman on the testimony of the accomplice Seijas unless you find that his evidence is corroborated by other evidence tending to connect defendant Forman with the offense committed and the corroboration is not sufficient if it merely shows the commission of the offense.

24.

You are instructed that the witness Seijas is charged in the indictment as a co-conspirator with defendant Forman. The witness Seijas is, therefore, as a matter of law, an accomplice. Consequently, the testimony of the witness Seijas should

be viewed and considered by you with suspicion and caution.

25.

The defendant Forman did not take the witness stand and testify. You are instructed that a defendant accused of a criminal offense does not have to take the stand and testify in his own behalf. He has the right to insist that the Government in this case should establish the commission of the offense charged in the indictment by evidence that convinces you beyond a reasonable doubt, and the evidence adduced by the Government must so convince you before you can find him guilty. You cannot draw any inference adverse to the defendant Forman by reason of the fact that he did not testify in his own behalf. A defendant in a criminal case does not have to disprove anything. The burden is always on the Government to prove the accusation made by the indictment beyond a reasonable doubt.

26.

You are the sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right to consider his demeanor upon the witness stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstance aris-

ing from the evidence which appeals to your judgment as in anywise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

27.

In connection with the instructions that I have given you relative to the application of the statute of limitations, you are instructed that even if you find that the defendants Seijas and Forman conspired to attempt to evade the tax liability of defendant Seijas and his wife for the years 1942 to 1945 inclusive, you must find the defendant Forman not guilty unless you are convinced beyond a reasonable doubt that they also conspired to conceal the alleged conspiracy in order to prevent prosecution therefor and that such additional conspiracy was a continuing one. You cannot imply that there was a continuing conspiracy to conceal the offense from the fact that they may have conspired to attempt to evade the tax liability of defendant Seijas and his wife. That is to say, the mere fact that they may have conspired to evade the tax liability of Seijas and his wife for the years in question, if it be a fact, does not warrant the conclusion that they also conspired to conceal the commission of the offense. You would have to be convinced beyond a reasonable doubt that they actually conspired to conceal the conspiracy and that they committed an overt act or acts in furtherance of such subsidiary conspiracy.

If you find that defendants only conspired to at-

tempt to evade the tax liability of defendant Seijas and his wife and did not form the additional conspiracy to conceal the same, then I charge you that the conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax returns of Seijas and his wife for the year 1945 which was filed in March 1946 and the statute of limitations would run from that time, and your verdict would have to be not guilty.

If you find that there was no subsidiary conspiracy to conceal, as I have heretofore defined it, but acts of concealment were thereafter committed as an after-thought and were conceived after the filing of the returns in March, 1946, your verdict must be for the defendant Forman.

Summarizing, you must:

First, find that Seijas and Forman conspired to attempt to evade the tax liability of Seijas and his wife;

Second, that part of this conspiracy was to make continuing efforts to avoid detection and prosecution;

Third, that defendant Forman knew that Seijas intended to attempt to evade his tax liability and that Forman committed acts designed to aid him in carrying out that purpose as a part of that conspiracy;

Fourth: that the alleged conspirators committed an overt act or acts within a period of six years prior to the filing of the indictment herein in fur-

therance of the conspiracy and during its continuance to accomplish the object of the conspiracy.

If you cannot answer all of these questions in the affirmative, beyond a reasonable doubt, you should return a verdict of not guilty.

If the Court declines to give the aforesaid instruction in toto, defendant requests that the Court give to the Jury the substance thereof or so much of the substance thereof as the Court deems to be proper and applicable to the case embodying the principle involved in the instruction as it is determined in the case of United States v. Grunewald, 233 F. 2d, 556-596.

28.

You are instructed that even if you find that the defendant Seijas was guilty of tax evasion for the tax years 1942 to 1945, you cannot find defendant Forman guilty unless you are convinced beyond a reasonable doubt that the defendant Forman knew that defendant Seijas intended to evade the tax liability of himself and his wife and that defendant Forman conspired with defendant Seijas that he should do so. You cannot impute such knowledge to defendant Forman. You must be convinced beyond a reasonable doubt that defendant Forman actually knew of Seijas' intentions and conspired with him to accomplish that purpose.

[Endorsed]: Filed Aug. 2, 1956.

[Title of District Court and Cause.]

MOTION FOR MISTRIAL

Comes now defendant Forman and moves that a mistrial be declared and that the jury be discharged on the ground that the defendant has been deprived of the protection of the Fourth Amendment and the self incrimination clause of the Fifth Amendment of the Constitution of the United States in that the Court permitted the introduction of evidence by the Government over the objection of the defendant in the following respects:

(a) The witness Thelma Endersby, subpoenaed by the Government, was permitted to testify in the presence of the Jury over the defendant's objection that she testified as a witness in the former trial of the defendant Seijas; that in said trial, subpoena was served upon the witness to produce books and records which were the property of defendant Forman; that she produced such documents at the said trial and gave testimony in relation thereto, and was permitted to testify with respect to this defendant's income tax returns and records pertaining thereto and the possession thereof by the defendant.

(b) The witness William Meyer, subpoenaed by the Government, was permitted to testify in the presence of the Jury over defendant's objection, that he was served with a subpoena duces tecum to appear and testify at this trial and to produce records and documents which were the property of, and in the possession of, defendant Forman and his Attorney, and was permitted to testify that said

records were in the possession of the defendant by and through his Attorney, and to give testimony relating thereto, and that the records and documents referred to were in court; that at the time such testimony was introduced, Counsel for the Government knew that the said documents and records were in the possession of the Attorney for the defendant and were not in the possession of the witness and the witness was permitted to testify in relation to said documents.

(c) The witness Albert Forman was permitted to testify over defendant's objection that he was subpoenaed to testify in this action and to produce books and records that were the property of and in the possession of defendant Forman and to give testimony in relation thereto; that he was subpoenaed to testify and produce books and records of defendant Forman that were the property and in the possession of defendant Forman at the previous trial of defendant Seijas and that he gave testimony in relation thereto at said trial.

That the said evidence was introduced by the Government for the purpose of parading before the Jury that the defendant Forman had in his possession and under his control, records and documents pertinent to the issues involved in this case; that defendant was holding the same from the Court and Jury, thus compelling defendant, against his will, to produce said documents or permit the inference and conclusion to be drawn by the Jury that if the documents were produced, that that would be adverse to the defendant.

A.

If the foregoing motion is denied, defendant Forman renews the motion to strike from Count XV of the indictment, paragraphs A, B, and D, pages 14, 15, and 16, of the indictment, and the overt acts numbered 24, 26, 29, 30, 31, 32, and 33, on the ground that the offenses charged therein are barred by the statute of limitations and do not state offenses against the United States, and the Court is without jurisdiction of the offense charged in the indictment.

B.

Comes now defendant Forman and moves to strike all of the evidence introduced by the plaintiff in support of the allegations in paragraphs A, B, and D, of Count XV of the indictment, and all of the evidence introduced in support of the overt acts relating to said paragraphs A, B, and D, on the ground that the offenses charged therein are barred by the statute of limitations and do not state offenses against the United States, and the Court is without jurisdiction of the offense charged in the indictment.

C.

Comes now defendant Forman and moves to strike:

(1) All exhibits relating to partnerships, corporations and transactions other than those involving the four partnerships named in the indictment.

(2) All exhibits relating to all transactions antidating and postdating the years 1942 to 1945 inclusive.

(3) All evidence relating to partnerships, firms, corporations, and transactions other than the partnerships named in the indictment.

(4) All evidence relating to income and tax liability for any years other than the years 1942 to 1945 inclusive.

(5) All evidence and exhibits relating to the income and tax liability of the defendant Forman.

Grounds of Motion

This motion to strike is based on the grounds:

1: The indictment charges conspiracy to attempt evasion of the income tax from four named partnerships only.

2: The indictment charges conspiracy to attempt to evade income tax from said four partnerships for the years 1942 to 1945 inclusive, only.

3: The indictment charges conspiracy to attempt to evade the tax of defendant Seijas and his wife, only, and not of the defendant Forman.

D.

Comes now the defendant William Forman and moves for a judgment of acquittal on the following grounds:

(1) The court lost jurisdiction of this cause when it transferred this cause to the Northern Division of the Western District of the United States District Court for the District of Washington on its own motion, defendant Forman not consenting thereto, by the Order entered June 17, 1955.

(2) The indictment is void because it was returned by a Grand Jury that had no jurisdiction

over the offense charged in the indictment in that the Grand Jury was impanelled from and limited to residents of the Southern Division of the Western District of the State of Washington, and were impanelled and instructed to consider only offenses committed within said Southern Division of the Western District of the State of Washington, and the indictment charges that the conspiracy was entered into in the Northern Division of the Western District of the State of Washington, and all of the overt acts committed within the period of the statute of limitations were committed in the Northern Division of the Western District of the State of Washington.

(3) The indictment is void for duplicity in that it charges four distinct conspiracies to violate different statutes having different elements, different statutes of limitations applicable thereto, and different penalties.

(4) The offense charged in the indictment is barred by the statute of limitations.

(5) Count XV of the indictment fails to charge any offense under Section 371 of the Criminal Code, or any offense.

(6) Plaintiff has failed to establish beyond a reasonable doubt the offense charged in Count XV of the indictment and the evidence is insufficient for submission to the Jury in that:

(a) The evidence fails to establish that the defendant Forman conspired with Seijas to attempt to evade Seijas' tax liability for income derived from

the four partnerships named in the indictment during the years 1942 to 1945 inclusive.

(b) The evidence fails to establish the commission of any overt act during the continuance of the alleged conspiracy in furtherance thereof within the statute of limitations applicable thereto.

(c) The evidence fails to establish that the alleged offense was committed within the territorial limits of the Southern Division of the Western District of the United States District Court for the District of Washington.

(d) The evidence as to alleged conspiracy and overt acts, if any there be, comes from the alleged co-conspirator and accomplice, which, as a matter of law, must be viewed with suspicion and caution, and is uncorroborated, and consequently is insufficient to establish the offense beyond a reasonable doubt.

(7) The plaintiff has failed to establish that the offense charged in Count XV of the indictment was committed within the statute of limitations applicable thereto.

E.

If motion for acquittal is denied, defendant Forman moves the Court to withdraw from the Jury the issues relating to paragraphs A, B, and D.

[Endorsed]: Filed Aug. 13, 1956.

United States District Court, Western District of Washington, Southern Division

RECORD OF PROCEEDINGS

At a regular session of the United States District

Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 15th day of August, 1956, the Honorable George H. Boldt, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

TRIAL TO JURY RESUMES

Now on this 15th day of August, 1956, this matter comes on before the Court for resumption of trial to a jury. The case is called and the defendant, all counsel and all jurors including the alternate present and ready to proceed.

The evidence having been closed, comes now the matter of final arguments to the jury. Whereupon, Charles W. Billinghurst, Assistant U. S. Attorney, now makes the opening argument to the jury on behalf of the Government.

Comes now Mr. Mead on behalf of the Defendant and states that the defendant will submit the matter to the jury without argument. Therefore, the arguments now being concluded, the Court recesses at 9:50 A.M. subject to call.

At 10:55 A.M. Court is again in session with all parties present and the Court now instructs the jury as to the law applicable to this case. The Instructions are concluded at 12:20 P.M. Bailiffs Inez V. Chapman and Ernest Grant are sworn on taking charge of the Jury and the Jury is excused at 12:21 P.M.

Court recesses at 12:21 P.M. for 5 minutes and at 12:25 P.M. Court is again in session with the defendant and all counsel present and Mr. Bischoff on behalf of the defendant notes certain exceptions to the Court's charge. The exceptions are allowed and the Jury is returned at 12:35 P.M. and the Court directs that they commence their deliberations.

The Court now thanks and discharges Alternate Juror Herluf S. Christiansen. Whereupon, the Court recesses subject to call.

At 9:20 P.M. Court is again in session with the defendant, all jurors and all counsel present. Upon inquiry of the Court, Jury Foreman Helmer O. Berg responds that the jury has reached a verdict and that the verdict is the unanimous verdict of all the jurors. The verdict appearing in proper form to the Court is now read by Deputy Clerk Rosemary D. Freeny as follows:

District Court of the United States, Western District of Washington, Southern Division

No. 16275

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM R. FORMAN, Defendant.

VERDICT

We, the jury empanelled in the above entitled cause find the defendant William R. Forman is

Guilty as charged in Count XV of the Indictment herein.

Dated at Tacoma, Washington this 15th day of August, 1956.

/s/ HELMER O. BERG,
Foreman

On the Court's own motion, the jury is polled by the Clerk and each juror responds affirmatively, that the verdict as read is their individual verdict and the verdict of the jury. Whereupon, the verdict is now received and filed herein.

The jury is thanked and discharged by the Court at 9:28 P.M. The defendant, upon a verdict of conviction is now remanded to the custody of the United States Marshal.

Mr. Mead on behalf of the Defendant, now orally moves the Court for ten days additional in which to file motions for Judgment of Acquittal, Arrest of Judgment and New Trial, pursuant to Rule 34 of the Rules of Criminal Procedure. There being no objections to the motion on behalf of the Government, it is so ordered that the defendant will have fifteen days in which to file motions and the Court directs that a minute order be entered accordingly.

Mr. Mead further orally moves the Court that the defendant be allowed to remain at large on the present bond until time of imposition of sentence. The motion is overruled and denied with leave to make application tomorrow.

Whereupon, the Court stands adjourned at 9:45 P.M. until 9:15 A.M. tomorrow morning.

[Title of District Court and Cause.]

RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL, AND IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL

Comes now defendant William R. Forman and renews his motions for judgment of acquittal made at the close of plaintiff's case and again at the close of the entire case on each and every of the grounds urged in support of said motions at said times.

In the event that the Court should deny the foregoing motions, defendant William R. Forman moves for an order setting aside the verdict and granting a new trial on the grounds:

(a) Newly discovered evidence;

(b) Errors of law committed by the Court in admitting evidence that was immaterial, irrelevant and incompetent over the objections of defendant, which evidence was highly prejudicial to the defendant;

(c) Errors committed by the Court in giving instructions to the Jury and in refusing to give instructions requested by defendant, which errors were prejudicial to the defendant;

(d) The evidence was insufficient to establish the guilt of the defendant beyond a reasonable doubt and was insufficient for submission to the Jury;

(e) The evidence failed to establish that the offense was committed within the statute of limitations applicable thereto and on the contrary, the

evidence establishes affirmatively that the offense charged was barred by the statute of limitations;

(f) The evidence fails to establish that the offense charged, was committed within the jurisdiction of this Court. On the contrary, the indictment alleges, and the evidence establishes affirmatively, that the offense, if any there be, was committed in the Northern Division of the Western District of the United States District Court for the District of Washington.

The motion for a new trial on the ground of newly discovered evidence is based upon the evidence introduced in the case and the affidavits filed in support of the motion simultaneously herewith, and the Court will be requested to hear oral evidence in support thereof at the hearing of this motion.

The alternative motion for a new trial on the other grounds enumerated above, is based upon the evidence introduced in this case on the trial thereof and the specific errors are set forth in detail in the Memorandum submitted in support of the motions simultaneously herewith and is referred to as if herein fully and at length set forth.

Dated: August 28, 1956.

METZGER, BLAIR & GARDNER,
/s/ By HILTON B. GARDNER,
/s/ S. J. BISCHOFF,
/s/ GEO. W. MEAD

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 29, 1956.

[Title of District Court and Cause.]

MOTION FOR ARREST OF JUDGMENT

Comes now defendant William R. Forman and moves the Court for arrest of judgment in the above entitled action on the grounds:

(a) Count XV of the indictment does not charge an offense;

(b) The Court is without jurisdiction of the offense charged in Count XV of the indictment.

Dated: August 28, 1956.

METZGER, BLAIR & GARDNER,
/s/ By HILTON B. GARDNER,
/s/ S. J. BISCHOFF,
/s/ GEO. W. MEAD

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 29, 1956.

[Title of District Court and Cause.]

ORDER DENYING MOTIONS

This cause coming on for hearing on the motions of William R. Forman,

(a) For arrest of judgment;

(b) Renewal motion for judgment of acquittal;

(c) Motion for a new trial,

it is

Ordered, that each of the aforesaid motions be, and the same hereby are, denied.

Dated: September 7, 1956.

/s/ GEO. H. BOLDT,
Judge

Approved as to form:
/s/ J. S. OBENOUR,
Asst. U. S. Attorney.

[Endorsed]: Filed Sept. 13, 1956.

United States District Court for the Western District of Washington, Southern Division

No. 16275

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM R. FORMAN, Defendant.

JUDGMENT AND COMMITMENT

On this 7th day of September, 1956 came the attorney for the government and the defendant appeared in person and by George W. Mead and S. J. Bischoff, his counsel,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of 18 U.S.C. 371 (conspiracy) as charged in Count XV of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of three years and shall pay a fine of $10,000, and that the defendant shall be further imprisoned until payment of the fine or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ GEO. H. BOLDT
United States District Judge

Presented by:
/s/ JOHN S. OBENOUR,
Assistant U. S. Attorney

[Endorsed]: Filed Sept. 7, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The appellant is defendant William R. Forman who resides at 314 Kinnear Street, Seattle, Washington.

The names and addresses of appellant's attorneys are: George W. Mead, Public Service Building, Portland, Oregon; S. J. Bischoff, Cascade Building, Portland, Oregon.

The appellant was tried on Count XV of the indictment in the above entitled action, which charges the defendants above named with conspiracy to violate Section 145 (b) of the Internal Revenue Code, Section 54 of the Internal Revenue

Code, Section 3809 of the Internal Revenue Code, and Section 1001 of the Criminal Code.

On September 7th, 1956, judgment was entered in the above entitled Court and cause, finding the defendant William R. Forman guilty, and it was further adjudged therein that defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of Three Years, and to pay a fine of $10,000.00.

Defendant William R. Forman is not in custody, having been admitted to bail pending appeal.

The defendant William R. Forman appeals to the United States Court of Appeals for the Ninth Circuit from the aforesaid judgment.

Dated: September 7th, 1956.

/s/ S. J. BISCHOFF
/s/ GEORGE W. MEAD
Attorneys for Defendant William R. Forman

Certificate of Mailing Attached.

[Endorsed]: Filed Sept. 7, 1956.

[Title of District Court and Cause.]

ORDER

On motion of defendant William R. Forman, it is

Ordered, that the Clerk of this Court be, and he hereby is, authorized and directed to transmit to

the Clerk of the United States Court of Appeals for the Ninth Circuit the files and records in this case, including all of the exhibits, at the time that the Clerk transmits the transcript on appeal to the Clerk of the United States Court of Appeals for the Ninth Circuit.

Dated: September 13, 1956.

/s/ GEO. H. BOLDT
Judge

Presented by:

/s/ JAMES E. O'HERN
Attorney for Defendant Forman

Approved as to form:

/s/ J. S. OBENOUR
Assistant United States Attorney

[Endorsed]: Filed Sept. 13, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 39 (b) of the Federal Rules of Criminal Procedure and Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers, pleadings and minute-entries in the above entitled cause as are designated by the written Designation of Record on Appeal of defendant Forman, and the said papers, pleadings

and minute entries, together with the original exhibits, constitute the Record on Appeal from that certain Judgment and Commitment of the above entitled Court, filed and entered on the 7th day of September, 1956, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

1. Indictment (filed Nov. 13, 1953).

2. Minute entry of plea of Not Guilty by defendant Forman (entered Dec. 7, 1953).

3. Minute order allowing defendants 50 days to file motions against Indictment (included in Item 2).

4. Motion of defendant Forman to dismiss Count XV, and in alternative to Strike parts of Indictment (filed Jan. 25, 1954).

5. Order on Motions Against Indictment (filed June 13, 1955).

6. Motion of defendant Forman for Separate Trial on Count XV (filed June 8, 1955).

7. Order Granting Motion for Separate Trial, etc. (filed June 17, 1955).

8. Motion of Plaintiff to Return Count XV to Southern Division (filed Jan. 20, 1956).

9. Suggestion that Court was without jurisdiction (filed Jan. 30, 1956).

10. Certified copy of Order (in Crim. Cause 49365, No. Div.) that Count XV be returned to So. Div. (filed Feb. 14, 1956).

11. Motion of defendant Forman to Dismiss Count XV, (filed Feb. 15, 1956).

12. & 13. Transcript of Proceedings (before

Judge Lindberg, 2/3/53) and of Proceedings (before Judge Bowen, 2/26/53) (filed 1/25/54).

14. Minute Order denying Motion to Dismiss Count XV (entered Apr. 10, 1956).

15. Motion and Affidavits to Quash Subpoena (filed July 2, 1956).

16. Affidavit of J. S. Obenour (filed July 16, 1956).

17. Order (Memo. Decision) denying Motion to Quash (filed July 23, 1956).

18. & 19. Objection to Introduction of Evidence and Motion for Judgment of Acquittal, etc. (filed July 31, 1956).

20. Instructions requested by defendant Forman (filed Aug. 2, 1956).

21. Motion for Mistrial, etc. (filed Aug. 13, 1956).

22. Verdict finding defendant Forman guilty (filed & entered Aug. 15, 1956).

23. Minute Order allowing defendant Forman 15 days to file Motion in Arrest of Judgment, etc. (entered Aug. 15, 1956).

23a. Motion for Arrest of Judgment (filed Aug. 29, 1956).

23b. Renewal of Motion for Judgment of Acquittal, etc. (filed Aug. 29, 1956).

24. Order Denying Motions: for Arrest of Judgment, Renewal of Motion for Judgment of Acquittal, and Motion for New Trial (filed Sept. 13, 1956).

25. Judgment of conviction of defendant William R. Forman (filed and entered Sept. 7, 1956).

26. Notice of Appeal of defendant Forman (filed Sept. 7, 1956).

27. Reporter's Transcript of Testimony and Proceedings in the Trial of defendant Forman (in 7 volumes) (filed Sept. 17, 1956).

28. Order for Transmittal of Original Exhibits (filed Sept. 13, 1956).

29. Designation of Record on Appeal (filed Sept. 13, 1956).

I further certify that as part of the Record on Appeal I am transmitting herewith all of the original exhibits introduced in evidence in the trial of defendant William R. Forman, to-wit: Plaintiff's Exhibits, Nos. 1 to 144, inclusive, and Defendant's Exhibits Nos. 500 to 506, inclusive (except No. 504 which was withdrawn and returned to witness during trial).

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to-wit: Notice of Appeal, Defendant, $5.00, and the said fee has been paid to the Clerk by the defendant William R. Forman.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court, at Tacoma, Washington, this 9th day of October, 1956.

[Seal] MILLARD P. THOMAS,
Clerk
By E. E. REDMAYNE,
Deputy.

In the District Court of the United States, Western District of Washington, Southern Division

No. 16275

UNITED STATES OF AMERICA, Plaintiff,

vs.

ARMADOR A. SEIJAS, also known as ARMY A. SEIJAS, and WILLIAM R. FORMAN, Defendants.

TRANSCRIPT OF PROCEEDINGS

Had in the above-entitled and numbered cause in the above-entitled court before the Honorable George H. Boldt, United States District Judge, commencing on Monday, July 30, 1956, at Tacoma, Washington.

Appearances: On behalf of the Plaintiff: Mr. J. S. Obenour, and Mr. Charles W. Billinghurst, Assistant United States Attorneys, Federal Building, Tacoma, Washington. On behalf of the Defendant Forman: Mr. George W. Mead, Attorney at Law, 1211 Public Service Building, Portland, Oregon. Mr. S. J. Bischoff, Attorney at Law, Cascade Building, Portland, Oregon. [1]*

Proceedings

The Court: United States vs. William R. For-

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

man. Are the parties and counsel ready in case No. 16275?

Mr. Obenour: Yes, Your Honor.

Mr. Mead: Defendant is ready, Your Honor.

The Court: Very well. Call the Jury, please.

(Whereupon, a Petit Jury was duly empaneled and sworn, and the following proceedings were had, to wit:)

Mr. Obenour: If it please the Court, Counsel, Mr. Forman, Ladies and Gentlemen of the Jury, as the Court has generally advised you, we are concerned with the criminal charge against the defendant William R. Forman, and the charge which the Government makes is that William Forman did conspire with Armador A. Seijas, also known as Army A. Seijas, to violate certain Federal laws.

You will be instructed, I believe, by the Court as to what constitutes conspiracy, but for the purpose of understanding, I would simply define conspiracy as an agreement between two or more persons to violate a Federal law and that pursuant to such agreement, some overt act is done by the parties to accomplish the purpose of the law violation.

Specifically, in this instance, the Government [2] charges that Seijas and Forman attempted to and did conspire to violate four Federal laws which were set forth in the indictment. They are that, first, they conspired to violate the laws of the Internal Revenue Code, particularly Section 54, and Regulations made by the Commissioner under such law, and in particular, that this violation was to wilfully and knowingly keep or cause to be kept partnership

records which did not accurately show the receipts and income of the partnerships, the partnerships which Forman and Seijas conducted.

The second violation of the Federal law is a violation of Section 1001 of the Criminal Code, and Section 3809 of the Internal Revenue Code, in that they caused, conspired to cause false partnership returns to be submitted to the Collector of Internal Revenue at Tacoma, which returns did not accurately reflect the income of the partnerships and the distributive share of the partners.

The third violation is a violation of Section 145-B of the Internal Revenue Code which is that Seijas and Forman conspired to evade the taxes of Army Seijas and his wife, Betty Seijas, and other persons, which tax was due and owing by Seijas and his wife and the other persons to the United States [3] by reason of the unreported income.

Fourth, to violate Section 1001 of the Criminal Code, and Section 145-B of the Internal Revenue Code by furnishing to officers, agents of the Internal Revenue Department, false books and records, false financial statements, and to make false statements to such agents for the purpose of concealing the correct income of Seijas and the tax due thereon.

The Government proposes, then, to show there were 33 overt acts done pursuant to this agreement to violate the Federal law. These acts consist of instructions to employees, to keep false records, to turn in false reports to the bookkeeper, to hold out money from the receipts of their partnership.

to distribute this money held out and not report it on the records between Seijas and Forman, to then submit the money so not reported between them which was concealed from the bookkeeper who kept the records of the company, and from which records partnership returns were caused to be submitted in each of the years 1942 to 1945, causing them to be prepared without such income being included, and causing them to be filed without such information being included; that during the same period, false tax returns were submitted for Army Seijas and his [4] wife which did not report this income, particularly for the years '42 to '45, both for the partnership and Mr. Seijas and his wife; that on September 1, 1945, Mr. Seijas and Mr. Forman caused to be presented to the agents of the Internal Revenue in the course of an investigation of the information returns of the partnerships, these records, knowing that they were false; that this act was again done in January, January 20, 1947, December 1, 1948, October 28, 1944, in Portland by Mr. Forman, September 1, 1948, in Seattle by Mr. Forman, September 1, 1944, by Mr. Seijas in Seattle, October 1, 1947, in Seattle by Mr. Seijas, September 1, 1948, in Seattle by Mr. Forman, September 1, 1948.

Mr. Seijas concealed from the same agents the true facts concerning his income for these earlier periods. December 29, 1951, Mr. Seijas submitted false statements containing the accumulation of the currency that resulted from this unreported income. Again on January 11, 1952, Mr. Seijas

made a statement that these earlier returns were correct, and finally, as the thirty-third overt act, January 11, 1952, that Mr. Seijas submitted a false statement to the agents concerning his assets that he then held. [5]

In proof of these charges and of these acts, the Government will show that Mr. Seijas and Mr. Forman had an association or an acquaintanceship dating back to the '30's; that Mr. Seijas was an attorney practicing law in Seattle, and Mr. Forman had been in the theater business with his father-in-law; that in 1941, or thereabouts, Mr. Forman left his association with his theaters and with his father-in-law, and took office space with Mr. Seijas. His office was at the Smith Tower in Seattle where Mr. Seijas had a suite of offices in which they occupied as well as others in his office. Mr. Forman occupied or shared office space with Mr. Seijas from that time on for several years.

About this time Mr. Forman was undertaking to go into some business interest, and in the course of inquiring around the Peninsula, Port Angeles and Bremerton, that they, Mr. Seijas and Mr. Forman, should enter the pinball business.

At this time there were no pinballs in Kitsap County or Bremerton. However, they inquired into it and determined that there were none and that it appeared to be a good business venture. As a result of their inquiries and after some difficulty in the succeeding and causing pinballs to be permitted in [6] Kitsap County and Bremerton, at that time the State had just licensed them, and

there was some question whether they would be permitted to operate even though the State had licensed them.

There was a suit begun to test the legality of pinballs in Kitsap County, and that suit subsequently was dissolved, and through the efforts of Mr. Seijas and Mr. Forman, ordinances in Kitsap County, Bremerton, and Port Orchard, were passed by the respective County Commissioners and by the City Councils of the two communities whereby each of the respective communities would license pinballs under a master license, as it was called, which would permit the holders of the license to operate so many pinballs. In Bremerton it was 35 pinballs per master license.

The Government will show that Mr. Forman and Mr. Seijas inquired into the situation and did cause these ordinances to be passed, and that pursuant to their efforts, they succeeded in getting a license to operate in Kitsap County in the latter part of 1941, and in early '42, they succeeded in obtaining three licenses to be obtained in the names of other persons in Bremerton.

At the time, certain regulations required that [7] local residents obtain a Bremerton license, and a man by the name of Bob Crawford and Ken Crawford, not related, and Parrot, obtained three licenses to operate pinballs in the City of Bremerton.

The United Amusement Company obtained a license to operate in Kitsap County. Mr. Seijas and Mr. Forman constituted that amusement company.

There were four partnerships that we will be concerned with. There is some similarity in names which may cause confusion. There is the United Amusement Company, which was the county route, and owned by Mr. Seijas and Mr. Forman.

After the original three Bremerton licenses were obtained, the licenses were subsequently changed in the name of three other partnerships. The licenses were taken out in the names of the Crawfords and Parrot, and one was called United Amusement Company of Bremerton, as distinguished from the county route, the Bremerton Amusement Company, and the American Amusement Company. These three partnerships were also owned by Mr. Forman and Mr. Seijas, but in some instances there were other interests in the partnership.

At the time the city licenses were obtained there were also other persons interested in obtaining [8] these licenses. One of them was a man by the name of Heberling, two brothers by the name of Heberling. They had been in business in that same area and were interested in getting pinball licenses also, and as a result of their negotiations the Heberling brothers obtained 50 per cent interest in the interest of Forman and Seijas in the city pinball routes. The Heberlings also had their own county route. This county route was separate from the county route held by Seijas and Forman.

After the pinball business began, there was the problem of taxes and licenses. The City of Bremerton had a license on the receipts of pinballs within

the City Limits of Bremerton, and the county had a license—rather, a tax on the receipts of pinballs in the county, which also was a separate tax, as I recall, and in addition, there was an annual license required of the master license which amounted to $1,000 per master license, as I recall, in Bremerton, and a similar fee in the county. This was a sizeable amount, and there was a question of who was going to pay it.

The pinballs were placed in the locations, the locations would be stores, taverns, whatever the business might be that would have a pinball [9] machine in its building, and the standard practice was that the location owner and the machine owner would split the proceeds 50-50. In other words, the partnership of Forman and Seijas in the county would own the machine and place them at their location and then split the returns 50-50 with the owners of the machine taking half and the owners of the location taking half. This was similarly done in the City.

At the time the operation began, the collections were first made by Mr. Forman and occasionally by Mr. Seijas, but shortly thereafter a man by the name of Arnold Meyers was employed by the partnership of Seijas and Forman to make their collections. He was a collector for the routes.

At the time the City routes began a Mr. Anderson, I believe, was employed by the Heberlings to collect for their routes, and when the City routes first began, or shortly thereafter, a man hired by

Heberlings and a man hired by the partnership collected together.

Mr. Meyers was an acquaintanceship of Mr. Forman and was introduced to Mr. Seijas, and was employed after his introduction by Mr. Forman by the partnership. [10]

After the two men collected the routes jointly for a period, Mr. Anderson, as I recall his name, was drafted, and thereafter Mr. Meyers continued to collect for the entire interests of Heberling and Seijas and Forman. He continued to collect over many years, and then he was in some instances assisted by one of the Crawfords who was then employed by the partnerships.

Throughout this time Mr. Forman continued to occupy office space with Mr. Seijas. After Mr. Meyers began collecting, he was instructed by Mr. Seijas and Mr. Forman to take out money from the pinball machines, which was not reported. The regular practice was that the collector would come into the location, count the money, the nickels in the machine, and make out a receipt for it with the location on it, split 50-50, as well as make out tax forms which were used for the City and the State for their percentage of the tax upon the gross receipts.

Mr. Meyers was instructed by Mr. Seijas and Mr. Forman to take certain monies out of the machines which were not reported upon his receipts. Apparently, at first the purpose was to insure the payment of the annual license fee of $1,000 for the master route, [11] that there was

some discussion, and in order to insure the payments, the money was taken from the machine and saved out so that the next annual license fee would be required they would have funds to pay it.

They soon found that the money collected and taken out exceeded the amount needed to pay the tax and the license. However, the withholding of part of the receipts did not stop. Mr. Meyers was instructed to go to these locations and remove a portion of the receipts before he made out the form receipting the amount taken in. These were called "holdouts." Mr. Meyers was instructed to then put down on his receipt blank only the remainder.

The receipt blank was made out showing only the remainder as having been taken in by these particular machines at this particular location at this time. These receipts were then used by the location owner, one copy was given to him, and it was the basis under which he paid his tax for the receipts, and also one copy was retained by Mr. Meyers, and he, according to the plan of the company, and the manner in which the partnership operated, brought these receipts in, and there would be one for each location along his route. [12] did bring these receipt forms with his half of the receipt money back to Seijas and Forman's office where he would give it to the bookkeeper. The bookkeeping system under which the partnership operated was that there was a bookkeeper employed at the same location as Seijas' and Forman's office in the Smith Tower, and generally

during the greater period with which we are concerned here, was a Mr. Renstrom.

Mr. Renstrom kept regular books showing the expenses and the normal books kept by the companies and receipts, and he kept the books from the information supplied him by the partners, Seijas and Forman, and by these receipt forms which were supplied to him by Mr. Meyers. Twice a week, after the operation got under way, Mr. Meyers came to Seattle, once after the collection of the county route, and once after the collection of the city route, and would give to Mr. Renstrom his copy of the forms made out at each of the locations which showed only the amounts which Meyers had put down in his forms. One copy went to the location and one copy came back to Renstrom. This was the information supplied Renstrom and they showed only the receipts which Meyers had included on his forms.

It was from these books that the partnership [13] returns prepared by Mr. Renstrom were made. Mr. Renstrom kept the books and prepared the partnership returns for the four amusement companies, United of Bremerton, United, Bremerton Amusement, and the American Amusement Company. These partnership returns for each of the years 1942 to 1945 were then given to each of the partners to be included by them in their own tax return. They did not show the amount of money Meyers had been instructed to hold out according to his instructions, and throughout all of the period of '42 to '45 Meyers first took off a portion

of the receipts which did not go in the receipts which he made notes that he kept of the amount that he held out in each of these locations, and, again, according to instructions, Mr. Meyers brought this back to Seattle at the same time. However, he did not bring in to Mr. Renstrom nor did he tell Mr. Renstrom of this money, nor did he tell him of the record he kept of the amount held out. Instead, according to instructions, he brought this holdout money and the record he showed of the money, the amount and where it was located, where it was taken from, this paper and this money, and an envelope was taken and given to Mr. Forman, and if Mr. Forman wasn't there, then to Mr. Seijas [14] and he did this on each of the occasions that he collected for 1942 to 1945.

Thereafter, Mr. Forman went into Mr. Seijas' office, if he had received it, or vice versa, if Mr. Forman hadn't been there and the amount that had been held out was split, and in the instance where Mr. Forman would have received the money from Mr. Meyers, he would also give a small slip or a note to Mr. Seijas showing the amounts where it was held out, the date and the information which was given to Mr. Seijas.

This money was not reported on Mr. Seijas' tax returns and it continued to exist until throughout the period.

In 1945 Heberling brothers, who continued to hold an interest with Seijas and Forman, sold out their interest in the city routes. This was the early

part of 1945. In the latter part of '45, December of '45, they bought Seijas' and Forman's county route. So, after this transaction, the two transactions in 1945, Heberlings owned the county routes and Seijas and Forman owned the city routes.

Through the period of '45 Meyers had continued in their employ and continued to collect and continued to use the same practice of holding out part [15] of the receipts from the records.

In 1946 a man by the name of Morin was introduced to the partnership. Mr. Morin was a brother-in-law of an acquaintance of Mr. Seijas. Mr. Morin came into the office of Seijas and Forman and indicated that he had some money to invest and would like to get into the pinball business.

There was a consultation between Forman and Seijas. After this consultation and within a day or two interval of the conversation with Mr. Morin, Mr. Morin invested $30,000, and 49 per cent of the city routes of Bremerton were sold to him. He was told that he was buying Mr. Forman's half interest less one per cent in the pinball business. He was so told and gave a check for $30,000, and as far as he knew, Mr. Forman was no longer a partner but that Mr. Seijas was then the partner holding 51 per cent of the partnership.

The partnership continued to operate the pinball routes through 1949 and early 1950. Throughout this time Mr. Morin contributed certain amounts additional to the business and did certain things to perform duties for the business, and through this period there were draws taken

from the partnership by Mr. Morin and Seijas. [16]

Partnership returns were made out by Mr. Renstrom of this business in the names of Seijas and Morin. In the period after the partnership began, in the due course of their work, certain Internal Revenue agents in 1944 and 1945 had occasion to call at the offices of Forman and Seijas and examine the partnership returns submitted by the businesses, and on those occasions they were furnished the records kept by Mr. Renstrom, and they were furnished by Seijas and Forman, and to their knowledge, they knew that those records did not accurately reflect the income.

There were further visits by the Internal Revenue agents in 1948 and '49, and in 1951 and 1952 investigation was begun of the income tax liability of Mr. Seijas and of these partnerships, and on each of these occasions Forman and Seijas caused the same records to be submitted to the agents although they knew they were false, or they made active representation themselves that the books were correct, and they at no time gave any information concerning the money held out and not reported.

However, after this time, in the course of the investigation of the affairs of Mr. Seijas, Mr. Seijas produced certain books in which he had [17] recorded these instances where money had been held out of the pinball receipts. He produced diaries for 1942 to 1945 which showed some five hundred entries which notations he explained as meaning holdouts of these locations listed, and the

amounts, and they totalled some $160,000, approximately, for four years, which $160,000 was split between Seijas and Forman and was not reported on the partnership returns submitted for the four businesses and which were not reported on Seijas' tax returns.

It was also shown in due course that what had been an ostensible sale of Forman's interests to Morin was actually not a sale but rather instead Forman still had a half of Seijas' interest in the pinball business, that Forman on his tax return for 1946 showing the sale of the pinball business took a capital gain, half of which was paid by Seijas, that in the years thereafter, every time there had been a draw by Seijas from the partnership in the years '47 and '48, and, I believe, '49, Mr. Seijas gave Forman half, that in fact Forman still had a half interest in the amusement company and did share in half the receipts which Seijas obtained during this period, that Seijas took the operating loss alone on his tax returns for the [18] years '46, '7, '8, and '9, the operating losses from his amusement company although in fact, half interest was Forman's, and that as late as 1952 in the statement of questions put to him by the agents, Mr. Forman stated to the agents that he had sold his amusement company interests in 1946, that Seijas had acted only as his attorney and that he had simply loaned Seijas $15,000.

Through these acts done to conceal the true tax liability of Army Seijas and others from these partnerships, the Government believes they will

show that William Forman conspired with Army Seijas to commit those Federal violations which we have outlined. Thank you.

The Court: Do you wish to make your statement now, Mr. Mead?

Mr. Mead: Yes, your Honor, I would prefer to make it now.

The Court: You have now heard the Government's opening statement, and now the defense attorney, Mr. Mead, will make an opening statement on behalf of the defendant.

Mr. Mead: If the Court please, Ladies and Gentlemen of the Jury, Counsel, as the Court stated to you, it is now the privilege of the defendant in [19] this case to make his opening statement at the beginning of the proceedings or to wait until after the Government has completed their case and then make the opening statement.

In this case I believe the Jury would be better advised and better able to weigh the evidence and to understand the evidence produced during the course of the Government's case if you have an opportunity to know what the facts are that the defendant expects to develop, many of which facts would be developed from the Government's own witnesses.

It is a rather sad duty for a lawyer, particularly one such as myself who has practiced law for considerably over 25 years, to be required to say things which I am about to say about a fellow lawyer, Army Seijas.

Mr. Obenour stated to you in a general way

what the Government expects to prove. The Court gave you a general statement as to the matter which is included in the indictment which affects Mr. Forman. With those facts, of course, as to what is stated in the indictment, we have no quarrel. This case is unusual and the allegations in the indictment are unusual because you should bear in mind that Mr. Forman is not charged in this [20] matter with avoiding or evading his own income taxes, but he is charged with the offense of conspiracy to assist Army Seijas in evading his income taxes by certain means, and his wife's, of course.

Now, this field of the plan that the Government has described here, as Mr. Obenour has stated to you, has to do with only four businesses or four partnership activities, and those partnership activities, as Mr. Obenour stated, are the pinball businesses that he described, three routes we will call them because we will be hearing about them considerably from now on, two in the City of Bremerton and one route outside the City which we will refer to as a county route.

Mr. Forman at the beginning of this time referred to by Mr. Obenour, was a young man in his late 20's. Mr. Seijas, a man somewhat his elder, had by that time practiced law for approximately ten years in Seattle. Seijas had been a graduate of the University of Washington and was quite active in law practice in the City of Seattle.

Bill Forman's home had been in The Dalles, Oregon, a town up the Columbia River about 90 miles

from Portland where he was raised and attended the common schools. [21]

In 1931 and 1932 he attended the University of Washington and then dropped out of the University and went to work in the City of Seattle, and since that time Seattle has been his home and he has always had his residence in Seattle, and since his working period, by that I mean the time since he left college in 1932, up to the present time, he has been continuously in the theater business.

As Mr. Obenour stated, when he first became interested in the theater business he went to work for a man in Seattle and continued in that job up to about 1940 or 1941 when he went into the theater business on his own account.

He had known Army Seijas, and Army Seijas was an established lawyer in the City of Seattle and had offices, as Mr. Obenour described, in the Smith Tower Building, and Mr. Forman had adjoining offices there to Mr. Seijas's office.

Mr. Forman at that time was in the theater business just getting started on his own account. As Mr. Obenour stated, they took a trip, he and Mr. Seijas, over to Kitsap County, I believe it was to Port Orchard or to Bremerton, to look at a theater location, and the opportunity seemed ripe to both of them, they were friends at that time, that [22] they might be able to go into the pinball business as a sideline over there and to establish the pinball routes. There was nothing unlawful about the business. There was some question about the validity or the legality of the business at that time,

so a test suit was brought, and it was determined that it was lawful and legal and licenses were obtained, and license charges were paid, as Mr. Obenour stated, to the county, to the state, and to the city, and these license fees and charges were quite substantial in addition to the thousand dollars per annum annual license fee that needed to be paid. There were four routes altogether.

The business was fairly successful, but Mr. Forman was not interested in the pinball business and he wanted to get out of it, and in 1945 he sold out his interest in the county route.

Now, there will be some, apparently for the first time, I understand there will be some dispute about whether Mr. Forman sold his interest out or whether it was in the county route or the city route, but I will explain that and tell you what our testimony will be, and by 1946 Mr. Forman was entirely out of the pinball business with Seijas and entirely out of it and was devoting his full [23] time and effort to the theater business which he had been in continually.

Now, in 1951 or thereabouts, and this is an important date to remember because this was the beginning of this whole problem, as Mr. Obenour stated, the Internal Revenue Bureau commenced an investigation of Army Seijas' income tax returns, and that investigation proceeded over the period between and then up to the Spring of 1953, and during that period of time, because Seijas' books and records apparently were not too complete and accurate, the Government approached

the question of his liability on the basis of his net worth, and you will be hearing something about that. That is a system whereby the Government or the tax payer can determine what he has at one time, say at the beginning of the period of 1951 or 1950, beginning of the tax year, what assets he has then, what assets he has on hand at the later period of time, and that is what the Government was interested in in this particular case with Mr. Seijas, the period the Government was interested in, and this investigation was the years 1946, 1947, and 1948. Mr. Seijas employed several accountants to prepare these so-called net worth statements. [24]

Now, when a net worth statement is obtained at the beginning of a period, knowing what a man owns and what obligations and debts that he has, and it is prepared at the end of the period, knowing what assets he has and what obligations and debts he has, by matching it up with the income tax returns as to what he reported and allowing a reasonable amount for living expenses, it can be in a rough way, determined whether or not he has reported the income that he has received, and if there is a gap there that cannot be explained by inheritance or gift or some other means, it is quite apparent that a tax payer has not reported his income.

Please bear in mind the dates, 1946, '7 and '8. Now, Mr. Seijas had apparently a serious problem on his hands because the net worth statement which he had given to the Government and which

had been prepared by the various accountants that he had employed, showed a substantial unreported income during the years 1946, '7, and '8, and we will show that early in the Spring of 1953 two agents, Mr. O'Leary and Mr. Oftedal, had been working spending a considerable period of time investigating Mr. Seijas' income tax returns, and they determined that he owed additional taxes during those years. [25]

They determined that he hadn't made accurate statements to them, and they recommended that he be prosecuted for those years, and we will show that the file was reviewed, that the reviewing lawyer in Seattle had his charge of criminal prosecution, recommended prosecution of Mr. Seijas for those years 1946, '7 and '8, and that the file was forwarded on to Washington with a recommendation of prosecution.

Mr. Seijas was then confronted with a very serious problem, and it is from this point that most of the facts which Mr. Obenour has developed which involved Mr. Forman and involved him in this fiasco developed, and we will show that these facts were developed entirely by Mr. Seijas in an attempt to save himself from prosecution for the years 1946, '47, and '48. His net worth statement for those years which the Government had looked at and which they had reconstructed, showed unreported income of approximately $160,000. I may be a little bit in error on this, but this demonstrates my point and the exact figure will later be demonstrated. He had to account for it or be prose-

cuted for the years 1946, '7, and '8, so he came to his accountant, a man whom he had employed, [26] to assist him in the preparation of these net worth statements, and told this accountant that he had some information which he thought would save him from this prosecution, and this information with some diaries that he presented to the accountant, and we will have photostatic copies of these diaries which the Government took before the originals mysteriously disappeared, where entries were presumably made by Mr. Seijas over the years 1942, 1943, 1944, and 1945, which, according to him, showed these holdouts that have been referred to by Mr. Obenour, and by that means he explained to his accountant he could account for about $86,000 of net worth, the increase in net worth which would otherwise be income to him in the years 1946, '7, and 8.

Now, the importance of Mr. Seijas' story was that the years 1942, 1943, 1944, and 1945, he being a lawyer, thought were barred by the statute of limitations for criminal prosecution, and this was the immediate problem with which he was faced.

Still being shy the difference between $86,000 and some $160,000 he concocted the story that he had $50,000 or $60,000 of this money that he had on hand that he had received from his old father who was a Spanish immigrant, I believe a Basque, [27] that had come over, and that his father had given him this $50,000 or $60,000, and that accounted for that additional money, although the facts will be that during this period of time his

father was on relief, a great deal of the time he was on relief, and that it was improbable that he ever had the money, and in addition to which this partnership that we had talking about, these partnerships, had employed his father part of the time during this period, and had paid his father several thousand dollars. I don't recall the exact amount, maybe it was $10,000 or $11,000, or $12,000, and he claimed that that money was also turned over to him, that his father didn't need the money, he gave it to him, and that built up additional capital and accounted for unexplained net worth during this period.

By this time the accountant could see that this matter was getting over his head, and then, for the first time, in 1953 Mr. Seijas decided he better employ a lawyer, and he employed Mr. Harry Sager, a former United States Deputy District Attorney, and Mr. Sager and Mr. Seijas and the accountant had a conference with the lawyer in Seattle who was the head of the Criminal Division, a Mr. Patten, and they made this disclosure that I have just mentioned, we [28] will call it a disclosure, and told this story to Mr. Patten in the hope of saving Mr. Seijas from criminal prosecution for the years 1946, '47, and '48.

Well, when this story was told, Mr. Forman was immediately involved, and we will show that some friends of Mr. Seijas happened to come to his rescue to assist him to extricate himself from the position that he found himself in, but that notwithstanding that he was indicted, and he was indicted on 15 counts involving income tax evasion, false

statements, and the like, and actually, of these 15 counts, none of them involved Mr. Forman, but because of the story that he had told to the agents, the information that he had come up with with these alleged diaries to explain part of this increase in net worth and to escape prosecution for the years 1946, '47, and '48, Mr. Forman was indicted back in November 1953 with Mr. Seijas under one count of this indictment with conspiring to assist Seijas in evading his income taxes by these means which have been described to you.

Now, Mr. Seijas was tried here, I think you were asked about whether you knew about that trial a year ago, was found guilty for income tax [29] evasion for the years 1946, 1947, and 1948, notwithstanding this story that had been cooked up, and Mr. Seijas is now serving the penalty that the court has imposed upon him for violation of the law for those years.

Now, I think Mr. Seijas' involvement of Mr. Forman at first in 1953, when he told the story of unexplained income, was purely an attempt on his part to save himself from prosecution for the years 1946, 1947, and 1948, but since his trial and shortly before the trial, and we will prove this, and this will have considerable bearing, we want you to understand his testimony, Mr. Seijas moved or attempted to move heaven and earth to blackmail or force Mr. Forman into paying him some money that he could use to pay some of the delinquent taxes that he owed the Government, under threat that if he didn't do that that he would in-

volve Mr. Forman still further in difficulties. Extortion you could call it. It is an unpleasant word, but I think we will satisfy you that that is exactly what happened, and so while Mr. Forman was not willing to pay any money to him for a purpose of that kind, the time ran on, and it is interesting some of the things I am going to mention now. [30]

Mr. Obenour has indicated to you that Mr. Forman didn't sell out the business in 1945 or '46, but there was a fake sale of some kind at that time. Now, this is new to us, but it is very plain and very understanding to us because it is a clever attempt on the part of a lawyer who was aware of the consequences of the statute of limitations, six years in a criminal case, to attempt to involve Mr. Forman by attempting to show that he was interested in this business up as late as 1950, I believe, although I think we will have ample proof here that Mr. Forman sold the business in 1945 and that—the county business, and that he sold the city routes that he was interested in in 1945, but I merely mentioned that to show the animus and feeling, and what has developed to make this man do some of the things that he has done.

While Mr. Seijas was jointly indicted with Mr. Forman and both made co-defendants on Count XV, you know he is not a defendant here in court and he is not a defendant here because on last Friday he entered a plea of guilty, and he entered a plea of guilty on last Friday so that he will be a witness here to testify against Mr. Forman in an attempt to involve him further because he was not

[31] and would not be a party to his demands for extortion.

Now, it is an unpleasant thing and an unpleasant duty to have to say those things about a lawyer, and I regret that I have to do that. I think the proof in this case will bear me out.

I would like to have you bear in mind the points that are mentioned during the statement by Mr. Obenour, that all that is involved in this proceeding that is relatively simple, did Mr. Forman conspire with Mr. Seijas to do these things that have been alleged in the complaint, or in the indictment, to assist Seijas in evading his income tax liability and evading and avoiding his taxes for the years 1942 through 1945. I think we can demonstrate very plainly to you that he did not, and if Mr. Seijas, when he testified in court last year, testified to many things that are inconsistent and he either committed perjury again in addition to all the other things that he was accused of and convicted of at that time, and we would like to have you bear these things in mind in weighing the testimony as you hear it.

We are telling you this now at this stage of the trial so that you will better understand the testimony of these various witnesses that are produced [32] here, by the Government during its direct case and by Mr. Forman on his case, and we feel that, I think, most of the things that I have stated here will be produced in the Government's own case, to be developed from their own witnesses and from

the evidence produced on the part of the Government.

Thank you very much for your attention, and thank you, your Honor.

The Court: Now, Ladies and Gentlemen, you have heard the opening statements by both sides, and I will call your attention again to what I told you before, so far you have heard no evidence whatsoever. Thus far you know just what the contentions are, what the lawyers think the evidence will show, but the fact of the matter is that you will have to judge from the evidence that is produced here.

Are you ready to proceed?

Mr. Obenour: Yes, your Honor.

The Court: Call your witnesses.

Mr. Mead: I don't believe the matter of exclusion of witnesses has been considered by your Honor, and we would move the Court that witnesses be excluded during the course of the trial and called only for their own testimony. I understand that Mr. Oftedal and Mr. O'Leary will be [33] witnesses for the Government, but it is quite satisfactory to us if they remain in the courtroom, and we may have one accountant.

Mrs. Forman is here in the courtroom with her husband, and she might be called upon to testify on a minor matter or two, and I——

The Court: On your assurance that it is only a minor matter she may remain.

Mr. Mead: I am not too certain how minor it would be.

The Court: You may judge yourself accordingly. If it is a minor matter, that will be all right. Otherwise I will have to enforce the rule.

Mr. Mead: She is here now, but I think she should perhaps be excluded with the other witnesses.

The Court: All persons who will be witnesses in this case must now leave the courtroom. With the exceptions referred to, namely, Mr. Oftedal and Mr. O'Leary, all witnesses will be excluded until they are called to testify, and will not discuss their testimony with any later witness prior to their testifying.

(Thereupon, all prospective witnesses withdrew from the courtroom.)

Mr. Obenour: If the record would show that [34] the exhibits of the Government, Exhibits 1 through 73, have been marked prior to appearance in court.

The Court: Yes. Have you had an opportunity to look at these yet?

Mr. Mead: No, we haven't, your Honor.

The Court: You will have a full opportunity to examine them now, so I wish you would do that at recess this afternoon and before tomorrow.

Proceed.

DONALD R. BURDICK

called as a witness on behalf of the plaintiff, being first duly sworn, was examined, and testified as follows:

(Testimony of Donald R. Burdick.)

The Clerk: Please state your full name and spell your last name.

The Witness: Donald R. Burdick, B-u-r-d-i-c-k.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Burdick? A. Tacoma, Washington.

Q. What is your occupation?

Mr. Bischoff: At this time we have an objection to make and a motion which will require some time. [35]

The Court: It is now about time for the afternoon recess. It is a little early but we will take the afternoon recess of about 10 or 15 minutes.

(Thereupon the Jury withdrew from the courtroom.)

The Court: All right, Mr. Bischoff, go ahead.

Mr. Bischoff: May it please the court, at this time the defendant Forman objects to the introduction of any evidence in support of the indictment on several grounds which I have incorporated in a written motion, which I would like to submit to your Honor, in lieu of reading it into the record, if that is agreeable to the Court?

The Court: That is agreeable, and I will look at it during recess and consider it.

Mr. Bischoff: In connection with that objection to the admission of evidence, and as a motion for a judgment of acquittal on the same grounds as urged on the objections, we have an alternative motion at the foot, that if in the event the Court de-

(Testimony of Donald R. Burdick.)

nies the motion, overrules the objection to the introduction of evidence and denies the motion for judgment of acquittal, that paragraphs A, B, and D of the indictment of page 14, and the overt acts, Nos. 24, 26, 29, 30, 31, 32, and 33, set forth in the indictment, should be stricken from the indictment, [36] and we would like an opportunity for a brief statement.

The Court: I am going to examine the document at the recess and consider whether I wish to interrupt the trial of the hearing. It strikes me on the face of it, that a good many of these points have been previously presented on your previous motion that I heard at great length on two or three different occasions, and while I don't want to be discourteous, I do not want to delay the trial to reconsider further points that have already been presented.

Mr. Bischoff: In fairness to the Court I should say that most of the matters embraced in the objections and the motion have been argued and ruled on.

The Court: This is a matter of preserving your rights, and I understand that. I will take a look at the objection at the recess, and if I consider that, I won't allow you any time at this time to argue it further. Otherwise, I will possibly reserve on some of the points for a further time, but I just don't want to interrupt and keep the people sitting in a crowded juryroom on a warm afternoon while I hear points reargued. [37]

Mr. Bischoff: I would like, your Honor, that

(Testimony of Donald R. Burdick.)

this motion be formally filed because I have not stated it verbatim into the record.

The Court: That isn't necessary, Mr. Bischoff. It is in the record fully and it has been marked and stamped "filed" and will be deemed as having been stated orally in the record.

I will take a short recess and I will advise you through the bailiff whether we will allow any additional argument at this time or not.

(Thereupon, a short recess was taken.)

The Court: I will act on the matters presented by Mr. Bischoff at the end of the day.

Mr. Burdick, come back, please. Go ahead, Mr. Obenour, please.

Q. (By Mr. Obenour): Where do you live, Mr. Burdick? A. Tacoma, Washington.

Q. What is your occupation?

A. I am chief of the return processing branch for the Internal Revenue Service for Washington and Alaska.

Q. How long have you been so engaged?

A. Ten years.

Q. In connection with this, in your duties, are you custodian of the tax returns for the returns required to be filed with the Collector of Internal Revenue for this district? [38] A. I am.

Q. And you produced certain records that were in your possession for this trial, I believe, is that correct? A. Yes, sir.

Mr. Obenour: I believe they were given to

(Testimony of Donald R. Burdick.)

Counsel at recess and examined only through 23, your Honor. There are 39.

The Court: Yes. We will go ahead with the identification. Give them all to Mr. Burdick, one after another. I think it will save time if he will just tell you briefly what it is referring to the exhibit number.

Mr. Obenour: He has Exhibits 1 through 39 in front of him.

Q. (By Mr. Obenour): Would you refer to each, Mr. Burdick, and identify what each document is, both by number of exhibit and also by identification in connection with your work in your office?

A. Exhibit No. 1 is the 1944 income tax return for Army A. Seijas. Exhibit No. 2 is the 1945 income tax return for Army Seijas. Exhibit No. 3 is the 1945 return for Betty L. Seijas. Exhibit No. 4 is the 1946 return for Army Seijas. Exhibit No. 5 is the 1946 return for Betty L. Seijas. Exhibit No. 6 is the 1947 income tax return for Army Seijas. Exhibit No. 7 is the 1947 income tax return [39] for Betty L. Seijas. Exhibit No. 8 is the joint income tax return for Army A. and Betty L. Seijas for the year 1948. Exhibit No. 9 is an amended return for Army A. and Betty L. Seijas for the year 1948. Exhibit No. 10 is the joint return for Army A. and Betty L. Seijas for the year 1949.

Mr. Obenour: We would offer Exhibits 1 through 10, your Honor. First of all——

Q. (By Mr. Obenour): Pardon me, would you

(Testimony of Donald R. Burdick.)

refer to the first exhibit which is the return for Army Seijas for 1944? Are there any marks that are placed thereon after it was received by the Collector of Internal Revenue or his employees?

A. Yes, sir.

Q. And what are those marks, sir?

A. There is the receiving date stamp for District No. 91.

Q. Where is that?

The Court: Hold it up so we can see what you are talking about.

The Witness: That is the stamp up in the upper lefthand corner. There is a red serial number on the upper righthand corner that we give each tax return. There is our district stamp in Washington in the upper righthand corner. The tax liability of $517.15 is circled in blue which means the tax was [40] paid and also circled in red which indicates that we assessed that amount. There are several other stamps along the return showing that the audit was reviewed, the return, and there is a stamp in the upper lefthand corner which indicates that additional income tax has been assessed under a supplemental number, and those figures are in red.

Q. (By Mr. Obenour): Are there similar marks placed upon the other exhibits of 2 through 10 by employees of the Collector of Internal Revenue or after receipt from the taxpayer? A. Yes, sir.

Mr. Obenour: Offer Exhibits 1 through 10.

(Testimony of Donald R. Burdick.)

Mr. Bischoff: May it please the Court, we have no objection to No. 1.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 1 for identification was received in evidence.)

Mr. Bischoff: And the Defendant has no objection to No. 2.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 2 for identification was received in evidence.)

Mr. Bischoff: With respect to No. 3, we have no objection to the return itself, but there is [41] attached to the return a number of departmental communications and records which were not obviously a part of the return, and we would have to object to No. 3 unless that part which was not a part of the return is detached therefrom. Otherwise, we object to No. 3.

The Court: Well, in order to make your record on the matter, you can detach the portions if you wish and call it 3-A.

Mr. Obenour: We would offer further identification as to this matter.

The Court: All right, put it on.

Q. (By Mr. Obenour): Attached to Exhibit 3 there is another portion of the exhibit that was not attached thereto when it was subinitted by the taxpayer, is that correct? A. Yes, sir.

Q. And what are those other papers?

A. This is an audit report of the examination of the return itself, and then there are several

(Testimony of Donald R. Burdick.)

documents—one document whereby the statute for examination had been extended a year, and that is signed by Betty L. Seijas.

Q. And what is the policy of the Internal Revenue Collector's Office of the Internal Revenue concerning audit reports which are subsequently made and prepared from the original returns? [42]

Mr. Bischoff: I object to that as incompetent, irrelevant and immaterial.

The Witness: These are generally attached to it, and these become part of the return as——

Q. (By Mr. Obenour—interrupting): As such, is it also part of the records maintained by the Collector of the Internal Revenue particularly concerning the tax returns, and particularly this one for Betty Seijas for 1945? A. Yes, sir.

Mr. Bischoff: Object, immaterial.

The Court: Overruled.

Mr. Bischoff: Not binding on the Defendant Forman.

Mr. Obenour: Offer Exhibit 3.

The Court: I will take a look at this one before I admit it. Go on to the others.

Mr. Bischoff: Defendant Forman objects to Exhibit No. 4 on the grounds that it is for the year 1946, a year that is not involved in the indictment. The tax liability that is subject to the inquiry and the Count 15 are the tax years '42 to '45, inclusive, and this is an individual return from Army Seijas of 1946, and therefore is immaterial, irrelevant and incompetent.

(Testimony of Donald R. Burdick.)

The Court: What is your position? [43]

Mr. Obenour: We would offer that the government would prove not only by the overt acts alleged in the indictment but other overt acts done pursuant to the agreement of the conspiracy; and that this exhibit will be subsequently shown to be connected with such an overt act.

Mr. Bischoff: Your Honor, it couldn't possibly be. The overt acts can be committed if done at a later time, but this is the return which fixes the tax liability as it was filed, but it was not——

The Court: Excuse me. I want you to make your position clear. Although you object to it, I am going to take it up at another time and not keep the jury here while we are working on these phases of the matter.

Go ahead.

Mr. Bischoff: I take it your Honor is not ruling at the moment?

The Court: That is right, on all of those, two, that you make an objection.

Mr. Bischoff: We object to Exhibit No. 5 on the grounds it is immaterial, irrelevant and incompetent and involves as a tax return for Betty Seijas alone for the tax year 1946, and it is outside the period of time covered by the indictment. [44]

The Court: Make your position on each. You don't need to make it in detail if it is the same proposition.

Mr. Bischoff: There is some difference in some of these.

(Testimony of Donald R. Burdick.)

The Court: Go ahead.

Mr. Bischoff: We object to No. 6 on the grounds that it is a personal return of Army Seijas, tax year 1947 and is not a year involved in the indictment.

We object to Exhibit No. 7 on the grounds that it is a personal return of Betty L. Seijas for the tax year 1947 and is a year that is not involved in the indictment.

We object to No. 8 on the ground that it purports to be an income tax return for Army Seijas and his wife Betty Seijas for the tax year 1948 and does not—is not one of the years involved in the indictment.

Mr. Obenour: In regard to the years of the indictment, I call the attention of the Court that the years of the conspiracy are the years through 1952.

The Court: I have that all in mind, but I am going to hear all of this and not keep the jury here while we attend to these things.

Complete your identification and make your objection.

Mr. Bischoff: We object to No. 9 on the grounds that it is a personal return of Army Seijas and Betty Seijas for the tax year 1948, and that tax year is not involved in the indictment.

We object to No. 10 on the ground that it is a return of Army Seijas and Betty L. Seijas for the tax year 1949 which is not a tax year involved in the indictment.

(Testimony of Donald R. Burdick.)

The Court: Go ahead with your identification of the other documents, please.

Q. (By Mr. Obenour): Would you proceed to similarly identify the Exhibits 11 through 15?

A. Exhibit No. 11 is a partnership return for A. M. Goldstein, William R. Forman and Army Seigas doing business as the Dock Concessions for the year 1945. Exhibit No. 12 is the 1946 partnership return for Dock Concessions. Exhibit 13 is the 1947 partnership return for Dock Concessions. Exhibit 14 is the 1948 partnership return for the Dock Concessions, and Exhibit No. 15 is the 1949 partnership return for Dock Concessions.

Q. Are there any marks that have been placed upon those partnership returns after their receipt by the Collector's Office? [46]

A. There is our receipt stamp which is usually in the upper lefthand corner and our serial number stamped in red on the — in the upper righthand corner.

Q. Is there any colored marks in addition to that placed upon the partnership returns?

A. On Exhibit No. 11 there is none, and on Exhibit 12 there is red check marks which indicate that we have mathematically verified the computation of the figures—the same marks on Exhibit 13 and 14, and 15 has no other marks on it.

Q. On partnership returns is there any record showing payment of the tax due?

Mr. Bischoff: We object to the evidence of con-

(Testimony of Donald R. Burdick.)

tents of a document until after they are admitted in evidence, if they are.

Mr. Obenour: On the contrary, there is no evidence of this partnership's returns.

The Court: It only called for a yes or no answer, whether there was such a matter.

The Witness: Repeat the question.

The Court: Repeat the question.

Q. (By Mr. Obenour): Is there any record made upon partnership returns showing payment of any accompanying tax? A. No, sir. [47]

Mr. Bischoff: We move to strike that, may it please the Court, as an indirect way of testifying to contents of it.

The Court: Overruled. Go ahead.

Q. (By Mr. Obenour): Under the requirements for the preparation of tax returns under the regulations of the Treasury Department or the laws of the United States, is there any requirement for the payment of any tax with partnership returns that are submitted?

Mr. Bischoff: Object as calling for a conclusion.

The Court: Denied.

The Witness: No.

Q. (By Mr. Obenour): What is the purpose of a partnership return that is submitted?

Mr. Bischoff: Object, calling for conclusion.

The Court: Overruled.

The Witness: Partnership return is merely an information return showing the income and expenses of the partnership.

(Testimony of Donald R. Burdick.)

Q. (By Mr. Obenour): Is there any particularity required concerning the identification of the partners constituting any partnership, specific partnership, and their receipt of income from such partnership?

A. The partnership return itself has a schedule [48] which indicates the names of the partners and the amount of the net income distributed to the partners.

Mr. Obenour: Offer Exhibits 11 through 15.

Mr. Bischoff: May it please the Court, Defendant Forman objects to Exhibit No. 11 on the grounds that it is a return of a partnership which is not one of the partnerships referred to in the indictment, and it is only the income from the partnerships referred to in the indictment that are subjects of the charge of attempted evasion. This is a return for the Dock Concessions, that is the name of the partnership, and it is a return signed by one A. M. Goldstein. It is not signed by the Defendant Forman and is not binding upon him.

The Court: Go ahead. State your objections to each, and we will go down and complete the identification.

Mr. Bischoff: Defendant Forman objects to Exhibit No. 12 on the ground that it is—purports to be a return for partnership called the Dock Concessions which is not one of the partnerships.

The Court: Same objection?

Mr. Bischoff: Same objection for the year 1946, and the defendant objects to Exhibit No. 13 for

(Testimony of Donald R. Burdick.)

the same reason, that it is also a Dock Concessions [49] partnership and not signed by the Defendant Forman.

Defendant Forman objects to Exhibit 14 on the same grounds that it is a partnership of the Dock Concessions partnership and not one involved in the indictment, and it is for the year 1948 and not signed by the Defendant Forman.

We object to Exhibit 15 on the grounds that it is a return for the Dock Concessions partnership for the year 1949, which is not involved in the indictment either as to the year or partnership, and it is not signed by the Defendant Forman.

Mr. Obenour: I would make further identification on these exhibits, if your Honor please.

Q. (By Mr. Obenour): Referring to Exhibit 11, would you please state the names shown on the top and the name section of the exhibit as to whom the persons are constituting Dock Concessions?

Mr. Bischoff: That is objected to as calling for the contents of the document.

The Court: That is the contents of the document. I can see that when I look at it myself.

Mr. Obenour: It goes to the identification of it.

The Court: I think not. I think I can look at the document myself and see that. [50]

Mr. Obenour: The question was raised also, your Honor, as to the matter not referring to the Defendant Forman and simply a partnership——

The Court: I will look at it when we pass on

(Testimony of Donald R. Burdick.)

it. I want you to go ahead and get Mr. Burdick on with his identification as we will consider all this matter at once, but this type of thing I would like to get on with as promptly as we can, because the jury is not needed for final solution.

Q. (By Mr. Obenour): Would you please identify Exhibits 16, 17, 18, 19, 20 and 21?

A. Exhibit No. 16 is the 1945 partnership return for United Amusement Company. Exhibit 17 is the 1946 partnership return for the United Amusement Company of Bremerton. Exhibit 18 is the 1946 partnership return for United Amusement Company of Bremerton. Exhibit No. 19 is the 1947 partnership return for United Amusement Company of Bremerton, and Exhibit No. 20 is the 1948 partnership return for the United Amusement Company, and Exhibit No. 21 is the 1949 partnership return for the United Amusement Company.

Mr. Obenour: Offer Exhibits 16 through 21.

Mr. Bischoff: Defendant Forman objects to Exhibit 16 as immaterial, irrelevant and incompetent on the ground that it is the return which was not [51] signed by the Defendant Forman, and there is no evidence that he was aware and has knowledge of its contents, and on the further grounds that there are documents attached to the return which were not a part of the return, but are apparently documents prepared by various departments of the Internal Revenue Bureau and others which were not part of the return.

Defendant objects to Exhibit No. 17 on the

(Testimony of Donald R. Burdick.)

grounds that it is a return for the tax year 1946, not being one of the years involved in the indictment and purports to be signed by the Defendant Seijas and not by Forman, and there is no evidence that Forman has any knowledge of its contents.

Defendant objects to Exhibit No. 18—beg your Honor's pardon. I want to withdraw objection No. 17. I overlooked that.

The Court: All right. No. 17 is admitted.

(Whereupon, Plaintiff's Exhibit No. 17 for identification was received in evidence.)

Mr. Bischoff: And we have no objection to No. 18.

The Court: No. 18 is admitted.

(Whereupon, Plaintiff's Exhibit No. 18 for identification was received in evidence.)

Mr. Bischoff: Defendent objects to No. 19 on the ground that it purports to be a return for [52] United Amusement Company for the tax year 1947 which is not a year involved and shows as partners Seijas and Morin and signed by Seijas. There is no evidence that Forman signed it or had any knowledge of its contents.

Defendant objects to Exhibit 20 on the ground that it purports to be a tax return for the year 1948, which is not the year involved in the indictment, and is at which time the partners were Seijas and Morin, and the return is signed by Morin and not signed by Forman, and there is no evidence that Forman had any knowledge of its contents.

(Testimony of Donald R. Burdick.)

The Defendant objects to Exhibit 21 which purports to be a return for United Amusement Company for the year 1949 which is not a year involved in the indictment, and it shows on its face that the partners were Seijas and Morin, and the return is signed by Seijas, and it is not signed by Forman, and there is no evidence that Forman had any knowledge of or connection with the return or its figure.

Mr. Obenour: I will ask further identification on Exhibit 16, your Honor.

Q. (By Mr. Obenour): Mr. Burdick, would you please identify the document attached to the original return of Exhibit 16, [53] that being the tax return for United Amusement Company for the year 1945?

A. This is an audit report, the examination of the partnership.

Q. And there are several documents attached thereto, are there not? A. Yes, sir.

Q. And what is the first one?

A. That I can't identify. It's out of my department.

Q. And the second?

A. This is a form, "H75" whereby the United Amusement Company accepts the revenue agent's finding with regard to his examination.

Q. And are those signed by the persons constituting the partnership?

A. It is signed by Army Seijas and W. R. Forman.

(Testimony of Donald R. Burdick.)

Mr. Obenour: I offer Exhibit 16 in its entirety.

The Court: No. 16 is admitted.

(Whereupon, Plaintiff's Exhibit No. 16 for identification was received in evidence.)

Q. (By Mr. Obenour): Would you please identify what is the next one in order. **A.** 22?

The Court: Yes. [54]

Q. (By Mr. Obenour): Would you please identify Exhibits 22 through 27?

A. Exhibit 22 is the 1945 partnership return for A. A. Seijas and W. R. Forman. Exhibit No. 23——

Mr. Bischoff: May we have the witness state for what year?

The Court: He said 1945.

Q. (By Mr. Obenour): Continue.

A. Exhibit No. 23 is the 1946 partnership return for A. A. Seijas and W. R. Forman. Exhibit No. 24 is the 1947 partnership return for A. A. Seijas and W. R. Forman. Exhibit No. 25 is the 1948 partnership return for A. A. Seijas and W. R. Forman. Exhibit No. 26 is the 1948 partnership return for A. A. Seijas and W. R. Forman. Exhibit No. 27 is the 1949 partnership return for A. A. Seijas and W. R. Forman.

Mr. Obenour: I offer Exhibits 22 through 29. You have also 30 and 31, too?

Mr. Bischoff: Your Honor, these have been offered at this time?

The Court: Yes, 22 through 27 have been offered.

Mr. Bischoff: At this time may it please the

(Testimony of Donald R. Burdick.)

Court, we object to Exhibits 22 on the grounds that it is not signed by Defendant Forman, and there is [55] no evidence that he had knowledge of the contents or that it was executed at his instruction. We also object on the grounds that it is a return that does not relate to any one of the partnerships referred to in the indictment, but refers to an entirely different transaction not involved in the indictment.

We object to 23 on the ground that it covers a return for the year 1946 and not for a partnership described in the indictment involving different transactions, and is not executed by the Defendant Forman, and there is no evidence that he has knowledge of its contents.

Defendant Forman objects to Exhibit 24 on the ground that it involves the year 1947 which was not a tax year involved in the indictment and does not involve any one of the partnerships described in the indictment, and is a return for a different transaction, and is not signed by Defendant Forman. There is no evidence that he had knowledge on his part of the return.

Object to Exhibit 25 which is a return for the year 1948, which was not a tax year involved in the indictment, refers to a different partnership than those described in the indictment, and that is all [56] for that.

Object to No. 26 on the ground that it is a return for the tax year 1948 which is not involved in the indictment, and it is not a return of partnership

(Testimony of Donald R. Burdick.)

involved in the indictment, and it is not signed by the Defendant Forman, and there is no evidence that he had any knowledge of its contents.

I object to Exhibit 27, which is a return for the tax year 1949 which is not a tax year involved in the indictment. It is for a partnership which is not involved in the indictment, and it is not signed by the Defendant Forman.

Q. (By Mr. Obenour): Handing you Exhibit 25, sir, is there a signature upon the tax return of W. R. Forman for the year 1948?

A. Signature of W. R. Forman appears on the return.

Mr. Obenour: Offer 25 and also Exhibits 22 through 27.

The Court: Yes. I am going to reserve on this one because of the other contention. Go ahead.

Q. (By Mr. Obenour): Exhibits 28 and 29 are there, sir? A. Yes, sir.

Q. Would you identify those similarly?

A. Exhibit 28 is the 1946 partnership return for the Green Parrot and First Avenue Theatres of Seattle. Exhibit 29 [57] is the 1947 partnership return for the Green Parrot and First Avenue Theatres of Seattle.

Mr. Obenour: Offer Exhibits 28 and 29.

Mr. Bischoff: The defendant objects to 28 on the ground that it covers a year not involved—involves the year 1946 which is not covered by the indictment and returns of a partnership which is not covered by the indictment, and we object to

(Testimony of Donald R. Burdick.)

29 on the grounds that it is for the tax year 1947, a year not involved in the indictment and involves a partnership which is not referred to in the indictment.

Q. (By Mr. Obenour): What is Exhibit 31?

The Court: 30 is the next one.

Q. (By Mr. Obenour): Would you please identify Exhibits 30, 31, 32, 33, 34, 35, 36 and 37?

A. Exhibit No. 30 is the 1945 income tax return for Dorothy Forman. Exhibit 31 is the 1945 income tax return for William R. Forman. Exhibit 32 is the 1946 income tax return for Dorothy Forman. Exhibit No. 33 is a 1946 income tax return for William R. Forman. Exhibit No. 34 is the 1947 income tax return for William R. Forman. No. 35 is the 1947 income tax return for Dorothy Forman. Exhibits No. 36 is the 1948 return for William and Dorothy Forman, and Exhibit 37 is the 1949 income tax return for [58] William R. and Dorothy Forman.

Mr. Obenour: Offer Exhibits 30 through 37.

Q. (By Mr. Obenour): Are there similar marks placed upon all of these individual returns that you described in the returns for Mr. Seijas, marks placed by the employees of the Collector's office?

A. Yes, sir.

Mr. Bischoff: Defendant objects to Exhibit 30 on the ground that the indictment does not involve tax returns of the Defendant Forman or of his wife, Dorothy Forman, the indictment charging merely

(Testimony of Donald R. Burdick.)

conspiracy to evade the tax liability of Army Seijas and his wife.

Mr. Obenour: And others, if the Court please?

The Court: That is right.

Mr. Bischoff: But it does on the——

The Court: Go ahead. State your objection.

Mr. Bischoff: I object to 31 on the ground that it is the return of William R. Forman, and the indictment does not charge any conspiracy to evade the taxes of William R. Forman.

I object to 32 being the return for the year 1946, which is—on the ground that it is that year which is not involved in the years in the indictment, and it involves a return of Dorothy Forman, [59] there being no charge in the indictment of any conspiracy to evade her tax.

Object to Exhibit 33 on the ground that it is for the year 1946 which is not a year involved in the indictment, and it is the return of William R. Forman. There is no charge in the indictment of any conspiracy to evade his tax.

I object to No. 34 on the ground that it purports to be a return for the year 1947 which is a year not covered by the indictment and involves the return of William Forman, there being no charge in the indictment of any conspiracy to evade his tax.

Object to 35 on the ground that it purports to be a return for the year 1947 which is a year not involved in the indictment and purports to be a return of Dorothy Forman, there being no charge

(Testimony of Donald R. Burdick.)

in the indictment of any conspiracy to evade her tax.

Object to 36 on the ground that it is a return for the year 1948 which is a year not involved in the indictment. It is a return of William and Dorothy Forman, and there is no charge in the indictment of any conspiracy to evade their tax liability.

Object to Exhibit 37 on the ground that it is [60] a return for the year 1949, which is not a year involved in the indictment and is a return of William and Dorothy Forman, there being no charge in the indictment of any conspiracy to evade their tax liability.

Mr. Obenour: What is the next exhibit?

The Court: 38.

Q. (By Mr. Obenour): 38, and what is that, sir?

A. This a certificate of assessment and payments of Form 899 covering our records of the United Amusement Company of Bremerton, American Amusements Company, Bremerton Amusement Company, and United Amusement Company for the years 1942 through 1945.

Mr. Obenour: Offer 38.

Mr. Bischoff: Object, may it please the Court, on the ground that the certificate is not binding upon the defendant in this case. There is no evidence that he had anything to do with its preparation or any way is involved in it.

The Court: The exhibit is admitted in evidence. Go ahead.

(Testimony of Donald R. Burdick.)

(Whereupon, Plaintiff's Exhibit No. 38 for identification was received in evidence.)

Q. (By Mr. Obenour): And 39?

A. This a certificate of assessment of payments, Form 899, [61] covering the taxes assessed and paid by Army and Betty Seijas for the years 1939 through 1948.

Mr. Obenour: Offer 39.

Mr. Bischoff: We object to Exhibit 39 on the ground stated with respect to the last exhibit, and on the additional ground that it involves—insofar as it involves years prior to and after the years 1942 to 1945, inclusive. Those years are not involved in the indictment, and therefore the document is immaterial, irrelevant and incompetent.

The Court: Objection overruled, and the exhibit is admitted.

(Whereupon, Plaintiff's Exhibit No. 39 for identification was received in evidence.)

The Court: Does that conclude the exhibits Mr. Burdick would identify?

Mr. Obenour: Identification. However, some of the last two exhibits are not self-explanatory, I don't believe, your Honor.

The Court: What I want to do is complete all identification material at one time, and we may not have to recall Mr. Burdick. That is what I am trying to get at.

Mr. Obenour: This is all he has to identify at this time, your Honor. [62]

(Testimony of Donald R. Burdick.)

The Court: Do you want to cross on identification?

Mr. Mead: No, your Honor.

The Court: If there is no further question on identification as such, I will understand that we need not recall Mr. Burdick for that phase of it.

All right, go ahead. What else have you?

Q. (By Mr. Obenour): Sir, would you please explain to the jury what information is contained in your certificate, that is Exhibit 38?

A. This indicates our records showing the partnership returns filed by these four partnerships for the years 1942 through 1945. It is prepared this way because the only record we have now is on micro-film. The returns prior to '46 have been destroyed, and for every tax return that is filed we make a 3 by 5 index card which is filed alphabetically. Because of our space problem, we micro-film all of those index cards, and this now is the only way we have of checking the record of a partnership return prior to the year 1946. This merely indicates the year involved and the account number we assign to the return.

Q. The first sheet is as to a particular partnership, is it not? [63] A. Yes, sir.

Q. And what is the name of the partnership?

A. United Amusement Company of Bremerton.

Q. And what is the record that you show for United Amusement Company of Bremerton for the year 1942?

(Testimony of Donald R. Burdick.)

A. It shows the filed partnership assigned account number NO1365.

Q. There is a column there of assessment, is there not? A. Yes, sir.

Q. Is there any assessment made on that?

A. No, sir.

Q. And is there any reason why there is no assessment made?

A. Since the partnership return is merely an information return, they pay no tax, and we can assess no tax on the partnership return.

Q. For the years '43 to '46 for the United Amusement Company of Bremerton, was there a partnership return prepared? A. Yes, sir.

Q. Was there a return prepared for each year?

A. Pardon me, sir, did you say through '46?

Q. Through '45, pardon me. A. Yes, sir.

Q. And in each instance there is no assessment made because it's an information return?

A. That is right. [64]

Q. Now, for the second sheet, what is the partnership shown there?

A. It shows the American Amusement Company filed returns for 1942 and 1943, but he had no record of the partnership returns for the years '44 and '45.

Q. That is American Amusement Company?

A. The American Amusement Company.

Q. Similarly, is there an assessment made in that partnership? A. No.

Q. And the next sheet is what partnership?

(Testimony of Donald R. Burdick.)

A. Bremerton Amusement Company.

Q. And what did your records show as to partnership returns for Bremerton Amusement Company?

A. Shows returns were filed for the years 1942, 1943, 1944, but there was no record for 1945.

Q. And for the fourth sheet?

A. It shows that returns for—were filed for each year by the United Amusement Company.

Q. For each year? A. For each year.

Q. Now, that record, is prepared, then, from a micro-film of the index cards, is that correct?

A. That is right.

Q. And do you have any record of the partnership returns [65] themselves for those years?

A. Other than this, no.

Q. Where are they?

A. They have been destroyed.

Q. By whom? A. By us by Act of Congress.

Q. And what is the basis under which the Collector's office destroys returns submitted to them in the normal course of preparation and filing by taxpayers?

A. The Congress of the United States authorizes us to destroy certain tax returns after a certain length of time.

Q. And as of now, what is the earliest tax return present on file in your office? A. 1947.

Q. Did you make an examination of the returns shown to be prepared from your index cards in order to produce them into court?

(Testimony of Donald R. Burdick.)

A. I examined the micro-film themselves.

Q. And were there any partnership returns for any of the four amusement companies other than those which you have just identified?

A. Not to my knowledge.

Q. And all of the returns shown to have been filed by your index cards have been destroyed?

A. That is right. [66]

Mr. Mead: We object to the witness testifying to material that is not here in court with respect to which we can't inquire of him about.

The Court: Oh, yes, you can inquire about it.

Mr. Mead: He is testifying with regard to micro-film, and he just couldn't find it, your Honor. It doesn't mean——

The Court: He is custodian of these records, and said there were no records beyond those he produced. That testimony is admissible.

Mr. Mead: We move the Court that it be stricken in order that the question be——

The Court: Motion is denied.

Q. (By Mr. Obenour): Does your answers apply to Dock Concessions and the Green Parrot and First Avenue Theatres as well as to the four amusement companies which you have shown there on Exhibit 38?

A. I wouldn't say it would apply to the first two partnerships because I didn't check those two.

Q. The first two partnerships being what?

A. Dock Concessions was one of them, and I think you said Green Parrot, and the——

(Testimony of Donald R. Burdick.)

Q. Green Parrot and First Avenue Theatres.

A. Theatres.

Q. Did you examine your records for earlier returns of William [67] R. Forman and Dorothy Forman prior to 1945? A. No.

Q. Have you examined your records concerning the earlier records of Army A. Seijas? A. No.

Q. Prior to '44? A. No.

Q. Will you please tell the Court what Exhibit 39 contains?

A. This shows the taxes assessed and taxes paid, both estimated and income tax by Army A. and Betty Seijas for the years 1939 through 1948.

Q. And what is shown upon those papers constituting that certificate, Mr. Burdick?

A. Well, it indicates the tax year and the list of our assessment, the list page and the list year. It shows the account number of the return. It shows the amount assessed and the amount paid and the date it was paid, and any other remarks pertinent to those payments.

Q. What is the distinguishment between the sheets as to Seijas alone or his wife or both of them together?

A. Well, sometimes the account is in both names, and they are in each individual name, and we prepare a sheet for the individual and also for the joint names, however they appear on our books.

Q. And the combination of the papers constituting the [68] exhibit constitutes the tax payment record of the taxpayers through the years of '39-'49.

(Testimony of Donald R. Burdick.)

regardless of under which name or combination of names they were prepared?

A. Through 1939 through 1948, yes, sir.

Q. '48? A. Yes. sir.

Mr. Obenour: With the exception, your Honor, we will recall him, this witness, after he conducts further examination of his records pertaining to earlier returns of Seijas and Forman's.

The Court: What I have in mind, I want to dispose of the matter without keeping or detaining the jury while we go through what are more or less formal matters and objections and that sort of thing. Complete all of that, because then I am going to excuse the jury for the day, and we will go ahead through these objections and consider them.

Mr. Obenour: I mean I would like to ask Mr. Burdick to examine his records after he leaves the courtroom today concerning the earlier returns for Forman and Seijas, and recall him for that purpose.

The Court: Do you have any cross that you want to make? [69]

Mr. Mead: I would like to ask one or two questions.

Cross Examination

Q. (By Mr. Mead): Form 899 is a certificate of assessment, is that right? A. Yes, sir.

Q. Then you referred to one exhibit, I believe it was No. 39 as being a certificate of assessment for United Amusement Company. That would be a

(Testimony of Donald R. Burdick.)

partnership, wouldn't it? A. That is right.

Q. And the partnership return, of course, is an information return, is it not? A. Yes.

Q. No tax is due or payable upon the filing of the return? A. That is right.

Q. Does that form show the amount of tax then paid—it would not be a certificate of assessment as far as the partnership is concerned?

A. The only thing I can say about that, that is the only form that we have that would show the records of the partnerships filed by year and by account number, and, of course, they would show no tax paid because they didn't pay any.

Q. And there would be no tax due or payable against that [70] partnership? A. That's right.

Q. The tax return would be by the individual members of the partnership who would make individual returns? A. That's right.

Q. So it is not surprising, then, that that record shows no tax paid? A. No, sir.

The Court: It would be surprising if it were contrary. Anything further in the way of cross?

Mr. Mead: No, your Honor.

Mr. Obenour: Just one thing, your Honor.

Redirect Examination

Q. (By Mr. Obenour): The regulations of the Treasury Department and of the laws are what, sir, as concerning the information to be contained in these partnership returns? A. Partnership——

Mr. Bischoff: Object as calling for a conclusion.

(Testimony of Donald R. Burdick.)

The Court: Well, in general, what do the returns call for to be reported, what information, [71] that you can cover?

The Witness: It shows the income received by the partnership, the expenses of the partnership, and the distribution of the net income to the partners.

Q. (By Mr. Obenour): What are the requirements and regulations of the Treasury Department and laws of the United States concerning the truth and the authenticity of the information contained in these information returns?

Mr. Bischoff: Object as calling for a conclusion.

The Court: Overruled.

The Witness: The partnership or one of the partners has to sign a statement that it is a true and correct statement of the partnership income and expenses to the best of his ability and knowledge. I believe that is the way the statement reads.

Mr. Obenour: Thank you.

The Court: Anything further now on this phase of it? I am about to excuse the jury while I consider your objections. If there is anything further you want from Mr. Burlick with that purpose——

Mr. Mead: One question, your Honor, if I may [72] develop by his last answer.

The Court: Yes.

Recross Examination

Q. (By Mr. Mead): You state, Mr. Burdick, the law requires that one of the partners execute

(Testimony of Donald R. Burdick.)

the return to the best of his knowledge and so forth. The Form 889, certificate of assessment, which you have does not show who signed the return, does it?

The Court: 899.

Q. (By Mr. Mead): 899, I beg your pardon.

A. No, sir.

Mr. Mead: Thank you, Mr. Burdick.

The Court: Ladies and gentlemen of the jury, we have some matters here that I would like to attend to, and all these matters we can get along without you folks on our own time, and not on yours, I would like to as near as I can. It's a little early for our regular adjournment time, but I am going to excuse you now while we go on with this, because it will not be particularly interesting to you or necessary for you to hear.

Will you all be able to return tomorrow morning [73] at 9:30? Not any of you will have any special hardship or difficulty in getting here at that time? Will you also keep in mind the admonition that I gave at some length earlier in the day. It's extremely important that you read nothing and hear nothing excepting in the courtroom here where we can all have a look at it or hear it and see it together.

Rather than that, I hope you have a pleasant evening, find your homes and families safe and well, and that you come back refreshed and ready for another day, tomorrow at 9:30.

You may be excused now.

(Whereupon, the jury retired from the courtroom.)

The Court: Now, if there is any particular matter you want to call my attention to in the attachments, let's take that subject first. In three or four instances an objection was made on the grounds that certain attachments were added to the document. I will have a look at them. Ordinarily, the rule is that the whole document, being the official record of the Government, with respect to the matter is admissible. However, if you can point out to me some particular phase of these attachments that would be particularly prejudicial or damaging [74] in one way or another, I would be glad to consider it.

Mr. Bischoff: May it please the Court, we regard all documents attached to a return as prejudicial because they are not the declarations or the acts of the taxpayer. This is a criminal case in which he is being charged with evasion or conspiracy to attempt to evade by means of the filing of returns, and whatever criminal implications there may be must be gathered entirely from the documents which he turned in. They can't be supplemented by any conclusions or self-serving declarations of agents.

The Court: If they are merely routine filing matters of that kind, I can't see any occasion to separate these documents. If there is something in them that you suggest is damaging or involves a material that either should or should not come before the jury, I will be glaid to consider it, but I have to look to you to point it out to me.

Mr. Bischoff: The time that was allotted to us has not been sufficient for us to examine, go through a part of them in any event, but when there are multitudes of paper attached, we are—never know what significance may be claimed for any one of those instruments, and therefore it is prejudicial [75] to a defendant charged with a crime to have attached documents which may later be claimed to have some significance when he doesn't know why they are here in the first place at this time, and he should be judged upon those documents which were tendered or submitted.

The Court: Mr. Bischoff, it is true that you haven't had long to look at these, so I will just reserve ruling until tomorrowing morning, and you can look at them and point out to me if there is anything that you suggest is prejudicial or conceivably prejudicial, and I will look at it and consider it, but if it's a mere matter of detaching documents attached which show various procedures in the Collector's office, I am not disposed to detach those simply to blind obeisance to a general objection of that kind. Right or wrong, that is my view of it, and if you want to point out to me any particular thing about them that are harmful or conceivably might be harmful, I would be glad to consider it, and I will give you until morning to consider it.

Mr. Bischoff: Tomorrow morning. I will examine them further.

The Court: Now, with respect to the objection, the objection was made that they were not within

the [76] indictment years, but the indictment years that we are concerned with here are the years 1942 to 1953, and I haven't seen any documents following that date that are offered, so that I do not regard—I do not regard that ground of objection as well taken.

The further objection——

Mr. Bischoff: May I prevail for a moment on that point?

The Court: Yes.

Mr. Bischoff: Your Honor, the charging part of the indictment specifically charges a conspiracy to evade Seijas' and his wife's income tax for four specific years. That is the issue, that he state those being for those years, and that Forman conspired with him that he should do so, understate that income. Now, if they are going to show in other years, he is going to be prejudiced here.

Now, of course, there are allegations of overt acts, but that doesn't involve the question of the filing of returns for subsequent years. They throw no light upon the question whether in a given year within the purview of the indictment, whether the income for that year was correctly reported or not. The indictment was drawn within narrow limits for those four years, and the tax liability for those [77] four years, and it involves the income derived from a specific source; namely, from these four sources, these four partnerships. Now, they have introduced other partnerships, the Dock Concessions, and other enterprises which have no relation to this case because the indictment doesn't

charge that there was any income diverted from any other source, and I think we are entitled to have the case tried within the limits of the indictment, and it will be highly prejudicial to have—to delve into tax liability for other years and from other sources and other partnerships.

The Court: Very rarely in a tax case you will not need to know something about what happened in years other than the years specifically in question. In other words, the tax liability for those years is dependent upon filings in other years, and I think, perhaps, it is so in this instance.

If we assume that the only years we were concerned with proof of any kind, were these years 1941 to 1945, a great deal of proof that bears on those years would have to be excluded.

Do you want to make any statement in connection with the matter?

Mr. Obenour: Yes, your Honor. As has already [78] been referred to, the indictment refers to acts up through '53. The government is not held to showing only these specific overt acts. I think the very fact that it shows that the Defendant Forman continued in partnership of other nature and of other type of businesses after they ostensibly ended their partnership in the amusement companies would be proof in itself, a fact that their partnerships did continue in the amusement companies which the government has alleged and which Counsel has made claim there is great surprise.

The Court: We might come to a point where that evidence would be admissible on some theory

of that kind, but we certainly haven't arrived at that at the outset of the case.

Mr. Obenour: There are several different types here. Taking them first, the amusement companies, as has been stated in the government's opening—first the amusement companies—the government contends that, in fact, the partnership continued through '49 or '50, and these returns show that ostensibly terminated partnership in that company and as would be shown by then referring to Forman's income tax return for '45 and '46, he shows the sale of the county route and the city route upon his [79] return, so that it is typed up with that showing that Forman made by the returns that he himself filed at the time.

The Dock Concessions with the partnership as shown on their face and by the first one that the government has and by the information contained in them that William R. Forman was a partner with Seijas and with Goldstein in those enterprises during the period of '42 through '45 as well as later times, that the partnership of Seijas and Forman in the Green Parrot Theater and First Avenue Theaters was another partnership venture of Seijas and Forman and continued after they ostensibly terminated any relationship even when Forman—and would now appear from statement of counsel and which we submit that the defendant would be bound by the statement of counsel as to their showing that he terminated relationships with Seijas, and, in fact, through this period he continued to file returns showing his office to be the same as

Seijas, and if continued in business with the partnership of Forman and Seijas, which is the name on one set of returns, and the Green Parrot and First Avenue Theaters as another, and, finally, those are linked up by Forman's own returns from '45 through '49, or [80] whatever it is we have introduced so far, that his own returns show income from these same partnerships, the ones that the government contends are now relevant, to show the continuation of the relationship, and we submit will be tied up by subsequent acts to further conspiracy.

The Court: I think our problem is the one that we are frequently confronted with in this type of case, that at the outset of the case a large number of documents are identified by a given witness for the convenience of the witness to come and give time and not to come back with identification material.

Yet, at the outside of the case and without any other evidence before us, we have no way of judging the admissibility of some of these documents. I think——

Mr. Bischoff: May I have a word.

The Court: As soon as I finish you may. If you have any further evidence you wish to present concerning identification, and I understood there was no further question about identification before us, I think the better practice for us would be to reserve ruling on the admissibility of these exhibits, at least, with some possible exceptions, until a later stage of the trial when presumably we will be

better [81] informed as to the relevance of the exhibit.

Mr. Obenour: Does that apply to the returns of William and Dorothy Forman?

The Court: I would be glad to hear you further on that. What is your position with respect to the Forman returns?

Mr. Bischoff: Did you address me?

The Court: Yes.

Mr. Bischoff: Our position is that the indictment charges the conspiracy to evade the taxes of Scijas and his wife——

The Court: And others.

Mr. Bischoff: And others, but Mr. Forman the defendant who is named in the indictment and is on trial, is not charged anywhere with any evasion or any conspiracy to evade his tax. All allegations relating to evasion relate to conspiracy to evade Scijas' tax, and so we are not concerned with any question whether Forman did or did not evade here. It is only a question whether Scijas evaded and whether Forman aided him by conspiring with him in Scijas' evasion. That is the indictment here, and it isn't the question of whether partnerships continued for any additional length of time beyond 1945. [82]

The true question is was there evasion of income in the subsequent years, and if there was, it should have been charged.

The Court: The question is whether there was conspiracy continuing through those years. That is the question.

Mr. Bischoff: First there had to be evasion and then conspiracy to evade it, and if they intended to charge evasion of taxes in subsequent years, and that by reason of the continuance of the partnerships, they should have charged evasion in subsequent years.

The Court: They don't need to do that at all. They charge evasion of the taxes for given years and evasion continued down to '53.

Mr. Bischoff: The evasion for those years, not the tax liability accruing in subsequent years.

The Court: That is what I am trying to say to you, is that they charge that the evasion in given years and that the evasion continued down through to 1953. Now, the question before us at the moment is do these income tax returns of Forman and wife, do they have some bearing or some relevance on the questions of the continuing conspiracy down through that time. That is the question. [83]

Mr. Bischoff: Under the specific allegations of the indictment here as alleged, they limit all charges of conspiracy to the evasion of Seijas' taxes. There isn't a word in there from the beginning to the end of it, evasion by Forman.

The Court: That seems to be beside the point. It might well be that all types of evidence will come in here that doesn't directly bear on that particular matter. It is a question of whether this evidence bears on the continuing of a conspiracy.

Let us hear from Mr. Obenour in what respect he suggests they do.

Mr. Obenour: The returns show the source of the

income of Mr. Forman and his wife, Dorothy, to be the same partnerships——

The Court: Which same partnerships?

Mr. Obenour: I will have to look to make sure, your Honor. I believe it is Exhibit 45—United Amusement Company of Bremerton. A. A. Seijas and William Forman are the ones, Green Parrot Theater, and Dock Concessions. There are two other Forman brothers, and Film Classics of the Northwest for which there have been no returns submitted. [84]

The Court: The return for 1945 for Forman and wife, Exhibits 30 and 31, you say they show what?

Mr. Obenour: It simply refers to her husband's return, if I recall.

The Court: Yes, that is the usual practice. What do they show?

Mr. Obenour: 31 shows United Amusement Company of Bremerton, address 1812 Smith Tower Building, $6,366.82.

The Court: That is within the four year period that we have been referring to and also shows a return from the very concern that we are concerned with, one of the concerns?

Mr. Obenour: I would have to find that return, but——

The Court: 30 and 31.

Mr. Obenour: I was going to refer to the comparable partnership return which was presented.

The Court: That would be Exhibit 16.

Mr. Obenour: 16. United Amusement Company

which shows Forman and Seijas, and Exhibit 16 has been admitted, shows the partners to be A. A. Seijas and W. R. Forman, $3644.77, and the same amount in United Amusement Company, 1812 Smith [85] Tower, Seattle, $3644.67.

The Court: That is the return for 1945. What about those following, what relevance do they have?

Mr. Obenour: Similarly, 46 refers to the return for Dorothy Forman, refers to her husband's return, and from this it shows United Amusement Company of Bremerton, A. A. Seijas and William R. Forman, Dock Concessions, Green Parrot and First Avenue Theaters which we are concerned with, and also shows Forman Brothers and Film Classics of the Northwest, and on those returns, Exhibit 17, which was admitted, United Amusement Company of Bremerton, it shows A. A. Seijas and W. R. Forman to have received $5501.75 on Exhibit 17, then, it shows $5501.75 on Exhibit 33.

The Court: That is for the year 1946?

Mr. Obenour: And the same returns for Dock Concessions and Green Parrot and First Avenue Theaters, and A. A. Seijas and William Forman returns which were also offered and on some of which there was reservation made.

34 is the '47 return for William Forman and shows Green Parrot and First Avenue Theaters, A. A. Seijas and W. R. Forman and Dock Concessions, [86] a loss of $610.67, of which there have been returns introduced, and it also shows others for which there has been no return introduced. It

shows the continuation of the interest of 1947 of Seijas and Forman.

The Court: In what enterprises, United Amusement again?

Mr. Obenour: A. A. Seijas and Forman Partnership as such, Green Parrot and First Avenue Theaters, and Dock Concessions.

Exhibit 29, the Green Parrot and First Avenue Theaters partnership return for '47 shows the partners to be William Forman, Albert Forman, A. A. Seijas, William R. Forman showing 1812 Smith Tower, Seijas 1814—Seijas 1812, and that the figure for the receipts from this partnership by Forman corresponds to that shown in his own return.

The A. A. Seijas and Forman return for '47, 24, prepared by Seijas, shows Forman and Seijas to be partners and shows a return of $2205.25. This is the partnership return of A. A. Seijas and William Forman, '47, and shows it was prepared by A. A. Seijas and it shows Forman Received $2205.25, the amount shown on his own return for [87] the year 1947.

The same would be true of Dock Concessions, 13, Dock Concessions, which was prepared by Goldstein showing Goldstein, W. R. Forman, 1812 Smith Tower, and Army Seijas, 1812 Smith Tower, all to be partners, and on this information return it shows Forman to have taken a loss of $601.27, and the figures have been transposed. It shows $610.67 loss upon Forman's return. That will be for '47.

The Court: Presumably the same for '48 and '49?

Mr. Obenour: Yes, sir.

The Court: How does that bear on our question here about a conspiracy?

Mr. Obenour: The conspiracy continued so long as there are acts done in furtherance of the conspiracy. The acts done in furtherance of the conspiracy will be shown that in this instance the income of the partnership was not shown on Forman's return.

The Court: In other words, your theory of that was that it wasn't properly shown on the information returns for that period and simply was picked up in the—the same erroneous figure was [88] used in Forman's return?

Mr. Obenour: Yes, sir, and in addition, that at the time of the sale of half of the long term capital gain taken by Forman was paid by Seijas.

The Court: We haven't got to that yet.

Mr. Obenour: No, sir. However, there is the information that would be contained in these returns to which we would have reference. The fact that these are the returns of Forman and his wife for the purpose of which we are now concerned, because there has been no question of identification. Apparently, if I understand correctly, the information contained therein would be linked up with other evidence that would be introduced.

The Court: The point of the question is whether we have got the cart before the horse. In other words, if when we have evidence here, if we do have evidence, that Forman knew or participated in the erroneous returns, or for the partnership, then,

clearly the fact that he made the same erroneous figure in his own return would be admissible, but I don't quite understand how it becomes admissible the other way around.

In other words, it is that same problem that we have in almost everyone of these cases, that we [89] bring a large mass of documents before us at the opening of the trial, and until we have further evidence developed in the case, it is very difficult to understand the relevance of it.

Now, I can see where it might be very harmful to admit a tax return of Forman at this time. I don't know what is in the return, but it is conceivable that it might have something in it that would be prejudicial, and I certainly wouldn't want to take a chance on doing that until I am certain that there is something relevant in it.

Now, if it turns out that there is something relevant in that return, then the fact that there is something damaging in it is just too bad. When there becomes something in that return that is admissible and relevant to our problem here, then, if the fact that it may also contain something else that is damaging, is just Damnum Absque Injuria, to get a little tort into the thing. That is the way I feel about it at this stage. I feel that we should develop the case a little further until we have at least some basis for concluding that the figure used in the Forman return with an adoption of figures known by him to be incorrect and erroneous. [90]

Mr. Obenour: All right.

The Court: It is a matter of order of proof more

than anything else. I will reserve ruling on all the documents not thus far admitted.

Mr. Bischoff: Your Honor, may I say a word in response to what was last developed here by Mr. Obenour?

The Court: Yes.

Mr. Bischoff: It may have to do with other matters, and while I don't have the Jury in here I thought it might be well to mention it because the questions will recur during the admission of evidence.

The indictment starts out by designating by name four specific partnerships in the first paragraph of the indictment, and then it goes on to say in Paragraph I what ever is charged in the failure to keep books is related by the allegation specifically to those partnerships by wilfully and knowingly keeping and causing to be kept for and on behalf of the partnerships named above. So as to that matter, we are confined to the four particular partnerships.

In Paragraph B where they charge us with making a false statement under 1001 and 3809, it is [91] again related to false and fraudulent information returns in the name of the aforesaid partnerships. When we get into C, the allegation is related again, and the concluding sentence to the aforesaid partnerships and in Paragraph D the same limitation is imposed.

Now, then, how can it be relevant under this indictment the question of the partnership returns and the individual returns of other partnerships.

That is the point that we should — we must have clarified now is evidence of the evasion.

The Court: As I understand Mr. Obenour's theory of it, he has the theory that if Forman and Seijas continued to be engaged in other partnership activity down through the years that somehow or other that bears on the question of the likelihood of their being partners in the matter in this one that Forman claimed to have sold out.

Now, it might turn out before we get through that that might have some merit in it, but at the present time I wouldn't want to hazard a ruling on just that assertion. I think we are going to have some more evidence about that.

I have ruled in any case, and I am going to reserve on these until we go along, but I don't [92] want to have to recall Mr. Burdick unless it is necessary. On the other hand, he is not very far away and if he doesn't have to sit here and listen too long, why I suppose he wouldn't be too disturbed at being called again.

Do you want him returned tomorrow as far as either of you presently know?

Mr. Obenour: Only for the purpose previously stated.

The Court: Some new and additional matter?

Mr. Obenour: Yes.

The Court: We will recess until 9:30 tomorrow morning.

(Whereupon the court recessed to reconvene the following morning, July 31, 1956, at 9:30 a.m.) [93]

(Whereupon, on the 31st day of July, 1956, at the hour of 9:30 o'clock a.m., the following further proceedings were had:)

The Court: Are you ready?

Mr. Obenour: Yes, your Honor.

The Clerk: Just resume the stand, Mr. Burdick.

DONALD R. BURDICK

called as a witness on behalf of the Plaintiff, having been previously sworn, resumed the stand, and testified further:

Redirect Examination

Q. (By Mr. Obenour): Mr. Burdick, have you examined your records and determined if there are any earlier returns for either Army Seijas, Betty L. Seijas, William R. Forman, or Dorothy Forman for the years prior to the returns which you introduced yesterday? A. Yes.

Q. And are there any such returns in your files?

A. No, sir.

Q. What happened to them?

A. They have been destroyed.

Q. And under what conditions were they destroyed? A. By Act of Congress.

Q. And is that the same situation as the destruction program you described yesterday? [94]

A. Yes.

Mr. Obenour: That is all.

The Court: Anything further?

Mr. Mead: No further questions.

The Court: That is all, Mr. Burdick. You are excused.

(Witness excused.)

LUCY H. HARVEY

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Lucy H. Harvey.

The Clerk: Spell your last name.

The Witness: H-a-r-v-e-y.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mrs. Harvey? A. Issaquah, Washington.

Q. What is your employment?

A. I am in Seattle at the Chief of the Service Branch.

Q. By whom are you employed?

A. Internal Revenue Service.

Q. What position do you hold?

A. Well, Chief of the Service Branch consisting of control of [95] all of the cards and records that the agents have prepared.

Q. How long have you been so employed?

A. Just about thirty years.

Q. Included in your duties, are you custodian of the records submitted by the agents performing audits and such things as that? A. Yes.

Q. And did you bring with you certain records pertaining to investigations conducted on the returns of William and Dorothy Forman and Army and Betty Seijas?

(Testimony of Lucy H. Harvey.)

A. I believe they are here, yes.

Q. Handing you Exhibit 40, would you identify that, please?

A. Well, these are what we call our permanent record cards which is the original card, actually, that was made up.

Q. And it's a record——

A. From the reports, the years that were covered during the investigation.

Q. Those are the record cards for whom?

A. For our agents' office.

Q. And for what tax years?

A. For William R. Forman, Dorothy Forman, A. A. Seijas, and Betty Seijas, United Amusement Company, American Amusement Company, Bremerton Amusement Company.

Mr. Obenour: I offer Exhibit 40. [96]

Mr. Mead: That is objected to as being a self-serving declaration and not binding.

The Court: Go ahead with your other identification.

Q. (By Mr. Obenour): Handing you Exhibit 41, can you identify that, please?

A. This is a report made out for William R. Forman for the year '45 by agent Clodfelter.

Q. What sort of report is it?

A. Well, it is a field investigation showing the amount of tax.

Q. Upon what taxpayer?

A. William R. Forman.

(Testimony of Lucy H. Harvey.)

Q. And by whom? A. Clodfelter.

Q. The date?

A. The date of the investigation was April 12, 1948.

Mr. Obenour: Offer Exhibit 41.

Mr. Mead: That is a self-serving declaration and merely the reports of revenue agents, your Honor, and we are entitled to have the agent here to testify with respect to this matter and to be able to cross-examine him with respect to it.

The Court: I will examine the document. Go ahead with your other identification. [97]

Q. (By Mr. Obenour): Handing you Exhibit 42, can you identify that, please?

A. This is a typed copy of the report for '45, the year '45, for Army Seijas made up by our agent, Clodfelter. The date of the examination was December 9, 1948.

Mr. Obenour: Offer Exhibit 42.

Mr. Mead: We have the same objection as to the previous exhibits, your Honor, and further that in no event is it binding upon the defendant Forman.

The Court: I will examine it.

Q. (By Mr. Obenour): Handing you Exhibit 43, can you identify that?

A. Well, this is a typed copy of our year '44 and '45 examination for Army Seijas, and it was made February 28, 1947, for the years '44 and '45.

Mr. Obenour: Offer Exhibit 43.

(Testimony of Lucy H. Harvey.)

Mr. Mead: We have the same objection to Exhibit 43, that it is a self-serving declaration and merely a written report of an agent, and we are entitled to have the agent present to examine with respect to it.

The Court: Reserve on these. Is there any further question about identification as far as this witness is concerned?

Mr. Mead: No. We have no question about the [98] identification on it.

Mr. Obenour: May I have Exhibit 40, please?

The Court: Yes.

Q. (By Mr. Obenour): Referring to Exhibit 40, particularly the second, third, fourth, and fifth sheets, referring to the word "copy" typed on the top, would you explain that?

A. Well, that is really an error in our office because that should not have been marked "copy." These are actually the originals, the original cards that we had in our files, and we actually made a copy of these when we were asked to, and kept them in our files and sent the originals in on them.

Q. Those that are marked "copy" are actually the originals?

A. These are all the originals. That is an error that we have marked "copy" on these.

Mr. Obenour: That is all.

The Court: You have fully covered everything about identification with this witness as far as you can? Have you done that?

Mr. Obenour: Yes, sir.

(Testimony of Lucy H. Harvey.)

The Court: I take it there is no question about identification?

Mr. Mead: We have no doubt, your Honor. The records are what the witness says they are. [99]

Mr. Obenour: That is all.

The Court: That is all, Mrs. Harvey.

(Witness excused.)

OLIVER PAUL BROWN

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Oliver Paul Brown.

Direct Examination

Q. (By Mr. Billinghurst): Where do you reside, Mr. Brown? A. Portland, Oregon.

Q. By whom are you employed?

A. The Canadian Bank of Commerce.

Q. How long have you been employed with the bank, Mr. Brown? A. 28 years.

Q. What is the nature of your employment with the bank?

A. Well, at present I am in the Collection and Loan Department.

Q. And as such are you custodian of the records of the bank?

A. The records pertaining to my department, yes.

(Testimony of Oliver Paul Brown.)

Q. Are you acquainted with Mr. Army Seijas?

A. Well, I have waited on him once or twice years ago.

Q. Are you familiar, Mr. Brown, with the safety deposit vault records? A. Yes, sir, I am.

Q. Are you the custodian of those records?

A. I was years ago.

Q. Were you the custodian of those records, Mr. Brown, — well, during what periods were you the custodian of those records?

A. From 1946 to 1950.

Q. And at that time, Mr. Brown, were you familiar with the records of the bank as they were prepared and kept in connection with safe deposit box accounts? A. Yes, sir, I was.

Q. Mr. Brown, I am going to hand you for identification No. 48 and ask you what it is?

A. Well, this is the safe deposit box lease covering Box No. 1668 rented to Army Seijas.

Q. When was that account opened, that rental account? A. 27th of August of 1943.

Q. When was it closed?

A. April 20, 1951.

Q. Are there any other names listed as patrons of this account, Mr. Brown?

A. He has Mrs. Betty Seijas as agent on the box. [161]

Q. Are there any other names?

A. Mrs. Betty Seijas and Henry Seijas, or anyone of them, as agent for Army Seijas.

(Testimony of Oliver Paul Brown.)

Mr. Billinghurst: I am going to offer No. 48 at this time, your Honor.

Mr. Mead: It is objected to until its materiality is connected up, your Honor.

The Court: Do you wish to make a statement about that, or do you want to reserve?

Mr. Billinghurst: Well, your Honor, I believe this is the same problem the court considered yesterday. I think that subsequent testimony will tie it in.

Mr. Mead: I assume your Honor is reserving judgment on this?

The Court: That is right. Your assumption is correct.

Q. (By Mr. Billinghurst): Mr. Brown, can you identify for identification No. 49?

A. Well, this is the entry card covering safe deposit box No. 1668. Every time a renter comes into the box they have to sign their name on this card.

Q. And during what period of time was that entry card used, Mr. Brown?

A. Well, the first entry according to this, was December 4, [102] 1943. The last entry was April 20, 1951.

Q. Who were the persons who used that card to gain entry?

A. The only person that used it was Army Seijas.

Q. And does that entry card relate to the same

(Testimony of Oliver Paul Brown.)

account that you described in examining Exhibit No. 48? A. It does.

Q. The same box? A. The same box.

Q. The same rental agreement?

A. Yes, sir.

Mr. Billinghurst: Thank you, Mr. Brown. At this time we offer No. 49, your Honor.

The Court: Same objection, I take it?

Mr. Mead: Yes.

The Court: Same ruling.

Mr. Mead: As to materiality.

The Court: Same ruling.

Q. (By Mr. Billinghurst): Can you examine and identify No. 50, please, Mr. Brown?

A. Well, this is a safe deposit box lease covering box No. 855 in the Canadian Bank of Commerce, and the name of the lessees are William Forman and Dorothy Forman of 1812 Smith Tower Building, Seattle, Washington.

Q. When was that account opened?

A. This box was rented on the 11th day of December, 1944. [103]

Q. And when was it closed?

A. It was closed May 26, 1948.

Q. And are there any other persons under the terms of the contract authorized to use the box?

A. Just those two.

Q. Are you personally familiar or acquainted with Mr. Forman? A. No, I am not.

Mr. Mead: This is objected to, Your Honor, upon the same grounds as the former, as Exhibit 49 and

(Testimony of Oliver Paul Brown.)

50, and that there is no question or allegation in the indictment with regard to Mr. Forman's evasion of his income taxes.

The Court: I will reserve ruling.

Mr. Mead: And for the further reason that there are attachments on this in the form of copies of communications which have not been identified.

The Court: I will reserve ruling.

Mr. Billinghurst: For further identification, Your Honor?

The Court: Yes.

Q. (By Mr. Billinghurst): Will you identify the documents attached to the contract?

A. Here is a letter dated May 18, 1948, signed by William R. Forman where he says, "Gentlemen——" [104]

The Court: You can't tell what the contents are. Tell us what it is in general. Just identify it without reading it.

The Witness: The letter just wants to——

The Court: It is a letter concerning the rental of the box, or something of that kind?

The Witness: A letter concerning the rental of the box.

The Court: Signed by Mr. Forman?

The Witness: Signed by Mr. Forman. Here is another letter signed by myself to Mr. Forman, a letter signed by Mr. Forman, and another letter signed by myself in the capacity of acting for the bank.

(Testimony of Oliver Paul Brown.)

Q. (By Mr. Billinghurst): What is the purpose of your letters?

A. Well, he sent in—he wanted to discontinue the box and he sent in two deposit keys to discontinue the box.

Q. All of these documents have to do with the closing of the account, is that correct?

A. That is right.

The Court: That answers the question.

Mr. Billinghurst: At this time we will offer it subject to the Court's ruling.

The Court: Yes. It is reserved.

Q. (By Mr. Billinghurst): Now, Mr. Brown, can you examine [105] and identify No. 51?

A. Yes. It is the entry card to the safe deposit box No. 855 of Mr. Forman.

Q. And what names appear on the entry list?

A. Well, I can only see that Mr. Forman was the only one who ever had access to the box.

Q. During what period of time were the entries made according to the card?

A. The first one was June 7, 1944, and the last was to Mr. Forman on September 24, 1947.

Q. And does that entry list refer to the same account we have previously discussed in connection with the last exhibit? A. Yes, it does.

Mr. Billinghurst: At this time we will offer No. 51.

Mr. Mead: Same objection.

The Court: Same ruling. It is reserved. It might be advisable, however, by way of identification to

(Testimony of Oliver Paul Brown.)

have the witness explain what an entry card is.

Q. (By Mr. Billinghurst): What is an entry card, Mr. Brown?

A. Well, every time a person comes into one of our safe deposit boxes they the entry card, and that card—there is room for a good many signatures on both sides of the card. Some banks use tickets but we use the entry [106] card system.

Q. Well, now, is it possible in the customs of the business for anyone to obtain entry to safe deposit valuts without signing a card?

A. No, is isn't.

Q. And each person who obtains entry to the vault then signs the card relating to his account, is that correct? A. That is correct.

Mr. Billinghurst: You may examine.

Mr. Mead: No questions.

The Court: Is there any further question on identification?

Mr. Mead: No, Your Honor.

The Court: You are excused and may leave whenever you wish.

(Witness excused.)

EDWARD F. MORTON, JR.

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name, please.

(Testimony of Edward F. Morton, Jr.)

The Witness: Edward F. Morton, Junior. M-o-r-t-o-n. [107]

Direct Examination

Q. (By Mr. Billinghurst): Where do you reside, Mr. Morton?

A. 15342 Southeast 23rd, Bellevue, Washington.

Q. And where are you employed?

A. Seattle Trust and Savings Bank.

Q. What is your position with the Seattle Trust and Savings Bank? A. Trust Officer.

Q. And that is the Seattle Branch?

A. Yes.

Q. How long have you been there, Mr. Morton?

A. Six and a half years.

Q. And as such are you the custodian of the records of the bank?

A. I have been until this last month.

Q. Are you acquainted with Mr. Army Seijas?

A. No, I am not.

Q. Are you familiar with the documents and records of the safe deposit accounts of the bank?

A. Yes, I am.

Q. Mr. Morton, I am going to hand you identification No. 44 and ask you to identify that.

A. This is a lease contract for safety deposit box rental.

Q. And to whom does it pertain? [108]

A. It pertains to Mr. F. Henry Seijas and Mr. Army Seijas.

Q. In what way does it pertain to them?

(Testimony of Edward F. Morton, Jr.)

A. It is a lease between them and the bank for the use of safe deposit box No. 1497.

Q. When was that account opened?

A. April 4, 1945.

Q. And when was it closed?

A. It was surrendered on October 18, 1949.

Q. By whom was the account opened, Mr. Morton?

A. It was opened jointly by F. Henry and Army Seijas.

Q. Are any other persons under the terms of the agreement entitled to have access to that box?

A. No, they are not.

Mr. Billinghurst: At this time, Your Honor, we will offer Exhibit No. 44.

Mr. Mead: We have the same objection, Your Honor, and in order to expedite the matter, I assume we may examine these more carefully at a later time and make further objection at that time.

The Court: Yes, you may, except that I want you to cover identification as far as you can while the witnesses are here because I don't want to have to bring them back unless it becomes necessary.

Mr. Mead: Yes, sir.

The Court: All right. Ruling is reserved. [109]

Q. (By Mr. Billinghurst): Now, I am going to ask you to identify Exhibit No. 45, Mr. Morton.

A. These are safe deposit entrance slips signed by the entrant at the time they were admitted to their box.

Q. And to what account do they pertain?

(Testimony of Edward F. Morton, Jr.)

A. They pertain to that account, or box No. 1497, the same box that the lease just covered.

Q. And what period of time do they cover?

A. These cover a period from April 4, 1945, to October 17, 1949.

Q. Can you describe the purpose of an entry slip and how it is used by the bank?

A. Yes. It is a permanent record of the signature and the time of admission of a party authorized to enter their safe deposit box. It is an authorization, in other words, to gain admission and acts as a permanent record of that entry.

Mr. Billinghurst: At this time, Your Honor, we will offer No. 45.

Mr. Mead: Same objection.

The Court: Same ruling.

Mr. Billinghurst: You may question.

Mr. Mead: We have no questions.

(Witness excused.) [110]

WALTER GEORGE SEELBACH

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name and spell your last name.

The Witness: Walter George Seelbach, S-e-e-l-b-a-c-h.

Direct Examination

Q. (By Mr. Billinghurst): Where do your reside, Mr. Seelbach?

(Testimony of Walter George Seelbach.)

A. 10626 - 51st Avenue South, Seattle.

Q. Where are you employed?

A. Seattle First National Bank, main office.

Q. And how long have you been there?

A. Let's say better than 30 years.

Q. What is your capacity at the bank, Mr. Seelbach? A. Assistant Cashier.

Q. Are you acquainted with Mr. Army Seijas?

A. Yes.

Q. And Mr. William R. Forman?

A. I am not acquainted with him, no.

Q. In your capacity at the bank, Mr. Seelbach, are you a custodian of the records and accounts of the bank as they relate to ledger sheets and checking accounts, business accounts of various kinds?

A. Yes.

Q. Do you know whether or not, Mr. Seelbach, Mr. Army Seijas has had any accounts in the bank?

A. Yes, he has.

Q. I am going to ask you to identify, if you can, Mr. Seelbach, Exhibit No. 68?

A. Yes, I can identify them.

Q. What are they?

A. They are the signature cards for six accounts.

Q. What are the accounts, Mr. Seelbach?

A. The United Amusement Company, United Amusement Company tax account, The Bremerton Amusement Company, Bremerton Amusement Company tax account, the American Amusement Company, and the American Amusement Company tax account.

(Testimony of Walter George Seelbach.)

Q. What is the signature card?

A. What is the signature card?

Q. Yes. What is its purpose?

A. It is the speciman of the man's signature or those authorized to draw funds against the account or from the account.

Q. Relating to the account of United Amusement Company, Mr. Seelbach, the first account you mentioned, who was authorized to draw on that account?

A. Army Seijas and William R. Forman.

Q. What is the date of that card? When was the authorization signed? [112]

A. July 21, 1941.

Q. Are there any other persons who were entitled to draw on that account? A. None.

Q. Now, referring to the United Amusement Company tax account, I will ask you the same questions. Who were the people authorized to draw on that account?

A. Army Seijas, W. R. Forman.

Q. And what date of that authority?

A. June 19, 1942.

Q. I am now going to direct your attention to the Bremerton Amusement account. Who were the people who were named as having authority to draw on that account?

A. Army Seijas, W. R. Forman.

Q. And on what date was that authority created?

A. There is a little question there. It was probably June 1, 1942 that the signatures were provided

(Testimony of Walter George Seelbach.)

for us and it appears as though perhaps the account was opened slightly prior to that. That isn't uncommon.

Q. Was any other person authorized to use that account? A. No.

Q. When you say that the account was perhaps opened shortly prior to the date you indicated, how long before the authority would that be?

A. There are two dates, May 16, 1942, and June 1, 1942. [113]

Q. What is the significance of the May 16 date?

A. It was probably the time the opening deposit was made.

Q. Does the card indicate at what time the account was closed or the authority terminated?

A. May 13, 1944.

Q. Now, Mr. Seelbach, in connection with the Bremerton Amusement Company tax account, who was authorized to use that account?

A. Army Seijas and W. R. Forman.

Q. And what date was the authority created?

A. The same as the prior one, the dates appearing are May 16 and June 1, May 16 being the probable dates the account was opened and June 1 the probable date of the receipt of the signed signature cards.

Q. What about the closing date?

A. Closed May 13, 1944.

Q. And in connection with that account, are any other persons authorized to use the account?

A. No.

(Testimony of Walter George Seelbach.)

Q. The American Amusement Company account, who was authorized to use that account?

A. Army Seijas and W. R. Forman.

Q. And what was the opening date of that authority? A. June 1, 1942.

Q. And the closing date? [114]

A. November 29, 1943.

Q. Were any other persons authorized to use that account? A. No.

Q. Now, the American Amusement Company tax account, who was authorized to use it?

A. Army Seijas and W. R. Forman.

Q. The opening date?

A. The same as in those prior ones where the two dates appear, May 16 and June 1.

Q. 1941 and 1944?

A. 1942. May 16, 1942, and June 1, 1942.

Q. In connection with the United Amusement Company account, both the regular account and the tax account, can you tell us the opening date of those two accounts?

A. I believe I answered the opening date on the United Amusement Company. That is July 21, 1941.

Q. And the closing date?

A. I can't answer that. Part of our records aren't available on that.

Q. All right, sir.

A. The other one, you wanted the opening date for the tax account?

Q. Yes.

(Testimony of Walter George Seelbach.)

A. On the United Amusement it was June 19, 1942.

Q. And the closing date on that indicated there?

A. There are two dates—might I see one of the other exhibits, the ledger sheets?

Q. For the United Amusement Company?

A. Tax account.

Mr. Mead: May I inquire the number of the exhibit?

Q. (By Mr. Billinghurst): This is Exhibit No. 69.

A. The closing date for United Amusement Company tax account was January 15, 1946.

Mr. Billinghurst: Thank you. At this time we will offer Exhibit No. 68.

Mr. Mead: We have the same objection as to materiality, your Honor, as to this exhibit.

The Court: I rather think that under the present showing these are admissible, Mr. Mead. If you want to elaborate on your objection, I will give you an opportunity to do so.

Mr. Mead: Well, they are not connected up.

The Court: Well, we can't do it all at once. I am going to admit these exhibits.

(Thereupon, Plaintiff's Exhibit No. 68 for identification was admitted into evidence.)

Q. (By Mr. Billinghurst): Mr. Seelbach, Exhibit No. 69 you have already seen. Can you describe it?

A. Exhibit 69 is the ledger sheets of the United Amusement [116] Company and United Amusement Company tax account.

(Testimony of Walter George Seelbach.)

Q. Now, do these accounts refer to the same accounts related to the signature cards you have discussed in the previous exhibit?

A. They are the accounts covered by those signature cards.

Q. Referring to the United Amusement Company Tax account, what was the opening date of that account?

A. I answered that from the signature cards. I should explain here that we have a retention schedule for our bank records which does not contemplate the retaining of ledger sheets for over ten years. Therefore, I can't answer from the ledger sheets the opening date. It is quite by accident that we have these ledger sheets dating back to the first of '43.

Q. Then, the accounts would be opened as of the times you indicated as to the authority connected with the previous exhibit? A. Correct.

Q. And how about the closing date?

A. The closing date would be indicated on the signature cards and corroboration would be on the ledger sheets if they cover the closing date.

Q. All right. Now, Mr. Seelbach, what is a bank ledger sheet? What general information does it contain?

A. Well, it is the book of account for each customer that [117] indicates the date and the amount of deposit, and the date and amount of withdrawals, with a running balance extended.

Q. Does it contain any other information?

(Testimony of Walter George Seelbach.)

A. Only in this way, in certain instances symbols may appear opposite some of the withdrawals. Those symbols, unfortunately, I don't have a record here, and I know what some of them are but I don't know all of them. "DM" for instance, meaning debit memoranda. If there is no symbol appearing, then it is a check.

Q. Then, the ledger sheet indicates the dates of deposits and withdrawals and relating to this particular account, which we are talking about?

A. Yes. Correct.

Q. And various data concerning the manner of deposit? A. Yes.

Mr. Billinghurst: At this time, your Honor, we will offer Exhibit No. 69.

Mr. Mead: May I inquire about it?

The Court: Yes, you may.

Examination on Voir Dire

Q. (By Mr. Mead): I understand, Mr. Seelbach, that this ledger sheet does not cover the entire period of time shown that the account was opened by your signature card, is that right? [118]

A. That may or may not be true. If any of those accounts were opened in 1943 or thereafter, I don't recall that any of them were, but if they were opened in '43 or thereafter, the ledger card would show the opening date. I mean the ledger sheet would show the opening date.

Q. It is my understanding that the signature card would indicate that the account was opened in

(Testimony of Walter George Seelbach.)

June of 1942? A. That wouldn't be covered.

Q. And that period from June of 1942 up to the first entry shown on the first ledger card which is January 2, 1943, would be the gap, would it not, sir? A. Correct.

Q. These entry cards, then, do they run up to the end of the period, do you know?

The Court: These are not entry cards, are they?

Q. (By Mr. Mead): The ledger sheets run up to the end of the period shown on the entry cards, or don't you know?

A. I am not understanding your question exactly. When you speak of entry cards, do you mean signature cards?

Q. My understanding, sir, is that the signature cards—there is a little confusion and I think the confusion is on my part. We have had some signature cards which you say indicate the opening and closing dates of these respective accounts. My point is, sir, that I want to determine whether or not the ledger sheets are complete and [119] cover the period of the various accounts from the time they were opened until the time they were closed.

A. They may or may not, depending on whether they run into our retention schedule or destruction schedule, whichever you want to call it.

Q. I see. And I think you said something about that being ten years?

A. Ten years for the ledger sheets.

Q. So they may or may not be complete?

A. They may or may not be. It is self evident

(Testimony of Walter George Seelbach.)

from the dates appearing on those sheets. They speak for themselves.

Q. They don't go back to the beginning, at least that is evident, but I haven't examined them all, and I wondered if you knew they were complete as to the entire period of time shown that these accounts were opened, except for the gap in the beginning, of course.

A. I don't recall. I would have to refer to them and refer to the——

The Court: Take another look at them, Mr. Seelbach, and see if you can tell us about it. As I understand the matter, there was a period of some months at the beginning of these accounts that the ledger does not show, they presumably having been destroyed under your destruction program, is that [120] right? Do I understand that correctly?

The Witness: If the account was opened prior to January 1943, that could easily be true.

The Court: Now, the question Mr. Mead wants answered is, are they complete at the other end?

Mr. Mead: Yes, that is the point.

The Witness: At the closing?

The Court: At the closing end, that is right.

Q. (By Mr. Mead): Are they complete from the January 1943 date to the closing of all of the six accounts as each one of the ledger sheets for each one of the accounts included in Exhibit No. 69?

A. They are complete as to all of the accounts except United Amusement Company regular ac-

(Testimony of Walter George Soelbach.)

count, regular as distinguished from the tax account, and that account extended into 1946, and, unfortunately, we have in spite of a pretty extended search, we have been unable to find the ledger sheets for the period from 1946 until the time that it was closed.

Q. And the date that that account was closed was what date, Mr. Soelbach?

A. I didn't mention the date of the closing of the United Amusement Company account. I merely said that it was closed, but I didn't give the date.

Q. What exhibit, by the way, is that, sir? Is that No. 69, the card which shows the date of the opening and the closing? [121]

A. That is Exhibit 69, and the card does not show the closing date. It is merely stamped "closed" but without the date.

The Court: Which card is that of the several attached?

The Witness: United Amusement Company.

The Court: The second card down from the top?

The Witness: That is right.

Q. (By Mr. Mead): Is that the only card with respect to any of these six accounts that does not show the closing date?

A. Yes. That is the only one that the closing date is not indicated on the card.

Q. And the ledger sheet with that account, that would go with that account which might show the closing date of that account or help you establish

(Testimony of Walter George Seelbach.)

when the account at least became inactive or closed out, that is not available?

A. It is not available, that is right.

The Court: The Exhibit is offered?

Mr. Mead: We have this objection, your Honor, that the exhibit is not complete and that it does not —as to the United Amusement Company it does not show when it was closed, and that the ledger cards which would aid us in establishing that are likewise missing. [122]

The Court: That may have something to do with the weight to be given to it but not the admissibility. The exhibit is admitted.

(Thereupon, Plaintiff's Exhibit No. 69 for identification was admitted into evidence.)

Q. (By Mr. Billinghurst): Mr. Seelbach, you have identification No. 70. Can you describe it?

A. Exhibit 70 consists of the ledger sheets for the Bremerton Amusement Company and for the Bremerton Amusement Company tax account.

Q. And are they the two accounts to which you referred when you were describing Exhibit 68, the signature cards? A. Yes.

Q. What is the date of the opening entry on the United Amusement Company tax account, if it is disclosed there?

A. You are speaking of the Bremerton Amusement Company, are you not?

Q. Pardon me. Bremerton Amusement Company.

A. Well, we run again into the fact that the ac-

(Testimony of Walter George Seelbach.)

count was opened at a time prior to January of 1943, so the opening entry on the ledger sheets which are available here is the extended balance from December 31 of '42. The card will indicate the opening date of the account.

Q. And what about the date of the last entry on the ledger sheet? What is that date? [123]

A. The closing entry is May 13, 1944.

Q. Now, can you say, Mr. Seelbach, whether or not the same situation exists with respect to these ledger sheets that existed with respect to the United Amusement Company ledger sheets as to the period of time covered by available records now?

A. Excepting that in the case of the Bremerton Amusement Company and Bremerton Amusement Company tax account, we have the ledger to the closing date that is to the end of the account.

Q. And that covers both the regular account and the tax account? A. Right.

Q. And what was the date that is indicated there?

A. Do you mean the closing dates?

Q. Yes.

A. For both accounts, on the regular accounts, May 13, 1944, and on the tax account it is May 13, 1944.

Q. And these documents, these ledger sheets, are similar to and serve the same purpose as those you previously described, isn't that correct?

A. Yes.

Q. For the United Amusement Company?

(Testimony of Walter George Seelbach.)

A. Yes.

Q. But for a different company? [124]

A. Yes.

Mr. Billinghurst: At this time we will offer No. 70.

Mr. Mead: May I have the signature cards that went with this account, please?

Mr. Billinghurst: It should be No. 68.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seelbach, as to the United Amusement Company, do you have an account of the United Amusement Company of Bremerton?

A. I can't answer that. I believe all that was covered in the subpoena was United Amusement Company tax account, and the American Amusement Company and the Bremerton Amusement Company. I am going from recollection now, isn't that correct.

Q. Well, I don't know.

Mr. Billinghurst: That is correct.

Q. (By Mr. Mead): You are referring to your subpoena, so all you know is what you produced as a result of a subpoena, is that right, and these cards that you have here, No. 68, Exhibit 68, that match up with the ledger sheets which you have also produced here, is that right? A. Correct.

Q. And are there any other signature cards besides these for [125] the same accounts or for later

(Testimony of Walter George Seelbach.)

accounts after these accounts were closed in the same name?

A. There were no later accounts opened under those same names. I know that, but I couldn't answer whether—that is, at this time I couldn't answer whether there might have been other accounts possibly under different names.

Q. Or similar names. Weren't there subsequent accounts opened after the closing of these accounts, and particularly with regard to the United Amusement Company of Bremerton which were carried on your books under different names, may I inquire?

The Court: It doesn't seem to me that that is quite voir dire. It may be, but I don't want to split any hairs about it. However, it seems to me that that is beyond voir dire, isn't it?

Mr. Mead: It may be, your Honor, except to ask him whether, with respect to these, they are all of the accounts.

The Court: I want to allow you latitude.

Q. (By Mr. Mead): It is a closed account?

A. I find that question a little bit difficult to answer.

Q. Well, in order to clarify it, sir, was there a limitation in the subpoena that was served on you to bring in these cards and these ledger sheets which covered these accounts [126] up to a certain time only? A. Yes.

Q. Will you please produce it, sir?

A. This isn't the subpoena. This is a reproduc-

(Testimony of Walter George Seelbach.)

tion of the subpoena. Do you want me to read that?

Q. Yes.

A. "And bring with you signature cards for the regular and tax accounts of United Amusement Company, Bremerton Amusement Company, American Amusement Company, partnerships owned by Army Seijas and William R. Forman." That is the first part of the request. No. 2, "ledger sheets for the above accounts for the years 1942 to 1946 inclusive."

Q. So, then, the subpoena was limited, sir, in the production of these records to only those partnerships which showed on your books as being participated in by Army Seijas and William Forman, and the subpoena did not include or cover partnerships under any of these names between Army Seijas and any other individual, is that correct?

A. That is correct.

Q. Could you then state whether you have other signature cards and other ledger sheets which would show other accounts in these same names of partnerships between Army Seijas and other individuals?

A. I couldn't answer that now.

Q. You couldn't answer that? [127]

A. Not from here. I would have to consult our bank records to answer a thing of that kind.

Q. And, of course, that answer would pertain to United Amusement Company of Bremerton and any of these accounts, I assume?

A. I would think so, yes. Understand now that

(Testimony of Walter George Seelbach.)

what I am answering is to the best of my knowledge. We had no accounts under similar names.

The Court: Similar to United Amusement Company or similar to Forman and Seijas?

The Witness: Similar to the name of these accounts which was United Amusement Company and Bremerton Amusement Company. We had no accounts similar in name to that.

Q. (By Mr. Mead): But the subpoena that was served on you directed you to produce these named accounts and only such partnerships as may be shown in your books between Army Seijas and William Forman? A. That is right.

Q. Did you have an account under the name of United Amusement Company or United Amusement Company of Bremerton which— in which the partners were Army Seijas and a man by the name of Morin?

A. I don't know whether I have a record of the investigation on that. No, I don't have. I can't answer that one offhand [128] either.

Q. So you are uncertain as to that?

A. I am uncertain as to it. I am quite sure we didn't have it, but I wouldn't want to say.

The Court: Your voir dire is closed?

Mr. Mead: We have no further questions on voir dire, your Honor.

The Court: Do you have any objection to Exhibit No. 70?

Mr. Mead: No.

The Court: Admitted.

(Testimony of Walter George Seelbach.)

(Thereupon, Plaintiff's Exhibit No. 70 for identification was admitted into evidence.)

Q. (By Mr. Billinghurst): Mr. Seelbach, can you identify and describe Exhibit No. 71?

A. Yes, Exhibit 71 consists of the ledger sheets of the account entitled American Amusement Company, and the account entitled American Amusement Company tax account.

Q. Now, do these two accounts relate to the accounts that you described in connection with Exhibit No. 68, the signature cards?

A. They do.

Q. And what is the date of the first entry on the tax account?

A. This is the same as occurred in that other case where we don't have the ledger sheets for the period from the opening [129] of the account to the 1st of January, 1943.

Q. Do the ledger sheets—are they continuous to the closing of the account? A. Yes.

Q. And what is the date of the last entry?

A. November 29, 1943, on both accounts.

Q. On both accounts? A. Yes.

Q. And as to the regular account, does the same situation concerning the opening date pertain as it has in the rest of these ledger sheets? In other words, does the opening entry correspond with the opening date of the account? A. No.

Q. I am referring to the regular account now.

A. No.

(Testimony of Walter George Seelbach.)

Mr. Billinghurst: At this time we will offer Exhibit 71, your Honor.

Examination on Voir Dire

Q. (By Mr. Mead): May I inquire, sir, do the same matters that were inquired into with respect to the previous ledger sheets would apply likewise to this one, I suppose, is that right? This does not cover the full period of time that the account was opened, or do you know?

A. That is correct. The same thing applies as applied to the others. In other words, the account was opened at a date prior to that of the opening date on the ledger sheet, [130] and the ledger sheets for the intervening period are not available due to our destruction and retention procedure.

Q. So, then, this ledger sheet does not purport to show the activity of this particular account up to the closing date of the account from the opening date that is shown on the ledger sheet which is not necessarily the beginning of the account?

A. Oh, yes, it purports to show all activity in the account from the first entry on those sheets to the final entry.

Q. To the final entry which is the closing date of the account, is that it? A. Yes, that is right.

The Court: The only exception in that regard was the United Amusement regular account, wasn't it?

The Witness: That is right.

Q. (By Mr. Mead): And they are complete as

(Testimony of Walter George Seelbach.)

to what they purport to show with respect to each account except for the one mentioned by the court?

A. Let's answer that this way, they are complete for the period from the date of the opening entry as shown on the ledger sheets to the date of the final entry as shown on the same sheets?

A. They are complete for that period.

Q. But is the final entry which is shown on the same sheet, [131] the closing date of the account? Was the account closed at that time?

A. In every case excepting the——

Q. United Amusement, the one mentioned by the court?

A. United Amusement Company regular account.

Mr. Mead: Thank you. No objection.

The Court: Admitted.

(Thereupon, Plaintiff's Exhibit No. 71 for identification was admitted into evidence.)

Q. (By Mr. Billinghurst): Can you identify Exhibit No. 72, Mr. Seelbach? A. Yes.

Q. What is it?

A. Signature card for an account entitled "Army Seijas, trustee."

Q. Are any other persons—does the card contain authority for any other persons to use the account? A. It does not.

Q. What was the date of the creation of this authority on the account?

A. December 14—I have a little difficulty reading this date, December 14, 1939, it appears to be.

(Testimony of Walter George Seelbach.)

Q. And is the date when the account was closed indicated? A. It isn't shown.

Q. And is this signature card similar in purpose and intent [132] to the signature cards you described in reference to Exhibit 68? A. Yes.

Q. Is it the same type of card?

A. Yes, only differing in the fact that this is a one name signature, one name authorization.

Mr. Billinghurst: At this time, your Honor, we will offer No. 72.

Mr. Mead: We haven't seen the card, your Honor, but the witness has stated it is an account of Army Seijas, a trustee account, opened in 1939, and he doesn't know when it was closed, and under no circumstances could this be competent and material for this case.

The Court: I am going to reserve ruling, but I want you to cover identification as far as you can go now so that it need not be necessary to call this witness for this particular thing, at least.

Q. (By Mr. Billinghurst): Mr. Seelbach, are you familiar personally with this account? Do you know of your own knowledge when it was closed?

A. Yes.

Q. The account of Army Seijas, trustee?

A. Yes—I am not at this time, no. Might I inquire whether this wasn't one of the exhibits in the prior trial and [133] held over?

Q. I believe it was, yes.

Mr. Mead: The witness has said he didn't know, your Honor, and the record shows that it can't be

(Testimony of Walter George Seelbach.)

determined, so I think any further inquiry along this line would be improper.

Mr. Billinghurst: I think, your Honor, we will be able to tie this in, Exhibit 73.

Q. (By Mr. Billinghurst): Can you describe that exhibit, No. 73, Mr. Seelbach?

A. That is ledger accounts or ledger sheets, I should say, for the account of Army Seijas, trustee.

Q. Now, do those ledger sheets relate to the signature card, No. 72, to the same account?

A. Yes.

Q. Are you able to say——

A. Exhibit 72 is the signature card for this account.

Q. What is the earliest date of entry on the ledger sheets?

The Court: The first entry made in it?

Q. (By Mr. Billinghurst): The first entry made in it, yes. A. January 8, 1946.

Q. Are you able to say by reference to the sheets and to the entry card whether or not the account was in existence through the years from the opening of the authority on the entry—or on the signature card, to the date you [134] just mentioned?

A. The records would indicate that that was right, yes.

Q. What was the date of the last entry on the ledger sheets?

A. The last entry referred to here is May 10, 1949.

(Testimony of Walter George Seelbach.)

Mr. Billinghurst: At this time, your Honor, we will offer for identification No. 73 in connection with the offer of 72.

Mr. Mead: May I inquire of the witness, your Honor?

The Court: Yes.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seelbach, do you have a ledger sheet which shows the activity, if any, of this account from the period that the account was opened December 1939 up to January 8, 1946?

A. I am quite certain that we do not have the ledger sheets for the first part of that period, but I should add that in the case of the other ledger sheets which start with the year of 1943, it was quite by accident and merely due to the fact that the ledger sheets weren't destroyed when and as they were supposed to have been, that I was able to provide the sheets from the first of '43 on to the end of '45. I think it quite possible that because of the fact that I located the prior sheets on the other accounts [135] that possibly earlier sheets here would be available, but I am not sure.

Q. But at least, did your subpoena direct you to produce the ledger sheets that might be available for the period, for example, 1942 through 1945 with respect to this account?

A. The subpoena didn't mention that account at all.

Q. It didn't mention this account at all?

(Testimony of Walter George Seelbach.)

A. No.

Q. And the ledger sheets that you have on this account were commenced January 14, 1946?

A. Well, let me correct that a litle bit. That also, I think, is one of the exhibits from the prior case which I didn't bring with me. They have been retained.

Q. I see. So this exhibit was an exhibit which you produced about a year ago and brought with you at that time, I suppose, and has now been presented to you again for identification?

A. Correct.

Q. So there may be others, other ledger sheets with respect to this account during these earlier years that you couldn't state with regard to?

A. I think it is possible, but I can't answer that definitely.

Mr. Mead: We object to this, your Honor.

The Court: I am going to reserve on 72 and 73. [136] Now it is time to have the morning recess, Ladies and Gentlemen. Let the Jury retire, please.

(Thereupon, the Jury retired from the courtroom.)

The Court: It may be that either one or both of you may wish Mr. Seelbach to do some further search on his records, and while I don't want to dictate to you as to how you are going to do it, if you could do that in recess or at the noon hour, something of that kind rather than take the long time to work that out in front of the Jury, I don't think there is any magic in it either way for any-

(Testimony of Walter George Seelbach.)

body, and it will be more convenient and probably a much more satisfactory way of getting at it, I would think.

However, if you feel there is something about it that you want to take up the Jury's time with, that is up to you. I am not interfering with the way you want to try the case, but I merely suggest that it will save us all time and trouble if you could do that.

Mr. Mead: That is right, your Honor, and if I may, I would like to mention at this time that we would like the witness to search the records of his bank and produce any signature cards, any ledger cards of United Amusement Company of Bremerton or the United Amusement Company which consisted of a [137] partnership between Seijas and Morin, or Seijas and any other individual as well as Seijas and Forman.

The Court: I think in order to avoid any further difficulty with Mr. Seelbach, and to be sure that he does understand what he is to do, I think it might not be a bad idea to write it out exactly what you do want him to do and let the prosecution ask for anything further they may wish, and then he will have it on a sheet and he won't have to remember and he won't be in the danger of getting into difficulty with the court, because I know that he is very sensitive about such matters, and I hate to have to detain him over here for ten days or so, something of that kind.

(Testimony of Walter George Seelbach.)

Mr. Mead: I am sure it won't be necessary, your Honor.

The Court: All right.

(Witness excused.)

The Court: Recess at this time.

(Thereupon, a short recess was taken.)

The Court: Call another witness. [138]

JOHN R. WALSH

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: My name is John R. Walsh, W-a-l-s-h.

Direct Examination

Q. (By Mr. Billinghurst): Where do you live, Mr. Walsh? A. 4730—48th Avenue South.

Q. What city? A. Seattle.

Q. And what is your occupation?

A. Assistant Vice President of the Pacific National Bank.

Q. How long have you been with the bank, Mr. Walsh? A. 25 years.

Q. Now, in connection with your position with the bank, are you custodian of the business records of the bank? A. I am.

Q. Are you acquainted with Mr. Army Seijas?

A. I am.

Q. And Mr. William R. Forman?

(Testimony of John R. Walsh.)

A. I only met Mr. Forman yesterday.

Q. Will you examine for identification No. 52, Mr. Walsh, and state what it is? [139]

A. 52 are signature cards of the United Amusement Company of Bremerton on the partnership agreement between Army Seijas signed by Army Seijas and W. R. Forman. They also include the United Amusements Company of Bremerton payroll account, and there are three signatures on that, Mr. Forman, George A. Heberling, and Army Seijas. The other one is United Amusement Company of Bremerton, a payroll account, and signed and authorized to sign are W. R. Forman, George A. Heberling, and Army Seijas. The other is United Amusement Company of Bremerton tax account by Army Seijas, W. R. Forman, George Heberling, C. W. Heberling. The other is United Amusements Company of Bremerton tax account, and authorized to sign are Army Seijas, W. R. Forman, George A. Heberling, and C. W. Heberling.

The Court: Four separate accounts, Mr. Walsh?

The Witness: That's correct.

Q. (By Mr. Billinghurst): Did you mention two tax accounts?

A. The United Amusement Company of Bremerton income tax account, another one, withholding tax account, and these are duplicate signature cards.

The Court: Are those two additional ones to make a total of six, or are there four total?

(Testimony of John R. Walsh.)

The Witness: There would be five, withholding tax and income tax accounts.

Q. (By Mr. Billinghurst): Relating to the United Amusement [140] Company card, Mr. Walsh, what date was that authority created?

A. April 2, 1945, United Amusement Company of Bremerton.

Q. And what names are listed as those having authority to draw on the account?

A. Army Seijas and W. R. Forman.

Q. Is the date of closing of that account indicated? A. No, sir.

Q. Now, going to the payroll account, Mr. Walsh, is the date of the creation of the authority of that account indicated?

A. On the particular card I have in front of me, it was created June 29, 1943.

Q. And what names are indicated as having authority to use that account?

A. W. R. Forman, George A. Heberling, and Army Seijas.

Q. Now, going to the income tax account, on what date was that authority created?

A. June the 29th, 1943.

Q. And what was the closing date?

A. It is not indicated.

Q. And is the closing date indicated on the payroll account, Mr. Walsh? A. No, sir.

Q. Now, how about the withholding tax account, on what date was that authority created? [141]

A. June the 29th, 1943.

(Testimony of John R. Walsh.)

Q. And how about the closing date?

A. It is not indicated.

Q. And whose names are listed as having authority to use the account?

A. The withholding tax account?

Q. Yes.

A. W. R. Forman, George A. Heberling, Army Seijas, and it looks like Maisie Gardiner. I am not sure of the correct first name.

Q. And how about the income tax account, what names are listed as having authority to use that account?

A. W. R. Forman, George A. Heberling, Army Seijas, and I guess it is Marvis Gardiner.

Q. Now, how about—there was one account known just as "Tax account," is that correct?

A. Yes, sir.

Q. What is the date of creation of that authority? A. June the 29th, 1943.

Q. Is the closing date indicated?

A. No, sir.

Q. Who were the people authorized to use that account?

A. W. R. Forman, George A. Heberling, Army Seijas, and Marvis Gardiner.

Q. Now, these signature cards have what purpose? [142]

A. The signature cards are the cards that the bank must have in order to authorize individuals to withdraw money from the account in this particular name. These are partnership cards.

(Testimony of John R. Walsh.)

Mr. Billinghurst: At this time, your Honor, we will offer for identification No. 52.

Mr. Mead: May I examine, your Honor?

The Court: Yes, you may.

Examination On Voir Dire

Q. (By Mr. Mead): Mr. Walsh, were there any other cards that you had for any other accounts of similar names of Army Seijas and others besides these cards that you have produced here, do you know? A. I do not know that.

Q. You didn't search for that? A. No, sir.

Q. You were subpoenaed directly only to produce these cards? A. That is correct, sir.

The Court: Any objection?

Mr. Mead: We have no objection.

The Court: Exhibit 52 is admitted.

(Whereupon Plaintiff's Exhibit No. 52 for identification was received in evidence.) [143]

Direct Examination—(Continued)

Q. (By Mr. Billinghurst): One more question, Mr. Walsh. Prior to the preparation of the subpoena, isn't it true that agents of the Internal Revenue Bureau checked with you concerning the existence of any such accounts? A. That is true, sir.

Q. And at that time a search was made?

A. That is true, sir.

Q. And, as a result of that, were any other accounts uncovered or discovered by you or someone acting under your authority? A. No, sir.

(Testimony of John R. Walsh.)

Q. Identification No. 53, Mr. Walsh, can you describe it?

A. No. 53 is a copy of a ledger sheet of United Amusement Company of Bremerton, 1812 Smith Tower, Seattle, Washington, beginning with the date of May 4, 1942, an opening balance of $200, and these are the micro-film copies that we have.

The Court: That is the same account, is it, Mr. Walsh, that you referred to under identification No. 52?

The Witness: That is correct, sir.

Q. (By Mr. Billinghurst): What is the date of the last entry, Mr. Walsh? [144]

A. The last date I have here is December 31, 1946, on the same account.

Q. Now, will you describe the ledger sheets generally and what information is contained on it?

A. The ledger sheets are the bank copies of all transactions showing all the credits or deposits to the account, and all the checks drawn against that particular account from 1942 to 1948.

Mr. Billinghurst: At this time, your Honor, we will offer Identification No. 54.

The Court: 53?

Mr. Billinghurst: Pardon me, 53.

The Court: Any objection to 53?

Mr. Mead: No, we have no objection.

The Court: No. 53 is admitted.

(Whereupon, Plaintiff's Exhibit No. 53 for identification was received in evidence.)

(Testimony of John R. Walsh.)

Q. (By Mr. Billinghurst): Please identify No. 54.

A. Identification No. 54 are the bank ledger copies of the United Amusement Company of Bremerton payroll account, 1812 Smith Tower, Seattle, Washington, beginning July 14, 1943, and ending December 31—showing what I have here, December 31, 1948, the records I have.

Q. Now, does this group of ledger sheets relate to the payroll account discussed by you in examining identification [145] No. 52, the signature cards?

A. That is correct, sir.

Q. And this series of ledger sheets accomplishes the same purpose and contains the same general information as that contained with respect to the account described in identification No. 53, is that right? A. That is correct, sir.

Mr. Billinghurst: At this time, your Honor, we will offer identification No. 54.

The Court: Any objection?

Mr. Mead: May we look at it?

The Court: Yes, of course.

Mr. Mead: No objection, your Honor.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 54 for identification was received in evidence.)

Q. (By Mr. Billinghurst): Now, Mr. Walsh, can you identify identification No. 55?

A. Identification No. 55 is the ledger account of the United Amusement Company of Bremerton tax

(Testimony of John R. Walsh.)

account, 1812 Smith Tower, Seattle, Washington, starting June 16, 1942, to March 22, 1949.

Q. And do these ledger sheets relate to the same tax account discussed and described by you in examining Identification No. 52, the signature cards?

A. Yes, sir.

Mr. Billinghurst: At this time we will offer Identification No. 55.

Mr. Mead: No objection.

The Court: 55 is admitted.

(Whereupon, Plaintiff's Exhibit No. 55 for identification was received in evidence.)

Q. (By Mr. Billinghurst): Will you examine and describe No. 56, please?

A. Identification No. 56 is the bank ledger of United Amusement Company of Bremerton withholding tax account, 1812 Smith Tower, beginning July 14, 1943 and ending March 22, 1949.

Q. Do these ledger sheets refer to the account discussed by you in connection with the signature cards in Exhibit No. 52? A. Yes, sir.

Mr. Billinghurst: At this time we will offer No. 56.

Mr. Mead: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 56 for identification was received in evidence.)

Q. (By Mr. Billinghurst): Will you examine and describe if you can No. 57, please? [147]

A. Identification No. 57 is the signature card of Army Seijas' office account, 1812 Smith Tower.

(Testimony of John R. Walsh.)

This is signed and requires two signatures—two signatures are authorized, one required, and the card is signed by Army Seijas and W. R. Forman.

Q. Which one was the signature required?

A. Either one.

Q. What is the opening date for this authority?

A. September 12, 1946.

Q. As to both parties, Mr. Walsh?

A. That is correct.

Q. Is the closing date of the authority indicated?

A. No, sir.

Q. Are any other persons authorized to use the account? A. No, sir.

Mr. Billinghurst: At this time we will offer No. 57.

Mr. Mead: Objected to as being incompetent and immaterial, your Honor, beyond the time involved in the matter.

The Court: The exhibit is admitted.

(Whereupon, Plaintiff's Exhibit No. 57 for identification was received in evidence.)

Q. (By Mr. Billinghurst): No. 58?

A. No. 58 is a bank's ledger records of the Army Seijas [148] office account 1812 Smith Tower, Seattle, Washington, beginning September 13, 1946, and ending December 31, 1948.

Q. Now, does this account relate to the signature card you previously discussed?

A. Yes, sir.

Q. And this ledger sheet, Mr. Walsh, is similar

(Testimony of John R. Walsh.)

in purpose and content as well as to the previous ledger sheets you have discussed?

A. Yes, sir.

Mr. Billinghurst: At this time we will offer No. 58.

Mr. Mead: May I inquire, your Honor?

The Court: You may.

Examination On Voir Dire

Q. (By Mr. Mead): Is this the end of the account, Mr. Walsh, the end of this ledger sheet is the account closed at that time?

A. No, it was not, sir. All those accounts have balances at the last date that I gave you, but that was all that was asked for.

Q. This was all that was covered by your subpoena, is that correct? A. That is correct, sir.

Mr. Mead: We have no objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 58 for identification was received in evidence.)

Direct Examination—(Continued)

Q. (By Mr. Billinghurst): Can you describe No. 59, Mr. Walsh?

A. No. 59 are the credit or deposit tickets to the Army Seijas office account. The first credit is dated 4 9 '48. I don't know whether the last one dated 12 9/'48—this is the money that was put into the account by the credits.

Q. That is the account you have discussed in

(Testimony of John R. Walsh.)

connection with the Exhibits 57 and 58, is that correct? A. That is correct, sir.

Q. Does the bank have records of accounts prior to 1948? A. Yes, sir.

Mr. Billinghurst: At this time, your Honor, we will offer Exhibit No. 59.

Mr. Mead: May I inquire, your Honor?

The Court: Yes. [150].

Examination On Voir Dire

Q. (By Mr. Mead): I noticed that apparently the opening date of this is 1948, these tickets. Do you have the tickets back to earlier times than this account, but they were not requested, is that right, Mr. Walsh? A. That is correct.

Q. So you only produced what the government asked you to produce in the subpoena? A. Yes.

Mr. Mead: They are objected to as being remote and way beyond any time involved in the indictment.

The Court: They are admitted. I must assume they will be connected up.

(Whereupon, Plaintiff's Exhibit No. 59 for identification was received in evidence.)

Direct Examination—(Continued)

Q. (By Mr. Billinghurst): Will you examine 60, Mr. Walsh?

A. Exhibit No. 60 is a contract for a safety deposit box at the Pacific National Bank signed by—dated August 9, 1946, Box No. 172, and signed by

(Testimony of John R. Walsh.)

Army Seijas, 1812 Smith Tower. The other two are just transfers. [151]

Q. Now, what general information is contained on the application? What type of information?

A. May I have that question again?

Q. Without referring to specific information contained on the application, what type of information does the application contain?

A. Well, it's a box rental contract between Army Seijas and the Pacific National Bank for a safety deposit box.

Q. What is the date of the application?

A. August 9, 1946.

Q. Does the application indicate when that account was closed, the safety deposit vault contract?

A. The box was surrendered on January 31, 1951.

Q. Does it indicate who was authorized to have entry to the box?

A. Army Seijas, and he also authorized—appointed an agent, Henry Seijas, which, apparently, he never acted on. The agent's signature was never obtained.

Mr. Billinghurst: At this time we will offer No. 60.

Mr. Mead: Objected to, your Honor, on the grounds that it is not relevant.

The Court: Reserved.

Q. (By Mr. Billinghurst): Will you examine No. 61, Mr. Walsh? [152]

A. No. 61 are slips for admittance to the safety

(Testimony of John R. Walsh.)

deposit box No. 172 in the Pacific National Bank, safety deposit admittance slips.

Q. What period of time do they cover?

A. December 3, 1946, to April 18, 1948.

Q. Do they represent all of the entry slips available from the records of the bank?

A. For these times, yes, and they are all signed by Army Seijas.

Mr. Billinghurst: At this time we will offer identification No. 61.

Mr. Mead: Objected to on the same former grounds as Exhibit 60.

The Court: Reserved. You will keep in mind I am expecting you to cover all identification matters with the thought of not recalling witnesses except where it is necessary.

Mr. Mead: Yes, I understand.

The Court: All right.

Mr. Billinghurst: You may question.

The Court: Is that all of this gentleman on direct?

Mr. Billinghurst: Yes.

The Court: Any cross?

Mr. Mead: Yes. [153]

Cross Examination

Q. (By Mr. Mead): Mr. Walsh, you have here all of the signature cards which have to do with any of these accounts either between the individuals who were shown as owning the account or any other individual successively who acquired interest in these accounts? A. Yes, sir.

(Testimony of John R. Walsh.)

Q. They are all here, and you produced all of them that you were able to find?

A. As far as I know.

Q. As far as you know? A. Yes.

Q. Have you made a search for that purpose yourself?

A. I did not make that search, no, sir.

Q. Did someone else make the search?

A. Under my supervision, yes, sir.

Q. Under your supervision? A. Yes.

Mr. Mead: Thank you, sir.

The Court: I believe that is all, Mr. Walsh. You may leave whenever you wish.

(Witness excused.) [154]

Mr. Obenour: Was Mr. Seelbach excused?

The Court: Yes, subject to whatever further you gentlemen needed him.

Mr. Mead: We were going to write out something, your Honor.

The Court: Yes. You will have a little time at noon because I am going to take a longer recess at noon due to another matter on the calendar. You will have extra time.

ROBERT B. GORDON

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Will the witness please state his full name and spell the last?

The Witness: Robert B. Gordon.

(Testimony of Robert B. Gordon.)

Direct Examination

Q. (By Mr. Billinghurst): Where do you reside, Mr. Gordon? A. Tacoma, Washington.

Q. By whom are you employed?

A. Puget Sound National Bank.

Q. How long have you been there?

A. Seventeen years. [155]

Q. What is your position with the bank?

A. Cashier.

Q. In connection with your position of cashier, Mr. Gordon, are you the custodian of the records of the bank? A. Yes, sir.

Q. And as such custodian, I am going to ask you to examine identification No. 46 and describe it if you can.

A. This is an original record card for safety deposit box No. 3001.

Q. And what do you mean by record card?

A. It's the record in which we place the name of the person who owns the box and the record of the payments on the box.

Q. Does the card indicate when the authority was granted, that is, the authority to enter the box?

A. January 20, 1945.

Q. And to whom was it granted?

A. Army Seijas.

Q. Does the card indicate that any other persons may or may not have a right to have entry to the box?

A. He appointed Betty Seijas with the power to enter the box.

(Testimony of Robert B. Gordon.)

Q. Are there any other names indicated?

A. No, sir.

Q. Does the card indicate when the rental account of the [156] box was closed?

A. It indicates it was closed on April 10 of 1950.

Mr. Billinghurst: At this time we will offer No. 46.

Mr. Mead: Objected to, your Honor, on the grounds that it is incompetent, immaterial and irrelevant at this time.

The Court: Reserved.

Q. (By Mr. Billinghurst): Will you examine identification No. 47, Mr. Gordon, and describe it if you can?

A. These are entrance slips to box No. 3,001 signed by Army Seijas.

Q. And that is the box you discussed in connection with the last exhibit, is that correct?

A. Yes, sir.

Q. During what period of time were the entry slips used? What was the date of the first one?

A. February 2, 1945.

Q. And the date of the last one?

A. April 12, 1948.

Mr. Billinghurst: At this time we will offer No. 47.

Mr. Mead: Same objection as to the previous exhibit, your Honor.

The Court: Reserved. [157]

Mr. Billinghurst: You may question.

Mr. Mead: No questions.

The Court: That is all, Mr. Corder.

(Witness excused.)

Mr. Obenour: I wonder if it would be feasible at this time to permit the defense time to examine the documents for whatever other objections they have indicated possibly might arise. The time that they had to examine these—these that have been put in, these are all bank documents that——

The Court: Do you still have all these people here?

Mr. Obenour: At least some of them are, and we would know then what the position the Court would take on these documents.

The Court: I don't think there is any question raised about identification in any case.

Mr. Mead: None at all.

Mr. Obenour: It was my understanding some of the attachments——

Mr. Mead: No.

The Court: I take it there is no question about identification. [158]

Mr. Mead: None whatsoever.

Mr. Obenour: Does the defense still require additional time to examine the documents? It was my understanding—I thought before we proceed with other matters, we could facilitate the proceedings.

The Court: Well, they seem not to wish that.

Mr. Mead: It is my understanding, your Honor, that as to those exhibits which have been identified that before they are offered, we will have an opportunity to examine them more carefully,

and if we do have some further objections, we would be permitted to make it at that time.

The Court: I guess that is what Mr. Obenour has in mind. If there is any question with respect to identification or description of the documents or anything that a witness of this character could supply, if we could get it done now, we won't have to call these people from their work, and in some instances, from other cities.

Mr. Mead: As to that, it was my understanding that we are satisfied as to identification, and there will be no further reason to keep [159] those witnesses.

The Court: Release the witnesses on that understanding.

Mr. Obenour: With the exception of Mr. Seelbach.

The Court: Except Mr. Seelbach who is going to supply some additional information and or make further search of some kind. He will have to be given directions before he leaves.

All right, go ahead, call another witness.

Mr. Mead: Could that also apply to Mr. Walsh? We may want to give him a written slip.

The Court: It may apply to Mr. Walsh, but we better have Mr. Grant tell Mr. Walsh to wait until the noon hour.

GEORGE V. WHITTLE

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

(Testimony of George V. Whittle.)

The Clerk: Please state your full name and spell your last name.

The Witness: George V. Whittle, W-h-i-t-t-l-e.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Whittle? A. Seattle.

Q. And what is your occupation?

A. Certified public accountant.

Q. How long have you been so engaged?

A. Since 1918.

Q. You have been a certified public accountant in Seattle during this time? A. Yes, sir.

Q. Since 1918? A. Yes.

Q. Where is your office? A. Smith Tower.

Q. And do you know Army Seijas?

A. Yes, sir.

Q. And how long have you known Mr. Seijas?

A. Oh, fifteen to twenty years probably.

Q. How did you become acquainted with Mr. Seijas?

A. Well, he is on the same floor in the Smith Tower as my office is on.

Q. Did you ever have him serve as your attorney? A. Yes.

Q. And when was that? [161]

A. From probably around '49, 1949.

Q. And have you ever acted as his accountant?

A. Yes, sir.

Q. And when were you engaged as his accountant? A. July, 1951.

(Testimony of George V. Whittle.)

Q. What was the nature of the engagement?

A. The special agents required a net worth statement, and Mr. Seijas hired me to prepare one.

Q. When you say "special agents," what do you mean?

A. Special agents of the Internal Revenue Service.

Q. In what connection had the special agents of the Internal Revenue Service requested a net worth statement of Mr. Seijas?

A. They were investigating his income tax returns.

Q. When an investigation of income tax is conducted, is there any particular period with which the agents concern themselves, or what is the situation?

Mr. Mead: We are interested in what happened in this particular occasion.

The Court: Yes.

Q. (By Mr. Obenour): What period were the agents concerned with?

A. From the end of 1941 to the end of 1949.

Q. By whom were you engaged?

A. Mr. Seijas. [162]

Q. What is a net worth statement, Mr. Whittle?

A. It's a statement of assessments and liabilities at the end of each year together with showing the differences, either increase or decrease, in assets from the previous year together with what you

(Testimony of George V. Whittle.)

reported in your income tax returns and allowances for living expenses and other deductible items, why, you come to the item that might be unreported.

Q. Is this a method of computation employed by the government in tax investigations?

A. Yes, sir.

Q. And as such, it is a common method employed by the accounting profession? A. Yes, sir.

Q. What was the purpose for which you were to prepare this net worth statement?

A. To determine if there was any unreported income during that period.

Q. By whom? A. By Mr. Seijas.

Q. Did you prepare such a net worth statement?

A. Yes, sir, I did.

Q. And over how long a period of time did you work upon it? A. I think above five months.

Q. And what did you do with it when it was completed? A. Submitted it to Mr. Seijas.

Q. What was the basis of the information which you employed to prepare this net worth statement?

A. From income tax returns and some cases, partnership returns, individual returns of Mr. Seijas and his wife, and financial statements, penciled financial statements, certain bank checkbooks, certain bank statements and return checks, and information submitted by Mr. Seijas.

Q. Do you have records of any of his business interests? A. Beg your pardon?

(Testimony of George V. Whittle.)

Q. Do you have any records of his business interests? A. Of his law business?

Q. No, sir, of any other businesses which he had an interest in?

A. Some books we had were incomplete mostly.

Q. And were these partnerships or incorporations?

A. Partnerships. Corporations, I believe, had records.

Q. Did you see any records of partnerships?

A. Yes, I saw some journals, but I don't think I ever saw a ledger.

Q. And what were the partnerships of which you saw the records?

A. I think they were United Amusement Company. I think it was either United Amusement Company or Amusement Company [164] of Bremerton. I don't recollect now which they were.

Q. And the corporate records, what were they?

A. Well, some of the corporate records were in pencil by an accountant who later put them into ledgers, into proper ink on proper forms.

Q. And during what period were these records maintained for these corporations?

A. Since their inception to the end of '49.

Q. Were they corporations formed prior or subsequent to 1945? A. These corporations?

Q. Yes, sir.

A. I think they were subsequent to 1945, if I remember correctly.

(Testimony of George V. Whittle.)

Q. And these corporations, did they involve Mr. Forman in any way?

A. No, I don't believe so.

Q. Did you receive any records of Mr. Seijas' personal business?

A. No, I never went into the law business.

Q. After you completed your net worth statement, what did you do with it?

A. Submitted it to Mr. Seijas.

Q. Do you know what happened after that?

A. After that, it was submitted to the agents.

The Clerk: Plaintiff's Exhibit 74 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 74, will you identify that, please, sir?

A. Yes, sir.

Q. What is Exhibit 74?

A. This pertains to the statement of net worth.

Q. That you have just described?

A. Beg your pardon?

Q. That you have just described?

A. Yes, sir.

Q. Is there also a letter attached to that statement? A. Yes, sir, there is.

Q. And what does that letter—what is that letter?

A. A statement in connection with the net worth statement.

Mr. Obenour: I offer 74.

The Court: Prepared by you in both instances?

The Witness: Yes, sir.

(Testimony of George V. Whittle.)

Mr. Mead: May I inquire, Mr. Whittle, is this the statement dated December 28, 1951?

The Witness: Yes, sir.

Mr. Mead: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 74 for identification was received in evidence.) [166]

Q. (By Mr. Obenour): Referring to Exhibit 74, what was the source of the information which you employed to include those various assets and liabilities upon that statement?

A. It was from various income tax returns which were made available to me, partnership returns, corporation returns, individual returns of Mr. Seijas and his wife.

Q. Now, they——

A. (Interrupting) And certain records.

Q. Did they include various assets such as stocks and real estate and investments of other kinds?

A. Yes, sir.

Q. What was the basis under which the cost or the amount invested, as the case may be, was established for your use in that statement?

A. It was through Mr. Seijas.

Q. He furnished you any documentation as to the cost of acquisition of the properties or amounts invested in his businesses?

A. Are you talking about stocks?

Q. Any of the assets?

A. Any of the assets?

(Testimony of George V. Whittle.)

Q. Did he document the price you have placed upon that net worth statement or was it strictly oral?

A. No, I saw certain contracts and mortgages and so forth [167] in connection with certain properties.

Q. And as a basis of the price used by you, then it was all furnished by Mr. Seijas and in some instances documented by records?

A. That is correct, sir.

Q. Similarly as to the price at which their various assets were sold, was there a documentation as to the selling price?

A. I think such assets as were sold were taken from his returns. I don't believe there was documentary evidence with regard to that.

Q. Here again, did you receive information from any one other than Mr. Seijas concerning the values of the sale? A. No.

Q. After you completed your net worth statement, did you discuss it with Mr. Seijas?

A. Yes, sir.

Q. What did you tell him that your net worth statement showed?

A. It showed an unreported income of around $165,000.

Q. During what period?

A. For the years 1946-7 and 8.

Q. During the period of 1946-7 and 8 there was unreported income of how much?

A. Of around $165,000. [168]

(Testimony of George V. Whittle.)

Q. And how did you reach this figure of $165,000 unreported income during this period?

A. By taking the difference in assets and liabilities at the end of each year and adding in living expenses and income taxes paid, and then showing what he had reported in the income tax return.

Q. Now, on the net worth statement you go from a calendar year basis, do you not? A. Yes.

Q. And any item is entered upon that statement during the year in which it is acquired?

A. That is correct.

Q. And it is entered at the value which you have established? A. That is correct.

Q. And similarly, any that is disposed of is taken out of the statement during that year in which it is disposed? A. That is correct, sir.

Q. And, as a result of this statement, then, is this correct that he acquired assets or expended money for living to the amount of $165,000 in excess of his reported income during the years '46-7 and 8? A. That is correct, sir.

Q. Did you tell this to Mr. Seijas?

A. Yes, sir.

Q. What did he say? [169]

A. He said he couldn't understand it.

Q. Did you ask him——

Mr. Mead (interrupting): This is objected to as hearsay, Your Honor, and not binding upon the——

The Court: We are a little late with the objection. I think perhaps I would be inclined to sustain——

(Testimony of George V. Whittle.)

Mr. Mead: I move that it be stricken.

The Court: I think it should be.

Mr. Obenour: If your Honor please, on the basis of the opening statement of Counsel as to the situation under which this subsequent evidence to be introduced——

The Court: I have that in mind, but I still think it is hearsay.

Q. (By Mr. Obenour): Did you ask Mr. Seijas where your net worth statement was in error?

A. I asked him to check it to see if I had missed out anything.

Q. Did he offer any correcting to show that your statement was in error? A. No, he did not.

Q. Did you ask him for an explanation of where this $165,000 had come from? [170]

A. Yes, sir, I asked him numerous times.

Q. Was this in the course of your preparation of your net worth statement or afterwards?

A. After the result had been determined.

Q. After the result had been determined and this was concluded on December 31——

A. December 28, 1951.

Q. December 28, 1951? A. Yes.

Q. And on these occasions did he give you any explanation of where $165,000 in excess of his income expended in 1946 through 1948 had come from? A. No, he did not.

Q. In the course of the use of the net worth statement in tax investigations, what is the normal

(Testimony of George V. Whittle.)

defense given for the expenditures in excess of reported income?

Mr. Mead: Objected to, your Honor, as a highly improper question. The question is what happened here and not what is a normal defense in tax cases in asking an accountant to testify.

The Court: I think so. Sustained.

Q. (By Mr. Obenour): Is there any explanation that could be made that would constitute a legal defense by the accounting profession to unexplained expenditures from your net worth statement? [171]

Mr. Mead: Same objection, your Honor.

The Court: The form of the question is objectionable, I think.

Mr. Mead: It's the same question in a different way.

The Court: I have sustained the objection. The form of the question is objectionable.

Q. (By Mr. Obenour): In the manner of the use of the net worth statement, what you have called unexplained income of $165,300, what is the basis of determining that to be income?

A. Well, the basis is on the assets owned less the liabilities at the end of any period in comparison with each one.

Q. The mere fact of expenditure of this money, does that in any way constitute proof that the money was income earned during that period?

Mr. Mead: Objected to, your Honor, as calling for a conclusion of the witness. He has already testified on this subject.

(Testimony of George V. Whittle.)

Mr. Obenour: It's a fact that it is a conclusion that it is income.

The Court: Well——

Mr. Mead: That remark is objectionable, too.

The Court: I think that an explanation may be made of the factors involved in the net worth statement and what their significance is. Perhaps the witness should elaborate to some extent. There may be some ladies and gentlemen that are not acquainted with these matters. Further elaboration on the factors involved in the preparation of the statement, I am not excluding that. I do think that the form or approach to the matter here is objectionable.

Mr. Mead: I appreciate that your Honor has ruled on that, and I also object to Counsel's remark before your Honor had an opportunity to rule on it, and ask that the Jury be instructed to disregard his remark.

The Court: Yes, the remark will be stricken.

Q. (By Mr. Obenour): The difference of expenditures and income reported were the information furnished you at this time. Did it in any way explain the source of this money?

A. No, it does not explain the source of it. It explains how it was expended.

Q. In order to be taxable income, what is the requirement under the law pertaining to monies coming into a person's possession? [173]

Mr. Mead: Objected to as calling for a conclusion of law for the witness to state.

(Testimony of George V. Whittle.)

The Court: Well, that is so, but a certified public accountant dealing with these matters is qualified to express an opinion as to what amounts are taxable income, I think, at least, entitled to explain what he understood it to be when he prepared this net worth statement.

Mr. Mead: That wasn't the question, your Honor.

The Court: No, it wasn't, but in that sense, I think the question can be answered.

The Witness: May I have the question, sir?

Q. (By Mr. Obenour): What, sir, was your understanding of what constituted taxable income at the time that statement was prepared?

A. Well, where is the discrepancy between a net worth final determination and what was reported, why, it is always considered to be income reported and not accounted for in any way. As to where it came from, we don't know. I don't know. I didn't know at that time, and whenever the excess of assets appear in a year over and above what was reported, then it is natural to assume that the money was made in that year.

Q. The increases assumed to have been made in that year? [174]

A. It's assumed to have been produced in that year.

The Court: That is for the purpose of a net worth statement?

The Witness: That is correct, sir.

Q. (By Mr. Obenour): What is the effect upon

(Testimony of George V. Whittle.)

your net worth statement of monies expended during any given time which had been, in fact, earned at a prior time and saved?

A. Well, in the net worth statement that doesn't show up when it was earned. The only time it appears is in the year in which it's in excess of the income tax return.

The Court: But the point of the question is, if in a given instance in the preparation of the net worth statement, a certain item is carried in a given year which, in fact, was employed monies accumulated in previous years, what effect does that have with respect to the net worth statement and the conclusions to be drawn from it?

The Witness: Well, if one knew when the money was earned irrespective of the year in which it shows up, why, naturally, a CPA would put it in the year in which he found it to be so.

Q. (By Mr. Obenour): In your net worth statement you have an item called "Cash on Hand?"

A. Yes, sir.

Q. And what is that item?

A. That is the excess determined in that year of cash on hand not expended from income.

Q. And you have a figure of cash on hand for each of the years '41 through '49?

A. None for '41.

Q. None for '41? A. No.

Q. Where does it first appear?

A. December 31, 1942.

(Testimony of George V. Whittle.)

Q. What was the figure of cash on hand for January 1, '46,—for December 31, '45.

A. December 31, '45, was $50,432.57.

The Court: I am reluctant to interrupt this subject matter now, but I think that this is as good a breaking point as any, and I am going to suspend now for the noon recess. I think we will be able to proceed at 1:45.

I hope you have a pleasant lunch. Keep in mind my admonition and be ready to go at 1:45. You may be excused now.

(Thereupon, the Jury retired from the courtroom.)

The Court: I neglected to mention this morning that the objection to the introduction of [176] evidence, and the motion for judgment of acquittal, which the clerk has filed in the case, the Court denies all portions of the first four paragraphs of the motion; namely, those involving matters previously heard at length, and with respect to the alternative motion, it will be denied with leave to renew at a later time if the state of the evidence jusifies it.

We will recess now. [177]

(Whereupon, the noon recess was taken.)

After Recess

The Court: The jurors are all present.

Q. (By Mr. Obenour): In your net worth computation, Exhibit 74, how do you take into account the entry of cash on hand as to your computation for

(Testimony of George V. Whittle.)

the unexplained increase in net worth for each of the succeeding years?

A. There is submitted with this net worth statement supporting schedules for each of the years, and it starts with a net income reported in the return, and if there had been examinations in between by the government which increased the income in any of those years, then we have increased that return by that amount in order to arrive at the total income for that particular year, and then there is deducted therefrom what had been expended for investments, and taking into consideration, the increase or decrease in cash balances in the banks and reductions in assets, and these are fully shown on each of these sheets attached to it for each year. The resulting balance is the unreported income. In other words, they have for 1942, $28,197.39 received more income than expended, so it was treated as cash on hand.

Q. Now, you have also entries on your net worth for cash in banks. A. Yes, sir. [178]

Q. And the basis of that is what?

A. The basis of that was either the stubs or the checkbooks or statements of the bank.

Q. And the figure for cash on hand, is that distinguished in any way from your entry of cash on bank? A. Yes, sir, absolutely.

Q. Did you have any documentation for your entry of cash on hand?

A. Only these yearly statements submitted with the net worth.

(Testimony of George V. Whittle.)

Q. Now, is this, do I understand you to say, then, sir, that you made a computation for each of the preceding years prior to January 1, '46, to determine the reported income and expenditures in order to reach a figure for cash on hand which would be in excess of that which had been expended or deposited to a bank? A. That is correct, sir.

Q. And those are in the accompanying documents? A. Yes, sir.

Q. And what did your computation show now for available cash on hand resulting from this excess of income over expenditures for those previous years? A. Up to December 31, '45, sir?

Q. Yes, sir. A. $50,432.57. [179]

Q. And this was based upon his reported income? A. Yes, sir.

Q. For those earlier years? A. Yes, sir.

Q. What would be the effect, sir, on your computation if, in fact, he had additional income or funds that he received during these prior years in excess of those reported?

Mr. Mead: Objected to, your Honor, unless it's just a hypothetical question. There is no such testimony.

The Court: At the present time it's a hypothetical question. What would be the effect—do you understand the question?

The Witness: Yes.

The Court: It is merely hypothetical.

The Witness: You would have to determine that

(Testimony of George V. Whittle.)

they were funds received in prior years first before you could put it in the previous years.

Q. (By Mr. Obenour): Yes, sir. Assume if you will, that there had been funds in excess of that reported by Mr. Seijas either as income or from any other source, what would be the effect of your computation of cash on hand as of 1/1/'46?

Mr. Mead: That is objected to, your Honor, [180] unless it's qualified by the statement that this is a hypothetical question.

The Court: He made that plain. He asked him to assume that.

The Witness: In other words, if I were to assume that funds had been received in prior years, what effect that would have?

The Court: Funds in addition to those that you did take into account, what effect would that have on your computation of the——

The Witness: It would increase the cash on hand at the end of each year.

Q. (By Mr. Obenour): Would it also increase the cash on hand as of January 1, '46?

A. Yes, sir.

Q. Assuming that Mr. Seijas had received $165,000 in excess of his reported income or in the form of non-taxable income prior to January 1, '46, what effect would that have upon your beginning figure for cash on hand?

A. Well, it would have to start in '42, each year be increased to the end of '45.

The Court: The point is, though, what effect

(Testimony of George V. Whittle.)

would it have on that figure for the end of '45 or the beginning of '46?

The Witness: A considerable increase. [181]

The Court: To what effect?

The Witness: To $165,000 if he had——

The Court: That is what he asked you to assume.

The Witness: I am sorry.

The Court: All right.

Q. (By Mr Obenour): Assuming that he had so received $165,000 and which would, as you say, increase his beginning cash on hand, what effect would that then have on your computation of the unexplained net worth, increase for the succeeding years '46, '47 and '48?

A. It would be decreased in those years, but there might be still a cash balance. You would have to figure that out. You would have to figure that out because at the end of '45, you got 50,000 and 160,000 now, even, would be 210. One would have to find the difference in the assets, the increase in assets over liabilities for the succeeding years in order to determine which amount would be properly included in each year.

Q. Sir, what was the unexplained net worth increase you reached by your net worth method for the years '46 through '48?

A. I didn't quite get that, your Honor.

Q. According to your net worth statement, what was the unexplained increase for the years '46 to '48? [182] A. That 165,000.

Q. Yes, sir. Now, if you had that much increase

(Testimony of George V. Whittle.)

in your beginning cash, and you still had the same ending cash that you have there, what would be the effect upon your computation?

A. Well, you would have 160,000 besides the 50,000. It would be 210,000 cash.

The Court: But that isn't the question. The question is, what effect would that have upon your net worth statement for the years in question?

The Witness: It would show the unaccounted for income in prior years.

Mr. Obenour: Yes, sir.

The Witness: That is correct.

Q. (By Mr. Obenour): What, then, sir, would be the effect upon Mr. Seijas' tax liability as shown by your net worth method if he had, in fact, had the additional amount of $165,000 at the beginning of the period?

A. Those increases would have shown up at the end of '41 and at the end of '45.

Q. I will ask you directly to answer the question.

The Court: You don't follow the question, Mr. Whittle, carefully. Restate the question. Now, please, follow it very closely.

Q. (By Mr. Obenour): Mr. Whittle, what, then, would be the [183] effect of the tax liability of Mr. Seijas for the years '46, '47 and '48 as shown by your net worth method if you had, in fact, used the figure of beginning cash on hand which would have included such $165,000 addition?

A. It would probably eliminate any tax liability.

Q. And did you ask Mr. Seijas if, in fact, he had

(Testimony of George V. Whittle.)

any additional cash on hand which would increase your beginning cash and so explain your net worth increase? A. Yes, sir.

Mr. Mead: Could we have the time, your Honor, what date?

The Court: He said he did. When was it you asked him that?

The Witness: Oh, I asked him numerous times during the investigation after I discovered that the item showed up in '46, '47 and '48.

Q. (By Mr. Obenour): Do you mean after you prepared the net worth statement? A. Yes, sir.

Q. And on these occasions did he ever have an explanation of any increase or any additional beginning cash? A. No, he did not.

Q. And at this time the only explanation for beginning cash was your computation of the amounts in excess that was [184] expenditures as shown by his reported income?

A. That is correct, sir.

Q. At a subsequent time did Mr. Seijas give you an explanation of this increase in net worth for the years '46 to '48?

A. No, not until the year 1953.

Q. 1953, this was prepared when, sir?

A. 1951.

Q. And after the intervening period between December of 1951 and 1953, did you have any contacts with the agents concerning this tax liability?

A. Yes, sir.

Q. And what then happened in 1953?

(Testimony of George V. Whittle.)

A. Oh, around April 1953, Mr. Seijas brought in diaries for the years 1942, '43, '44 and '45 and explained that he had kept track of what he and Forman had split from the top of the pinball machines.

Q. Where did that take place?

A. I am not sure whether it was in his office or mine. I think it was in his.

Q. What was the occasion when this happened?

A. There seemed to be no occasion to me, because I knew nothing about them, and it was a complete surprise.

Q. What did Mr. Seijas do?

A. He had taken a tape off these diaries and shown it to me. [185]

The Court: Do you mean an adding machine tape?

The Witness: An adding machine tape, yes, sir.

Q. (By Mr. Obenour): Would you describe the diary, sir? A. Beg your pardon?

Q. Would you describe these diaries?

A. Oh, they were an ordinary diary about that length and probably about that wide (indicating), as I remember them.

Q. Color? A. I don't remember the color.

Q. How did he identify these diaries?

A. Well, he showed me on different pages the tape from different establishments and the split, 50 per cent.

Q. Well, whose diary was it? A. Seijas'.

Q. And what years were they for?

(Testimony of George V. Whittle.)

A. For '42-3-4 and 5.

Q. Were there entries in all of the diaries at any regular intervals?

A. Well, I think they made collections every two weeks. There were other notations in the diaries besides those as I remember them.

Q. How did he show them to you? [186]

A. He just produced them to me.

Q. Did you examine them?

A. I looked at them, but I wasn't particularly interested then because I just wondered about—it was quite a shock to me after three years trying to get some information and all at once have him put these diaries in front of me.

Q. What did he state these diaries represented?

A. They represented in his opinion the amounts——

Mr. Mead (interrupting): That is hearsay, of course, your Honor. We can go into it, and I won't object to it if we can also inquire into hearsay.

The Court: You just have to make your objections as you see them, Mr. Mead. I will have to rule on them as you make them.

Mr. Mead: I will not object to the question, then, your Honor.

Q. (By Mr. Obenour): Incidentally, you were subpoenaed by the government? A. Yes, sir.

Q. Is that correct? A. Yes.

Q. Were you subpoenaed by the defense as well?

A. Yes, sir. [187]

Q. And have you discussed your testimony with

(Testimony of George V. Whittle.)

anyone from either the defendant or any of his representatives?

A. With his representatives.

Q. And who was that? A. Mr. Mead.

Q. And when was that?

A. I think it was about last Thursday or Friday.

Q. And have you furnished any of the documents to which you have been referring to Mr. Forman or his representative at any time?

A. Yes, sir. He asked me for a copy of my net worth statement, and that is all he asked me for.

Q. And you furnished that? A. Yes, sir.

Q. And at no time have you ever received any instructions against such action by the government, have you? A. No, sir.

Q. I am sorry, I have forgotten——

The Court: The question was, did Seijas make any explanation of the diary.

Q. (By Mr. Obenour): What explanation did he make to you of the diary?

A. He thought those diaries were going to put him beyond the Statute of Limitations of criminal——

Q. What is the Statute of Limitations? [188]

A. Six years.

Q. And how is it measured?

A. From the date—the due date of the return.

Q. Beg your pardon?

A. The due date of the return.

Q. And the Statute of Limitations applies to

(Testimony of George V. Whittle.)

what? What is the Statute of Limitations, what does it mean?

A. It means that a person cannot be criminally prosecuted after six years, over six years.

Q. From the time the return is filed?

A. That is correct, sir.

Q. Now, in the interval that you have—you were trying to get this information, had the Statute run as to any of these years?

Mr. Mead: This again calls for legal conclusions.

The Court: Well, of course, that is something any of us—you don't have to have a legal conclusion about it even. It's a matter of computation.

Mr. Mead: It may be, your Honor, but it calls for a conclusion of the witness as to a legal question, and it is objected to on that grounds.

The Court: I think possibly it does involve [189] some, but in any case, whatever the facts are, can be deriyed. Whatever inference properly can be drawn is now covered. Go ahead.

Q. (By Mr. Obenour): How did he explain the contents of the diaries, sir?

A. He took a page or two and showed me an adding machine tape, for instance, on one time and the names of the places that operated pinball machines, and opposite the name was an amount, and that totaled so much, say 600, and then 50 per cent was 300.

Mr. Mead: If the Court please, if the witness is going to testify with respect to the contents of

(Testimony of George V. Whittle.)

these diaries, let the government produce the diaries and let him refer to them and have them marked and introduced in evidence. It's improper for him.

The Court: I think the general description of what they are—if the diaries are available, then, of course, they should be produced. They are the best evidence of what they contain.

Mr. Mead: That is the point of my objection, your Honor.

The Court: All right.

Mr. Obenour: Your Honor, it is intended for only generally as indicated. [190]

The Court: I thought probably that is what you had in mind, but you better not go beyond just the generalities.

Q. (By Mr. Obenour): Were you subpoenaed to produce these original diaries?

A. Yes, I was.

Q. And did you search for them? A. Yes.

Q. Do you have them? A. No, sir.

Q. Who had them the last to the best of your knowledge? A. Mr. Seijas.

Q. And when?

A. Oh, I would say it was probably in the late '53.

Q. Have you seen them since that time?

A. No, sir.

Q. And have you seen them on any occasion other than this? A. Yes, at the first time.

Q. Other than the first time?

A. Other than the first time?

(Testimony of George V. Whittle.)

Q. Have you seen them?

A. The second time late in '54 I was compiling the information, that source of information. I was compiling a file, income tax returns, financial statements and what not, all in this file, and I said, "Now let me take a tape of [191] the books," and he brought the books into my office and turned every page and told me what I should take as representing this tape.

The Court: Do you mean you made, you yourself, made an addition on the adding machine of these same figures that were in these books?

The Witness: Yes, sir, your Honor.

Q. (By Mr. Obenour): What did you include on the figures that you computed on this tape?

A. I took all the figures that he pointed to on the pages representing 50 per cent.

Q. Fifty per cent of what?

A. Of the total holdout.

Q. Holdout? A. Is what they called it.

Q. Had he identified this as either being included on his reported income for the partnership for those prior years, or had it not been so reported?

A. It had not been.

Q. Now, of the amounts included there, did you include the total or one half? A. Just one half.

Q. What happened to the respective halves according to what Mr. Seijas told you?

A. What happened, do you mean the total, sir?

Q. What did Mr. Seijas tell you was done with

(Testimony of George V. Whittle.)

the two halves of the total shown on each of these entries?

Mr. Mead: This is objected to, your Honor.

The Court: Yes, I think this is hearsay.

Mr. Mead: It is quite objectional.

Q. (By Mr. Obenour): Did he state whether or not he had received any of the——

Mr. Mead (interrupting): That is objected to for the same reason, your Honor.

The Court: Yes, probably so.

Q. (By Mr. Obenour): What was the total of the tape that you have described?

Mr. Mead: Objected to, your Honor, as not the best evidence.

The Witness: Eighty-six thousand——

The Court: Just a moment, Mr. Whittle, I am thinking about it.

The Witness: I am sorry, your Honor.

The Court: That is perfectly all right. The availability of these records has been shown as fully as you expect to show it.

Mr. Obenour: No, your Honor, but in this instance, this is computations made, and it has nothing to do with the records. This is what he computed according to the direction of Mr. Seijas. [193]

The Court: Well——

Mr. Mead: The point is, your Honor, that he says he made some calculations from some records. We certainly would be entitled to have them.

The Court: Oh, yes, of course, but the question at the moment is whether the witness can say what

(Testimony of George V. Whittle.)

the total of these figures added to, and I think under the particular circumstances, he can tell us that. I think he can tell us that.

Mr. Mead: The question is objected to, your Honor, if he is going to testify with respect to the records or what they show. Of course, the best evidence would be the records.

The Court: Well, yes, that is right, but I mean admissible for another purpose in and of itself, and, of course, evidence often is admissible under one theory and not another. If it's admissible under any theory, then it goes in. I am inclined to think this is admissible, the figure as to what the total was.

Answer please.

The Witness: $86,427.42.

Q. (By Mr. Obenour): And this was a computation made by [194] whom? A. Myself.

Q. Had Mr. Seijas made a similar computation at some other occasion?

A. Yes, sir, I think he had. Yes, sir, he had.

Q. Did he show you such computation?

A. I think I saw the tape, but I don't know whether I looked at the figures on it.

Q. What was the total of what Mr. Seijas had computed?

Mr. Mead: He can't answer that.

The Court: That would call for hearsay since he said he didn't see the tape itself.

Q. (By Mr. Obenour): Excuse me, did you see the tape or did you not?

A. I saw the tape but not an examination of it.

(Testimony of George V. Whittle.)

Q. When you say you saw it, you didn't see the figures, do you mean, the figures included in it or the total?

A. I paid no attention to his tape. I accepted it to begin with. I wanted proof. I made a tape myself.

Q. Did you receive the tape? A. No, sir.

Q. Did you make a notation of the total Mr. Seijas had made? A. I have a total on the sheet.

Q. Did you, sir?

A. I couldn't swear that it was his tape. I can't recollect [195] where I got this other total from.

Q. At this time that you were presented with this, this accounted, then, for $86,000 of the $165,000 increase you had found for the years '46 to '48?

A. Well, this represents 50 per cent according to the diary.

Q. Yes, sir, but it represented an explanation, the $165,000 increase shown in your computation for the years '46 to '48 to the amount of $86,000, is that correct? A. That is correct.

Q. Did you ask Mr. Seijas at that time for an explanation of the remaining $80,000?

Mr. Mead: Hearsay again, your Honor.

The Court: No, the question, did he ask for it, that is not hearsay.

The Witness: Yes, that question——

The Court: Just answer the question.

The Witness: Yes, I did.

Q. (By Mr. Obenour): Did Mr. Seijas at that

(Testimony of George V. Whittle.)

time give you an explanation for the $80,000 addition? A. Addition to what, sir?

Q. Addition to the $86,000 accounted for by the diary, and the $80,000 making up the difference of $165,000?

Mr. Mead: If he is going to tell about hearsay, I object. [196]

The Court: This is a different matter. This is hearsay.

Mr. Mead: We object to it.

The Court: The answer is, but not the request made by the witness.

Mr. Obenour: If your Honor please, I would state that it was the act of answering or not rather than what was said. It's the act of answering or not answering which would be an act and not hearsay, and the question was intended to be such if I did not so state.

Mr. Mead: I think Counsel is right, but the two are so close together that——

The Court: It's very difficult, for a witness may not understand that very fine distinction there.

Without giving us anything that Mr. Seijas said, can you tell us what, if anything, he did with respect to responding to your request for an explanation of this $80,000 that wasn't still accounted for?

The Witness: He responded stating certain amounts.

Q. (By Mr. Obenour): What was this occasion when he gave this explanation of certain amounts, Mr. Whittle? [197] A. What was that?

(Testimony of George V. Whittle.)

Q. What was the occasion when he gave you this explanation of certain amounts?

A. Well, this is sometime after the disclosure of the diaries.

Q. Sometime after the disclosure of the diaries?

A. Yes, sir.

Q. In other words, now referring to the time when he first showed you the diaries, did you ask him if he had an explanation for the differences?

Mr. Mead: I would like to object to that question unless the witness is cautioned, your Honor, to answer just yes or no because it's another question that is so close to the objectional answer.

The Court: We are running into a situation again where you must be very careful just to answer the question. Do you understand?

The Witness: Yes.

The Court: It's not any criticism of you as a layman, but it involves some points of law here that you presumably are not familiar with, but just follow the question very carefully and answer it, just the question and nothing else, will you? [198]

The Witness: Yes.

The Court: Thank you.

The last question, I think, was what was the occasion when this response concerning certain amounts was made.

The Witness: The question was to find sufficient to put onto this $86,000 to take up the $165,000 difference.

(Testimony of George V. Whittle.)

Q. (By Mr. Obenour): Yes, sir. On the first occasion—April, I believe you stated, of 1953?

A. Yes, sir.

Q. You first were advised of the diaries, is that correct? A. Beg your pardon?

Q. In April of 1953 you were first advised of the diaries' existence, were you not?

A. Yes, sir.

Q. Did you advise Mr. Seijas what action he should take in his own behalf on that occasion?

A. Yes, sir.

Q. And what did you advise him to do?

A. To secure a lawyer.

Q. Did he do so? A. Yes, sir.

Q. Whom did he secure? A. Harry Sager.

Q. And after he secured the services of Mr. Sager, did you have a conference with Sager and Seijas? A. Yes, sir.

Q. Where?

A. I think in Seijas' office or my office.

Q. What was the purpose of the conference?

A. To go over the matter as to whether to disclose it to the government.

Q. And as a result of this conference, what action was taken by Mr. Seijas?

A. I was instructed by Mr. Seijas to make an arrangement for a conference with the government officials.

Q And did you do so? A. Yes, sir, I did.

Q. Whom did you contact?

A. I contacted Mr. Patten who was the enforce-

(Testimony of George V. Whittle.)

ment official, and Willard Paine, the head of the appellate division.

Q. And were those men lawyers?

A. Yes, sir.

Q. And they were both with the government?

A. Yes, sir.

Q. And they were in the enforcement division officed where?

A. Officed in the Smith Tower.

Q. And at that time you had such a conference?

A. Yes, sir.

Q. And do you recall when, sir?

A. I beg your pardon?

Q. Do you recall when?

A. Probably around somewhere early part of April. I couldn't remember the date.

Q. Shortly after you learned of the existence of the diaries? A. Yes, sir.

Q. What was the purpose for which the conference was requested?

A. To produce these diaries for the purpose of trying to eliminate criminal prosecution.

Q. Were you present at the conference?

A. Yes, sir.

Q. And what was done at that conference concerning these diaries?

A. Oh, I imagine the conference lasted about an hour, and the diaries were looked over by the government officials, and they were to let us know what further they would require.

Q. But on that occasion did you advise them

(Testimony of George V. Whittle.)

what was unexplained net worth increase that you found by your computation?

A. Well, they had that in their possession, I believe. [201]

Q. They were aware of it?

A. They were aware of it.

The Court: You had already submitted a copy to them?

The Witness: Yes, sir.

Q. (By Mr. Obenour): And had they made a similar computation of which they advised you?

A. Similar to my net worth?

Q. Yes, sir.

A. Yes. They advised me that there was not too much difference between my figures and their's.

Q. Were you advised as to what was the entry that constituted the difference of their figure and yours?

A. I don't think that came up at that time, Mr. Obenour. I think it came up later.

Q. Were you on some occasion apprised of the difference between the net worth as being beginning cash on hand? A. Yes, sir.

Q. Beginning as of 1946? A. Yes, sir.

Q. At the time of this conference with Mr. Patton and Mr. Paine, did Mr. Scijas and/or you and Mr. Sager explain to the government officials what the diaries represented?

A. Yes. Mr. Scijas really took charge and did most of the answering and questioning. [202]

Q. What did he say that the diaries represented?

(Testimony of George V. Whittle.)

Mr. Mead: This is the brashest kind of hearsay, your Honor.

The Court: Objection sustained.

Q. (By Mr. Obenour): Was an explanation given to the government officials as to the difference between the $165,000 represented by your computation and the $86,000 represented by the diaries?

Mr. Mead: This is also hearsay, your Honor, and is objected to.

The Court: Yes. Later in the case, it may well be that any statements made by Mr. Seijas will be then openly admitted. I think we have not proceeded to that point in the case.

Mr. Obenour: If your Honor please, was such a thing said or given rather than what was said. Again, it's a question of something done rather than the hearsay.

The Court: Whether or not an explanation was offered?

Mr. Obenour: Yes.

The Court: All right, on that question, you can answer that, not what it was, but whether one was offered.

The Witness: I am a little hazy as to [203] whether it was done at that meeting, or whether it was subsequent thereto as to the difference.

Q. (By Mr. Obenour): Did Mr. Seijas himself, or through Mr. Sager, give an explanation of the $80,000 difference either on that occasion to your recollection or later?

(Testimony of George V. Whittle.)

Mr. Mead: That is hearsay, your Honor. It's a leading question in the first place.

The Court: I don't think that it's leading. The question is, did he make an explanation either at that time or later, not what the explanation was, but whether he offered one. I think that is not hearsay. He may answer that.

The question now is—do you have it in mind what the question is?

The Witness: Yes.

The Court: All right.

The Witness: To my best recollection, I don't think there was any explanation given with regard to the difference between $86,000 and $165,000.

Q. (By Mr. Obenour): There was no explanation given?

A. What helped me to remember is that—if I may explain—every effort was made to try and fix up the difference.

The Court: To account for the $80,000?

The Witness: To account for the $80,000 by [204] mentioning three or four other items that never had been previously considered.

Q. (By Mr. Obenour): All right, sir, that is what I was inquiring about. Did he give an explanation on this occasion?

The Court: It's your word of explanation that I think the witness may not be understanding.

Mr. Obenour: Excuse me.

The Witness: I still do not believe that the explanation was given to the government attorneys.

(Testimony of George V. Whittle.)

That discussion was between Seijas and myself and Harry Sager.

Q. (By Mr. Obenour): Do you recall your testimony given at a prior trial here, Mr. Whittle?

A. No, I do not.

Q. Pardon? A. No, I do not.

Q. You do not? A. No.

Q. When now is your recollection of when this conversation concerning these other things took place?

A. It appears to me that my recollection is that either Mr. Oftedal or Mr. O'Leary suggested that it was still a discrepancy between the 86 and 165. That is how the thing started, I believe. [205]

Q. When?

A. I don't remember it coming up at that meeting.

Q. Was this afterwards? A. Yes, sir.

Q. But at the time of the conference with Mr. Patten? A. Yes, sir.

Q. And Mr. Paine? A. Yes, sir.

Q. Then you had heard no explanation of the $165,000 except the diary?

Mr. Mead: He has answered that question several times.

The Court: It's not entirely clear, and I think we had better clarify it.

Answer the question.

The Witness: I can't remember it having taken place at a meeting.

Mr. Obenour: No, sir——

(Testimony of George V. Whittle.)

Q. At the meeting with Mr. Patten and Mr. Paine?

A. No, sir, just he and I personally.

Q. And why didn't you do it, sir?

A. I did that then.

Q. You did it then? A. In pencil.

Q. In pencil?

A. Made a draft of it, and it was never used for any other purpose than to see what it would bring about, what result it would bring about.

Q. And you did not submit it to anybody?

A. No, sir.

Q. Why didn't you submit it?

A. Nobody needed it.

Q. Now, did Mr. Seijas employ another accountant after he had retained your services to prepare a net worth statement, to your knowledge?

A. Officially, no; I don't know.

Q. Officially you do not know? [224]

A. I do not know.

Q. Do you have personal knowledge?

A. I have personal knowledge that he hired other accountants.

Q. You have personal knowledge?

A. I have no knowledge from anybody as to what they did.

Q. But you have knowledge, personal knowledge, that he then employed other accountants besides yourself? A. Yes.

Q. Do you know who those accountants were, sir?

(Testimony of George V. Whittle.)

The Court: That wasn't the question. You have got to listen to the question.

Q. (By Mr. Obenour). At the time of the conference with Mr. Patten and Mr. Paine, had you ever previously heard of an explanation of your $165,000 difference except the diary?

A. That is correct. [206]

Q. You had not? You say "That is correct."

A. Except the diary.

Q. Except the diary was the only thing you had heard? A. That is correct.

Q. You subsequently were advised by Mr. Scijas of an additional explanation? A. Yes, sir.

Q. And they consisted of how many items?

Mr. Mead: This is all hearsay, and is objected to.

The Court: Well, it's a borderline situation. I think I will let him mention the number of items.

How many items, additional items, of explanation?

The Witness: My recollection is three, maybe four.

Q. (By Mr. Obenour): Did you keep a diary at this time, Mr. Whittle?

A. Oh, my secretary keeps one.

Q. Did you make any notes at the time when this conference took place and what happened at the conference?

A. No, I don't write any reports on conferences.

The Court: Well, the question is, though, did you take any notes on this particular one? [207]

The Witness: No, sir.

(Testimony of George V. Whittle.)

A. Yes, sir, I knew their name, but I don't recall it to mind now, the name.

Q. Was Mr. John Rike the accountant?

A. I think Rankin was one of the accountants.

Q. Now, during this period that you were preparing the net worth statement for 1951 up to the end of 1951, and during the period which followed that when you were attempting to find an answer to this $165,000 of unexplained income, up to the time that Mr. Seijas came to your office in the year 1953, did you ever confer with Mr. Forman with regard to the matter, or did Mr. Forman ever submit any information or aid or assist you in any way of any of these problems? A. No, he did not.

Q. Have you ever been employed at any time by Mr. Forman [225] to do any accounting work or any other kind of work? A. No, sir.

Q. Was the conference which you described in your direct examination, Mr. Whittle, with myself last week the first meeting that you had had with me where I inquired as to the facts or has anyone on Mr. Forman's behalf inquired as to the facts of this situation? A. That is the only time.

Q. Did I serve you with a subpoena to appear at that time and produce information with regard to this matter? A. That is correct, sir.

Q. And it was then under those circumstances that you furnished me with a copy of this net worth statement that has been introduced in evidence, is that correct? A. I did.

Q. Now, Mr. Whittle, or your direct examina-

(Testimony of George V. Whittle.)

The Court: All right.

Q. (By Mr. Obenour): One year ago you had occasion to go over this same information, did you not? A. Yes, in connection with the trial.

Q. Yes, sir, and on that occasion you refreshed your recollection from some records you possessed as to what transpired during this same time?

A. I don't remember.

The Clerk: Plaintiff's Exhibit 75 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 75, can you identify that?

A. The Internal Revenue agents' report of an examination made for the year 1943 of Army Seijas.

Q. And have you seen it before? A. Yes.

Q. Have you seen it before?

A. It was among the records submitted to me by Mr. Seijas during the examination.

Q. And how was that received by Mr. Seijas?

A. How was it received?

Q. Yes, sir. A. Through the mail.

Q. Well, in connection with what? What was the occasion [208] that it was received?

A. Well, when an agent makes an examination, he makes a report on it, and the taxpayer gets a copy of that report.

Q. Is that a copy of such a report (indicating)?

A. That is a copy of the report for 1943.

Q. And it was a report conducted by whom?

A. Mr. Fortner.

Q. Forker? A. Fortner.

(Testimony of George V. Whittle.)

Q. And what did you do with that report?

A. I used it in my computation of income for each year.

Q. And after that, did you produce it for any of the agents? A. Yes, I did.

Q. And in the course of investigation, you furnished that for the use of the agents?

A. I did, sir.

Mr. Obenour: We offer Exhibit 75.

The Court: We will take a little time to look at this, so you better go ahead with something else.

Q. (By Mr. Obenour): When did you give him that report?

Mr. Mead: Just a moment, your Honor. We are looking over the exhibit.

The Court: I want you to have time, but I [209] thought you want to take the time to——

Mr. Mead: We will take time later.

The Court: Either way you think, you look over it quickly.

Mr. Mead: He is going on with the examination.

The Court: We'll just wait a minute then. Go ahead, take a look at it and see if you can quickly satisfy yourself about it.

Mr. Mead: We object to the exhibit, your Honor. The Internal Revenue agents' report dated September, 1944 of the income tax return of Army Seijas for the year 1943, it is not binding upon Mr. Forman, and it is incompetent and immaterial.

The Court: It's not clear to me now on what basis this would be admissible.

(Testimony of George V. Whittle.)

Mr. Obenour: Matter of materiality, your Honor.

The Court: I don't see it at the moment. I will let you cover it more fully later. I think you better pass on to something else.

Q. (By Mr. Obenour): This was furnished to the agents when, Mr. Whittle? A. What?

Q. When was this document furnished to the agents? [210]

The Court: When did you give it——

The Witness (interrupting): Well, it was probably after I had submitted my statement to them, after December '51.

Q. (By Mr. Obenour): After you had submitted that to the agents, did you return all the other documents to Mr. Seijas that you had?

A. Eventually Mr. Seijas took them all back.

Q. What happened to the file that you compiled including the computation you got?

A. Well, he borrowed that, and I have never seen it since.

Q. Do you have any other records at all?

A. Just these scratch papers is all.

Q. Beg your pardon?

A. Just scratch papers is all.

Mr. Obenour: That is all.

The Court: Cross-examination.

Cross Examination

Q. (By Mr. Mead): Mr. Whittle, I think you said that you were a certified public accountant, is that correct, sir? A. Yes, sir.

(Testimony of George V. Whittle.)

Q. And your offices are in the Smith Tower Building in Seattle? [211] A. Yes, sir.

Q. How long have you practiced your profession?

A. Since 1918; I have been in the profession all my life.

Q. You have followed the public accounting work all your life? A. Yes, sir.

Q. And you are a certified public accountant?

A. Yes, sir, in the State of Washington.

Q. In the State of Washington, and what is a certified public accountant, sir?

A. A person who takes a national examination.

Q. Do you belong to any organizations in your field?

A. Yes, sir. I belong to the Society of Certified Public Accountants, American Institute of Accountants, and the National Institute.

Q. And you have been continually following that work since 1918? A. Yes, sir.

Q. And that has been in Seattle, has it, sir?

A. In the Smith Tower all that time.

Q. All that time? A. Yes, sir.

Q. And I think you stated that you became acquainted with Army Seijas sometime prior to the time you were employed to do this work for him, is that correct? [212]

A. Yes, that is correct.

Q. How long have you been acquainted with Mr. Seijas? A. Oh, I would say 15 or 20 years.

Q. And have you done work for him as an

(Testimony of George V. Whittle.)

accountant prior to this time you were employed?

A. No, sir.

Q. And will you state, please, just when you were employed in connection with this problem by Mr. Seijas? A. July, 1951.

Q. July, 1951? A. Yes, sir.

Q. And what were the circumstances of your employment? By that I mean, what made necessary your employment?

A. Special agents had approached Mr. Seijas for an examination. They wanted to look at everything and demanded a net worth statement and asked for a net worth statement.

Q. And did that matter then make necessary accounting services? A. Yes, sir.

Q. And you were employed, then, for the purpose of compiling a net worth statement?

A. That is correct, sir.

Q. And over how long a period of time did this work go on, Mr. Whittle, in the compilation of the net worth statement which has been introduced in evidence? [213]

A. To July, to the end of December, 1951.

Q. From July to the end of December?

A. Yes, sir.

Q. And did you have conferences during that period of time with Mr. Seijas with respect to the matter? A. Yes, sir.

Q. And had Mr. Seijas employed the services of some accountant prior to this time for the same purpose? A. Yes, he had. He told me so.

(Testimony of George V. Whittle.)

Q. What accountant had he employed?

A. Mr. Jacobson, I believe he was.

Q. Were his work papers and his memorandum and other work that he had done on this made available to you?

A. No, I didn't want anybody's papers. I just wanted to do it on my own and be independent.

Q. Had there been a net worth statement prepared by anyone else?

A. Mr. Jacobson told me he had prepared one, and it wasn't satisfactory to Mr. Seijas.

Q. So before your employment, then, in the summer of 1951, Mr. Seijas had already obtained a net worth statement prepared by another accountant?

A. Yes, But I would say it was a very tentative net worth statement.

Mr. Obenour: I didn't hear that. [214]

The Witness: Tentative.

Q. (By Mr. Mead): Tentative. Now, during the period of time from the summer of 1951 until this net worth statement was completed in December of 1951, did you have occasion to have conferences with representatives of the Internal Revenue Service with respect to Mr. Seijas' tax problem? A. Yes, I did.

Q. And who were those representatives?

A. Mr. O'Leary and Mr. Oftedal.

Q. And did Mr. Seijas attend those conferences upon occasion? A. Not always, mostly not.

(Testimony of George V. Whittle.)

Q. Were your conferences with the representatives of the Bureau numerous?

A. Yes, they were.

Q. And how frequently during this period of time did you meet with them?

A. Well, during that time and subsequent thereto, I had numerous conferences with them.

Q. Did the government make available to you, these agents, information that they had to assist you in the compilation of the net worth statement?

A. Some two years later, probably.

Q. And by that—— [215]

A. (Interrupting) Not during the investigation.

Q. Two years later would be sometime in the year 1953? A. Yes, sir.

Q. So they did not make available to you during this period any information to assist you then, and when I say "this period," I mean up to the time this net worth statement was completed?

A. That is correct.

Q. Do you know when this net worth statement, Mr. Whittle, was submitted to the government or to the agents, Mr. O'Leary and Mr. Oftedal?

A. Shortly after that date.

Q. And when you say "that date," do you mean—— A. December 28, '51.

Q. December 28, 1953—is that correct—1951?

A. 1951.

Q. The purpose of this net worth statement, then, I take it, was to submit it to the government

(Testimony of George V. Whittle.)

for the purpose of determining Mr. Seijas' income tax liability? A. That is correct.

Q. And that had to do with what particular year, sir? A. 1942 to '49 both, inclusive.

Q. And all of you—when I say "all of you," at least Mr. Seijas and yourself knew that it was prepared for that purpose? [216]

A. That is correct.

Q. Now, during the period following the submission of this net worth statement up to the time of the spring meeting that you have described with Mr. Seijas, when he exhibited to you these diaries which you have referred to, were there numerous meetings with the representatives of the Treasury Department with respect to Mr. Seijas' income tax liability, or were there any meetings?

A. Subsequent to that conference?

Q. Subsequent to the time that this net worth statement was submitted and prior to the meeting that you had with Mr. Seijas in the early part of 1953? A. Yes, there were.

Q. And how many meetings over that period of time did you have?

A. Oh, I couldn't say. It was a considerable number because they were checking my figures, the source of my information for the figures in the net worth statement, and it required numerous conferences.

Q. Did Mr. Seijas attend some of those conferences? A. No, very rarely.

Q. When did the government then first aid you

(Testimony of George V. Whittle.)

in preparing a net worth statement by furnishing you with any information? [217]

A. Oh, I think it was about the time that Mr. Seijas' case was up before the Commissioner.

Q. And that was about when, do you recall?

A. Some of those—it must have been about the middle of '54, wasn't it?

Q. About the middle of 1954? A. '54.

Q. This involved the meeting with Mr. Patten and Mr. Paine? A. Yes, sir.

Q. And was that for information for the purpose of correcting any omissions which you had left out of the net worth statement in the way of assets that had been omitted?

A. It was for the—yes, they gave me the figures.

Q. They gave you these figures?

A. Some things I had in my net worth statement were not correct because the items had been included in another item, things like that.

Q. Now, following the time that this net worth statement showing a liability of or an unexplained income of $165,000 or thereabouts in the years 1946, 7 and 8, up to the time that Mr. Seijas came to your office in 1953, and showed you these diaries, was there any explanation offered to you by Mr. Seijas as to the source of this [218] $165,000 of unexplained income?

A. No, not at any time prior thereto.

Q. Not at any time prior to that time?

A. No.

(Testimony of George V. Whittle.)

Q. What sort of diaries were these diaries which Mr. Seijas showed to you?

A. Oh, just a regular desk diary about that length, and about this width (indicating).

Mr. Mead: May we have this exhibit marked, your Honor? I think it would be 501.

The Clerk: Defendant's Exhibit 500 has been marked for identification.

Q. (By Mr. Mead): There has been handed you a booklet or diary which—we choose to call it that—is marked Defendant's Exhibit 500 for identification. Will you please examine it, Mr. Whittle, and state whether or not that was a similar type of book shown to you by Mr. Seijas.

A. I would say it was a similar size.

Q. Similar size? A. Similar size.

Q. Will you open it and refer to the fly leaf and to the balance of it and state whether or not that was a similar type of book?

A. He had similar paper, similar binding, as I recollect, [219] but as to whether the division made in the sheet was that, I don't remember.

Q. You couldn't say?

A. No, I don't remember.

Q. Thank you, sir. What was the appearance of the diaries or books that Mr. Seijas furnished you with? When I say appearance of them, did you note the pages in them, whether they showed signs of handling or whether they appeared to be new and not handled?

(Testimony of George V. Whittle.)

Mr. Obenour: Objection, your Honor, it calls for a conclusion.

The Court: Well, I think he may answer that.

The Witness: My first impression, as I remember, was that——

Mr. Obenour (interrupting): Objection, if your Honor please, it calls for a conclusion.

The Court: Well——

Mr. Mead: I think perhaps Counsel is right, the question was a little bit leading.

The Court: Sometimes Mr. Whittle doesn't follow too closely the question, although I have suggested that he do that several times. Repeat the question. Perhaps he will listen more carefully this time. Go ahead. [220]

Mr. Mead: I am not saying——

The Court: Put a new question to him.

Q. (By Mr. Mead): Would you describe the condition of the books or diaries that you saw that were exhibited to you, please?

A. They appeared to be quite unused.

Q. They appeared to be quite unused?

A. Like as though they were freshly produced.

Mr. Obenour: I didn't hear the last answer.

The Court: He said they appeared to be fresh as though unused.

Q. (By Mr. Mead): You testified, Mr. Whittle, that you then advised Mr. Seijas when he produced these books and showed them to you that he better employ an attorney. Why did you advise him that?

A. Because I considered the diaries were ex-

(Testimony of George V. Whittle.)

treme evidence, and I wouldn't want to take a chance on anything connected with evidence.

Q. And he then, I think, obtained the services of Mr. Sager? A. Yes, sir, that is true.

Q. I think you stated that the reason for the meeting at Mr. Patten's office between Mr. Seijas and Mr. Harry Sager, his then employed attorney, and yourself was to [221] ward off or avoid a criminal prosecution for income tax evasion, is that correct? A. That was the purpose.

Q. And that was the purpose of your going to Mr. Patten's office? A. Yes, sir.

Q. What years were involved in that prosecution, Mr. Whittle? A. I think '46 to '49.

Q. '46 to '49? A. Yes, sir.

Q. And you and Mr. Seijas had been advised that a criminal prosecution was contemplated for those years? A. That is correct.

Q. Had the papers already been forwarded to Washington recommending prosecution, do you know, or were you advised of that?

A. They had been forwarded to Washington prior to the April meeting in 1953.

Q. That was the meeting that you described in Mr. Patten's office with Mr. Paine?

A. Yes, sir.

Q. And there was present at that meeting, then, Mr. Paine, Mr. Woolvin Patten, yourself and Mr. Seijas, and Mr. Harry Sager representing Mr. Seijas? [222] A. Yes, sir.

Q. Now, a disclosure, you say, was made at that

(Testimony of George V. Whittle.)

time to Mr. Patten and Mr. Paine by Mr. Sager and Mr. Seijas of this so-called holdout?

A. Yes, that is right.

Q. And that holdout was stated to have occurred in earlier years, is that correct?

A. Yes, sir.

Q. And I think you stated on your direct examination that the purpose of that was to push it back to a time that was beyond the Statute of Limitations for criminal prosecution?

A. Yes, that is true.

Q. Did you ever at anytime prepare for submission to the government and submit to the government a net worth statement which included this $86,000 of the alleged holdouts for the earlier years of 1942 to '45, inclusive? A. No, sir.

Q. Why did you not do so, sir?

A. Well, I wasn't asked to do it in the first place.

Q. You were not asked to do it?

A. I was not asked to do it.

Q. Why were you not asked to do it, if you know? A. Nobody requested it.

Q. Nobody requested it? [223]

A. Except from the government.

Q. Nobody from the government requested it?

A. No, sir.

Q. Did Mr. Seijas request it?

A. He asked me whether I would prepare one to show those amounts in those years.

(Testimony of George V. Whittle.)

tion when Mr. Obenour referred to these diaries that were handed to you by Mr. Seijas, you stated that they came as a big surprise to you. Why did you state that? Will you explain it, please?

A. Because I had been continually trying to get out of Mr. Seijas the source of these funds that produced these assets, ever from 1951 to April of 1953, and all at once he gives me this evidence.

Q. And this was the eleventh hour when his recommendation [226] for prosecution had gone forward? A. That is correct.

Q. And you further stated in your direct examination, Mr. Whittle, that you were not particularly interested in these diaries. Why did you make that statement? Would you explain that, please?

Mr. Obenour: Objection, please, calls for a conclusion of the witness.

The Court: I am not sure why he wasn't interested is important to us.

Mr. Mead: He stated on direct examination, your Honor, that he was not interested. He was not particularly interested in these diaries, and these diaries are——

The Court: His conclusion about them, the matter is of no importance to us, it seems to me. Whatever private conclusion he might have had about it doesn't add anything to the matter one way or another, does it?

Mr. Mead: It seemed to be a bit of startling testimony, your Honor, and I don't know the answer to it, and I merely——

(Testimony of George V. Whittle.)

The Court: That is the reason I am not concerned, because it is just private ruminations about it, and we are not interested in it. [227]

Q. (By Mr. Mead): Why, Mr. Whittle, when you went up to confer with Mr. Patten and Mr. Paine, and this net worth statement which has been introduced in evidence having been the only statement up to that time prepared by you for submission to them and there being unexplained income of $165,000 for this period of time, why did you not give effect to this alleged $86,000 of income in an earlier year to a revised net worth statement?

A. In the first place, $86,000 did not take up the slack. It was insufficient, and any other items that Mr. Seijas brought up there was no evidence to support it, so I never made one.

Q. When you say there was no evidence to support it, how about these diaries he produced?

A. That only supported $86,000.

Q. Why didn't you give effect, at least, to that amount, then?

The Court: Well, I think he has covered that.

The Witness: It wouldn't help any.

Q. (By Mr. Mead): Was there any explanation for the balance of that amount?

A. Oh, later on there was some explanation given by Mr. Seijas. [228]

Q. Later on there was some explanation for this additional income given by Mr. Seijas?

The Court: Do you mean the $80,000 short?

Q. (By Mr. Mead): That is the difference I

(Testimony of George V. Whittle.)

mean, Mr. Whittle. My question might have been confusing, the difference between $86,000 and $165,000. A. That is right.

Q. And so Mr. Seijas then had an explanation which was given at a later time to you for the difference between $165,000 and $86,000, is that right, sir? A. That is correct.

Q. And how long after the meeting in Mr. Patten's office do you recall, if you recall, was that explanation given?

A. Oh, I think it started soon thereafter.

Q. Now, this $86,000—this $165,000 according to your net worth statement, was income in what particular years, did you determine, shown by this statement? A. '46, '47, '48.

Q. Now, had that $165,000 been explained by the $86,000 and the additional three or four items, whatever they were, given by Mr. Seijas, then Mr. Seijas would have had no unreported income for the years 1946-7 and 8, would he?

A. That is correct. [229]

Q. Is that correct?

A. Yes, sir, I believe it to be.

Q. So then if his explanation was accurate and he had this income, he would have not had any tax liability for the years '46-7 and 8?

A. That is what I believe.

Mr. Mead: I think that is all, your Honor.

Redirect Examination

Q. (By Mr. Obenour): Mr. Jacobson was sick?

(Testimony of George V. Whittle.)

A. I beg your pardon?

Q. Mr. Jacobson was sick at the time you replaced him in rendering services to Mr. Seijas?

A. I believe he was, Mr. Obenour.

Q. And the reason that he was unable to continue was because he was sick rather than because his work was not satisfactory with Mr. Seijas, isn't that correct?

A. Well, I think it was both that had something to do with it.

Q. Did Mr. Seijas also tell you that Mr. Jacobson was unable to continue because of illness?

A. I don't remember that.

Q. You do recall he was sick, though?

A. Oh, yes, I do. [230]

Q. Referring to the question of explanation given at the meeting, and I believe, as Counsel put it on cross-examination, that the purpose of explanation was to push it back prior to 1946 to explain the increase? A. Yes, sir.

Q. And by simply taking the entire amounts shown in the diary rather than only a half, would that not have explained the entire difference that you had? A. Approximately.

Q. In other words, had Mr. Seijas told you he had received the entire amount, that would have exceeded by $5,000, would it not, the amount that your net worth statement showed?

A. It would have been approximately the same.

Q. And there would have been no other additional explanations necessary, would there?

(Testimony of George V. Whittle.)

A. That is correct.

Q. Did any of his explanations involve Mr. Forman? A. No, sir.

Q. Did his explanation——

The Court: Do you mean his explanation other than the $86,000?

Mr. Obenour: No, sir, I mean any of his explanations—there has not been any explanation involving Mr. Forman. [231]

The Court: That is right; there has not. Go ahead.

The Witness: I was told by Mr. Seijas that the other 50 per cent belonged to Mr. Forman.

Mr. Mead: There we go.

The Court: You should not volunteer statements, Mr. Whittle. I will have to strike the answer. Go ahead.

Q. (By Mr. Obenour): The question is, did any of the explanations given you by Mr. Seijas involve Mr. Forman? A. Yes.

Q. Which one?

A. In connection with the diaries.

Mr. Mead: That is hearsay again, your Honor. He is just doing the same thing indirectly which you ruled couldn't be done directly.

The Court: The field has been to some extent enlarged by the cross examining. It's a little difficult just to know where to draw the line. I think we have it covered sufficiently now.

Q. (By Mr. Obenour): And I believe you stated

(Testimony of George V. Whittle.)

there were four other items included in a subsequent explanation given by Mr. Seijas?

A. To me. [232]

Q. And that is to what you referred that you did not include at any subsequent net worth statements because there was no evidence to support it?

A. That is correct, sir.

Q. And there were four of those items?

A. Yes.

Q. Did any of those four involve Mr. Forman?

A. No, sir.

Q. Did they involve other persons?

A. Yes, sir.

Mr. Obenour: I believe that is all. Thank you.

Mr. Mead: There is one more matter I should have asked on cross-examination.

The Court: Go ahead, Mr. Mead.

Recross Examination

Q. (By Mr. Mead): Mr. Whittle, your subpoena directed you to produce these original diaries, did it? A. Who?

Q. Did your subpoena that was served on you by the government to come here as a witness today direct you to produce these original diaries that were referred to you? [233] A. Yes, sir.

Q. Did you ever have those diaries in your possession? A. Never at any time.

Q. Did Mr. Seijas ever turn them over to you?

A. Never at any time.

Q. Did he ever leave them in your office?

(Testimony of George V. Whittle.)

A. Never.

Q. Was he always present when you had an opportunity to examine those diaries?

A. He held the diaries and turned the pages.

Q. Did he take them from your office on every occasion when he left there or when he brought them there? A. Yes, sir.

Mr. Mead: That is all.

Q. (By Mr. Obenour): In fact, you never even handled them yourself, did you?

A. No, sir, I did not, sir.

Mr. Obenour: That is all.

The Court: That is all, Mr. Whittle. You may leave whenever you wish.

(Witness excused.)

The Court: Before you step down, I think I will let the Jury go out for the recess. We will take the afternoon recess now, please.

(Whereupon, the afternoon recess was had.)

The Court: I am quite satisfied that the volunteered statement of the witness was not intentional.

Mr. Mead: There is no question about it, your Honor. Will you just excuse the witness, and I want to remind him he is under subpoena, and we will call him if we need him further.

The Court: By the way, in that connection, throughout the trial, if either of you want to have the witness retained, be sure and call my attention to it. Otherwise, I am going to excuse them because often times, when I don't, then we have people sitting around here wondering and it's inconvenient to

them and so forth, so I make a practice of excusing them here, and then if you want them retained, you speak up. Will you do that?

Mr. Mead: Yes, your Honor.

The Court: Call another witness. [235]

WOOLVIN PATTEN

called as a witness on behalf of the Plaintiff, being first duly sworn; was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Woolvin Patten, W-o-o-l-v-i-n P-a-t-t-e-n.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Patten? A. In Seattle.

Q. And your occupation? A. Attorney.

Q. And where do you practice?

A. In the Hoge Building.

Q. In private practice? A. Yes.

Q. How long have you been in private practice?

A. Approximately a year.

Q. Prior to that time, where were you employed?

A. I was employed as an attorney by the Internal Revenue Service.

Q. And how long were you so employed?

A. About six years.

Q. And what was your capacity of employment?

A. I was enforcement counsel, assistant regional counsel and acting regional counsel.

(Testimony of Woolvin Patten.)

Q. And as acting regional counsel, where were you offieed? A. San Francisco.

Q. How long did you serve in that capacity?

A. About two years.

Q. During what period of time were you acting regional counsel?

A. In '54 and the latter part of '53, I think.

Q. And as acting regional counsel, over what area were you concerned?

A. The western states.

Q. Western states? A. Yes.

Q. And how many of the western states were included?

A. Let's see, Territory of Hawaii, Territory of Alaska, Washington, Oregon, Idaho, Montana, California, Nevada, New Mexico.

Q. And what were your duties in that capacity?

A. Reviewing the work of the other attorneys.

Q. The other attorneys were acting in what capacity?

A. They were in the various cities where the Internal Revenue Service had offices.

Q. What was their title—the other attorneys?

A. There were quite a number of other titles and other [237] attorneys engaged in various types of work.

Q. And prior to 1953, what were you doing?

A. I was engaged in enforcement work in the Northwest area.

Q. Located where?

A. In the United States Court House in Seattle.

(Testimony of Woolvin Patten.)

Q. And was that the type of work which you subsequently came to review?

A. Yes, among other types.

Q. In other words, you were advanced from the enforcement counsel to acting regional counsel in the fall of '53? **A.** Yes.

Q. How long were you employed as enforcement counsel in Seattle?

A. From about—about four years.

Q. What were you duties as enforcement counsel?

A. I reviewed the reports turned in by the special agents to determine whether prosecution was warranted.

Q. And if you determined prosecution was warranted, what action did you take?

A. I sent the report along with a recommendation to the Department of Justice.

Q. And if you determined prosecution was not warranted, what action did you take?

A. We sent the case back to the Collector of Internal Revenue for settlement in the ordinary routine as a [238] civil case.

Q. In the course of your duties in reviewing cases, did you on occasion have conferences with taxpayers and or their representatives?

A. Quite frequently.

Q. Did you in the course of your duties have occasion to review the investigation concerning the income tax liabilities of Army Seijas? **A.** I did.

Q. And in connection with your review, did you

(Testimony of Woolvin Patten.)

have occasion to hold interviews with Mr. Seijas and or his representatives? A. I did.

Q. And how many such interviews did you have?

A. I had only one interview with Mr. Seijas. I think I had one and possibly two interviews with Mr. Whittle.

Q. In what capacity did you have interviews with Mr. Whittle?

A. Mr. Whittle had filed a power of attorney to represent Mr. Seijas.

Q. Did you have occasion on April 15, 1953, to have an interview with Mr. Seijas, Mr. Sager and Mr. Whittle? A. Yes, I did.

Q. And where did that interview take place?

A. In the Smith Tower. [239]

Q. At whose office?

A. The office of Wilfred Paine.

Q. And who was he?

A. He was then district counsel.

Q. Who were present at this conference?

A. Mr. Seijas was present. Mr. Whittle was present. Mr. Sager was present. Mr. Paine was present, and I was present. I think that is all.

Q. Who initiated the conference?

A. I think the request came from Mr. Seijas to Mr. Paine.

Q. Did you advise Mr. Seijas on this occasion of the status procedurewise of the investigation?

A. Yes. I told Mr. Seijas that the case was in the hands of the Department of Justice with a recommendation that he be prosecuted for income

(Testimony of Woolvin Patten.)

tax evasion as to the years 1946, 1947, and 1948. I told him that my function in the case would be limited to reporting and transmitting to them whatever information he cared to furnish me.

Q. What was said in reply to your statement?

A. Either Mr. Whittle or Mr. Sager said that they were aware of that, that they had contacted the Department of Justice, and they were withholding action on the case until they were furnished the results of that conference. I told them, as they probably knew, that the recommendations for prosecution had been based upon a [240] discrepancy in the amount of about $204,000 in Mr. Seijas' reported income for the years '46, '47 and '48, a disparity of that amount between his increase in net worth in his reported income, and I believe Mr. Whittle and I discussed for a few minutes the difference between his figures and my figures. I believe Mr. Whittle had arrived at a figure of about $165,000, and I believe we discovered that our main difference lay in the amount of beginning cash which had been allowed him and possibly one theatre—that I am not too certain about, the missing theatre. I remember our main difference lay in the amount of cash which had been allowed at the beginning.

Q. When you say "beginning," what date do you mean, sir? A. January 1, 1946.

Q. What was the consequence of the difference between beginning cash as of January 1, '46?

A. The larger the amount of beginning cash,

(Testimony of Woolvin Patten.)

the smaller the understatement of income would be according to the net worth method.

Q. And who had the larger beginning cash?

A. Mr. Whittle had a substantially larger amount.

Q. By how much?

A. Right now I would guess about $40,000 difference, $40,000 to $50,000 difference. [241]

Q. Did Mr. Whittle explain to you the basis under which he arrived at his figure for beginning cash?

A. Yes. Mr. Whittle said that he had taken Mr. Seijas' income for the years prior to 1946, I believe starting with about the beginning of the war, and from that had substracted visible assets which he had acquired and computed that he could have saved $50,000 from his prior reported income. I have forgotten how far that went back. I know it went back to at least the beginning of the war. It may have gone back a few years prior. I don't know.

Q. Did you have any discussion with any of the persons present concerning the defense employed in net-worth type cases?

A. Yes. Mr. Sager said, "Well, you know in these net worth——

Mr. Mead (interrupting): I object to this as not proper, your Honor.

The Court: Yes, I think so. In fact, "Yes" can stand, that you did discuss that subject, the details of it.

(Testimony of Woolvin Patten.)

Q. (By Mr. Obenour): Was there conversation concerning unreported income for years prior to 1946? A. Yes.

Q. Who told you of this?

A. Principally Mr. Sager.

Q. What did Mr. Sager say? [242]

Mr. Mead: Objected to, your Honor.

The Court: I think it is hearsay.

Mr. Obenour: Yes, sir.

Q. (By Mr. Obenour): Incidentally, have you been subpoenaed by the defense as well as by the government? A. Yes.

Q. And you have testified concerning this same matter previously? A. Yes.

Q. And you have covered all of the information in that prior testimony which occurred of all the events occurring at this interview?

A. Yes, to the best of my memory.

Q. And to your knowledge, does the defendant have a transcript of your testimony at that time?

The Court: This defendant?

Mr. Obenour: Yes.

The Court: Transcript of the testimony of the previous case?

The Witness: I have no idea.

Q. (By Mr. Obenour): Were you given an explanation of the unexplained or rather of the increase in net worth that occurred according to Mr. Whittle's computation for the years 1946 through 1948? A. Yes. [243]

Q. Who gave you this explanation?

(Testimony of Woolvin Patten.)

A. Mr. Sager.

Q. What did he say?

Mr. Mead: Objected to, your Honor.

The Court: Same ruling.

Mr. Obenour: I don't mean to be going contrary to the Court's ruling.

The Court: I know sometimes it is difficult. I am not touchy about it as long as I am satisfied there is no intentional violation. Then I get somewhat touchy.

Mr. Obenour: I would attempt to lay the basis of a record, your Honor.

Q. (By Mr. Obenour): Did the explanation include the source of acquisition of an amount of $165,000 or excess?

A. Yes, I remember the amount was about 187.

Q. One hundred eighty-seven thousand?

A. Yes.

Q. Who gave you the explanation?

A. Principally Mr. Sager.

Q. Were you given details of the explanation?

A. Yes.

Q. How many sources of the $186,000 were you advised at this time? A. Five, I believe. [244]

Q. Did any involve Mr. Forman? A. Yes.

Q. How many? A. One.

Q. Who were involved by the other four other than Mr. Seijas?

A. Principally members of his family.

Q. Who were the members of his family that were involved in Mr. Seijas' explanation?

(Testimony of Woolvin Patten.)

A. Different people were involved in different explanations, and at least no one was involved further than Mr. Seijas.

Q. Who were the persons that were involved of his family?

A. His father and his two brothers. I believe it was Henry Seijas and Lewis Seijas.

Q. Was the source of the unexplained increase credited to any one particular business?

A. Each of the explanations was in some way connected with the business.

Q. What was the nature of the business?

A. For which explanation?

Q. For the one involving Mr. Forman.

A. Pinball machine routes.

Q. What was the amount given in the portion of the explanation involving the pinball business?

A. Eighty-six thousand dollars.

Q. And the balance of $100,000 was accounted for from what [245] businesses?

A. Mr. Seijas' general business that he was alleged to have accumulated some starting cash from, and the Castle Club, the pinball machine business, the Palace Cafe, and some smoke shop, I have forgotten the name. I believe it might have been just the Smoke Shop.

Q. How was his family alleged to have contributed the $100,000 additional income accounted for, the subsequent increase in that net worth?

Mr. Mead: Now, your Honor, he is going into hearsay, but he has also brought out matter of

(Testimony of Woolvin Patten.)

involvement, so I withdraw my objection to hearsay and invite Counsel to proceed to explain this situation on these other items. I think they should be cleared up.

The Court: That is as you please. I can only rule when objections are made.

Mr. Mead: I withdraw my hearsay objection.

The Court: All right. Go ahead.

The Witness: The first item involved is the father. During the years prior to 1946, the elder Mr. Seijas was an employee of the partnership, and allegedly he was carried on the salary on the payroll and paid a salary. I was advised that the elder Mr. Seijas did not actually receive this salary, that the checks were issued to him, and he immediately endorsed these [246] checks over to his son, Mr. Army Seijas. I was advised that the amount of the checks during the years from about '42 to '45, which were turned back to Mr. Seijas, amounted to about $11,000.

Q. (By Mr. Chestnut): On what account were these checks drawn?

A. The bank account of the partnership.

Q. Of whom? A. Of Seijas and Forman.

Q. What was the ostensible purpose for which Mr. Seijas, senior, was paid?

A. He was an inspector or collector or something. I have forgotten the exact position he occupied.

Q. Do you recall that any explanation was given

(Testimony of Woolvin Patten.)

as to checking on pinball cheaters or anything of that kind?

Mr. Mead: That is a leading question, and this witness is highly competent to answer any questions, your Honor.

The Court: Yes, it is leading.

The Witness: No, I don't. He went around to the locations. For what purpose, I don't recall.

Q. (By Mr. Obenour): And was Mr. Seijas, senior, alive or dead at that time?

A. I think he was dead at that time.

The Court: Do you mean at the time this conference—— [247]

The Witness: At the time of the conference. That is my best memory.

Q. (By Mr. Obenour): Did you ask Mr. Seijas if he had any evidence to support this claim that he had received $11,000 from his father?

A. Yes. I asked him what evidence he had that he simply hadn't cashed those checks for his father. He admitted he had none, and I also asked him what his father had lived on during this period, and he said his father was on relief.

Q. What was said to you concerning the manner in which Henry Seijas, his brother, figured in in this explanation?

A. He told me that one of the years immediately prior to 1946 that his brother had ostensibly operated a cigar store called the Smoke Shop and had reported the profits of that business as his own, which was $21,000. Mr. Seijas told me that the

(Testimony of Woolvin Patten.)

fact was that the Smoke Shop and all the profits had belonged to him, Army Seijas, and had not been the income of Henry Seijas.

Q. And when was this supposed to have occurred?

A. I think this was around the year 1943.

Q. What explanation was given concerning the source of funds from his brother, Lewis Seijas?

A. About the same time his brother, Lewis, was carried on [248] the payroll of the Castle Club, which, I believe, was a gambling establishment down in Vancouver, as a slot machine repairman and paid a total of about $14,000. Mr. Army Seijas told me that Lewis Seijas had not actually received those checks, that they had come to him, or had been endorsed over to him, I believe he said.

Q. What was said concerning the Palace Cafe?

A. That during this period Mr. Seijas had made a profit of approximately $5,000 on the sale of the Palace Cafe which had not been reported in his tax returns.

Q. Did Mr. Seijas say anything concerning anyone else having received money from the sale of the Palace Cafe? A. I don't recall now.

Q. What was said to you concerning the manner in which he had acquired the $86,000?

A. It was stated that during the years from about 1942 to 1945 that Mr. Seijas had been a member of a partnership which operated pinball machines around the Bremerton area, that these pinball machines were in various taverns and loca-

(Testimony of Woolvin Patten.)

tions, and the collector had over these years gone on Tuesdays and Thursdays, I believe the days were the collections were made, and had accurate accounted with the owner of the location for half the money taken out of the pinball machines, but that the collector had furnished the owner with a slip showing that a smaller [249] amount had been taken out of the pinball machines than was actually taken out, and that he turned in this understated slip to the bookkeeper, but along with it, he turned in another slip of paper and some additional money, and Mr. Seijas or Mr. Sager stated that this second amount of money had never been entered in the partnership books, and that over the years that he had received $86,000 as a result of this money which had been creamed off from the collections of the pinball routes.

Q. Did you ask him if the $86,000 was the total amount not reported on the partnership books, or was any conversation held concerning that?

A. I asked him if the $86,000 was the entire amount which had been held off from the pinball routes during the war or merely the amount that he had received or merely the half which he had received. He stated that it was merely the half that he had received. I asked him if Mr. Forman, his partner, had received an equal amount, and he said yes.

Q. Was any documentation produced at this time to substantiate this statement?

A. Yes, some records were produced.

(Testimony of Woolvin Patten.)

Q. What were they?

A. They were about four little black books about four by six. [250] They seemed to be diary pads or diary books.

Q. Could you describe them as to color and content and makeup?

A. They were black, fairly small books, a fairly standard office diary book, as I remember. The first books were written in under various days. They would—there would be the name of the location, like the Red Rooster or the various names of the taverns, and there would be an amount of money on various dates and then totals. As I recall, the latter books, mainly there were substantial amounts of just small pieces of paper which had been taped in the books at the later part there.

Q. Did you have access to examine these yourself?

A. Yes, I examined them at the conference rather briefly. Later I examined photostatic copies of them in more detail.

Q. Now, at this time was any statement made concerning the willingness to have these originals duplicated?

A. I asked Mr. Sager if he would be willing for us to make photostatic copies of those records, and he advised me they were, and I told him we would send an agency to get copies.

Q. Subsequently, did you cause an agent to contact Mr. Sager and Mr. Seijas for the purpose of reproducing these diaries? [251]

(Testimony of Woolvin Patten.)

A. Yes. I asked Mr. Oftedal to go by and see Mr. Seijas and have the documents photostated.

Q. Was this done? A. Yes.

Q. Did you subsequently then see the photostats? A. Yes.

The Clerk: Plaintiff's Exhibits 76, 77, 78 and 79 have been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibits 76 through 79, can you identify those, please, sir?

A. These are photostats of those records.

Q. And were those the same which you had examined in 1953? A. Yes.

The Court: Are they for separate years or something of the kind, Mr. Patten?

The Witness: Yes.

The Court: You better tell us which one is which so we can keep track of them starting with 76.

The Witness: Number 76 is the record for 1942, 77 is the record for 1943, 78 is the record for 1944, and 79 is the record for 1945.

The Court: Thank you.

Q. (By Mr. Obenour): After you examined the original diaries on the occasion of this interview, did you ever see them again? [252] A. No.

Q. When you examined the photostats, did you notice any difference between the photostats and the originals?

A. Yes. I noticed a number of places in the photostats where a paper had been placed over the diary so as to obliterate what had appeared on certain places through there.

(Testimony of Woolvin Patten.)

Q. In your examination of the original diaries, do you recall seeing any entries in there other than entries referring to receipts or entries pertaining to money, either receipted or expended?

A. I think I remember noticing a few extrinsic notations in there.

Q. In your examination of the duplicates did you note any such similar notations that were not covered in the duplicates?

A. I don't recall any.

Q. On this occasion of the interview in April 15 of '53, did Mr. Seijas make any statement concerning where this accumulation of money had been kept?

A. Yes, he said it had been kept in safety deposit boxes which he had in Portland, in San Francisco and I believe several safety deposit boxes in Seattle.

Q. After showing this and giving this explanation, was anything said concerning the believe of Mr. Seijas or [253] Mr. Sager of the effect of this upon prosecution?

A. Yes. They stated that the net worth discrepancy was about $200,000, and it was their position that at the beginning of 1946 Mr. Seijas had somewhere between two hundred and two hundred fifty thousand dollars in currency which had accounted for the expenditures which he made in '46, '47 and '48, and they said, "We furnished you evidence to account for $186,000 of it, and we think

(Testimony of Woolvin Patten.)

if we dug far enough, we could substantiate the rest of it."

Q. What would be the effect, then, upon prosecution of substantiating the entire amount?

A. If he could have substantiated the entire amount and shown that he had enough cash at the beginning of the period to account for all of his expenditures in '46, '47 and '48, obviously his income for '46, '47 and '48 wouldn't have been understated.

Q. After this interview, was a complaint subsequently filed? A. Yes.

Q. What is a complaint?

A. A complaint is a charge.

Q. And do you recall when that complaint was filed?

A. I believe it was in the late summer or early fall of 1943. I wouldn't trust my memory on that.

The Court: In '53?

The Witness: '53. I don't recall the date specifically.

Q. (By Mr. Obenour): And do you recall when the indictment was brought against Mr. Seijas and Mr. Forman? A. No, I don't recall.

Mr. Obenour: I believe that is all.

Cross Examination

Q. (By Mr. Mead): Mr. Patten, I think you said that in 1953 you were an attorney with the Treasury Department? A. Yes, sir.

Q. And your position was assistant enforcement

(Testimony of Woolvin Patten.)

attorney, is that correct? A. Yes, sir.

Q. And as a holder of that position, you had the responsibility of reviewing recommendations for criminal prosecution of people who were accused of violating the income tax laws?

A. That is correct, sir.

Q. And that you and your office reviewed the reports of agents, and if you felt that prosecution was justified on the strength of the agent's report, you forwarded it to the Justice Department for attention? [255] A. Yes, sir.

Q. If you felt it was not justified, you returned it to the field for processing as a civil case?

A. That is correct, sir.

Q. And prior to the conference in your office in 1953 between the gentlemen you have mentioned, Mr. Seijas, Mr. Sager and Mr. Whittle, Mr. Paine and yourself, had you had occasion to review the file with respect to Army Seijas? A. I had, sir.

Q. And do you recall approximately when that file first came to your attention?

A. The best of my memory is that that file came to my attention about the last of 1942.

Q. And, I take it, that the prosecution was recommended by the agents? A. Yes, sir.

Q. And if that prosecution was recommended for the tax years 1946, '47 and '48, is that correct?

A. Yes, sir.

Q. And after reviewing that file, you and your office concurred in the recommendation of the

(Testimony of Woolvin Patten.)

agents, and the file was then forwarded on to Washington for processing?

A. That is correct. I had already recommended prosecution at the time of the conference. [256]

Q. And the fact that prosecution had been recommended as far as Mr. Seijas was concerned for the years 1946, '47 and '48 was a fact well known to Mr. Seijas at the time of that conference?

A. Yes, sir.

Q. Had there been any recommendations for criminal prosecution at that time of Mr. Forman?

A. No, sir.

Q. And had there been any suggestions or recommendations from the field to your office that there be a prosecution of Mr. Forman for income tax evasion? A. There had not.

Q. Now, I think you have stated that the announced purpose when these gentlemen came to your office to attend this conference arranged by Mr. Seija was to avoid the possibility of criminal prosecution of Mr. Seijas for the years 1946, '47 and '48? A. That was their hopes, sir.

Q. Prior to the time of that conference, had there been any disclosure by you or your office to Mr. Seijas or Mr. Whittle or to Mr. Sager of the results of the net worth statements compiled by your office or the agents?

A. Yes. I think the agents had worked up the understatement of net worth in conjunction with Mr. Whittle. I think Mr. Whittle and the agents knew generally that there was [257] a large discrep-

(Testimony of Woolvin Patten.)

ancy in these years between the increase in net worth and the reported income.

Q. You are quite familiar, Mr. Patten, with the net worth method of arriving at income tax liability? A. Yes, sir.

Q. Is the net worth method of arriving at income tax liability an accurate method?

A. It is accurate if you have all the information.

Q. It actually is recognized as an estimate at best, is it not, sir?

A. It will not generally—generally that is true. The difficulty, however, is not with the method. It's the undependability of some of the figures which go into it, and usually that figure is cash, the uncertainty of your cash figure and other uncertainties such as living expenses and the like.

Q. So it's unavoidable that in 99 cases out of 100 where a net worth statement is made that it is an estimated basis of arriving at an approximate liability, is that a fair statement?

A. I still come back to my statement, that it depends upon the figures which go into it.

Q. If you had all the facts, of course, with regard to all of these items, then you wouldn't need a net worth statement, would you? [258]

A. Well, there are two types of accounting, capital accounting and income accounting. Normally, the two should come out with the identical answer if you have all the correct information.

Q. That is right, but it's only in those cases where you don't have books and you don't have ac-

(Testimony of Woolvin Patten.)

curate records that can be referred to to clearly determine income that we use the net worth method?

A. Yes, that is generally true.

Q. Now, I think there was mentioned at this conference in your office and in the spring of 1953 various different items of income that Mr. Seijas claimed he had which went to make up a substantial part of this shortage, we will call it, with respect to net worth, is that correct?

A. Yes, that is correct.

Q. Now, those items that were given to you at that time were, as I understand it, some five items. First, he told you that he had received the proceeds of checks issued to his father who was presumably employed by this partnership business, and that his father turned over to him the proceeds of these checks? A. That is correct.

Q. And that accounted for some $11,000, approximately, is that correct? [259]

A. That is correct.

Q. And also as to another item, item two, we will call it, that his brother Henry Seijas had turned over to him income from a business known as the Smoke Shop some $21,000 or thereabouts, is that correct? A. That is correct.

Q. And that also he had a profit from the sale of a business known as the Palace Cafe, is that correct? A. Yes.

Q. And that was some $5,000?

A. That is correct.

Q. And that there was another item of alleged

(Testimony of Woolvin Patten.)

income that he had in earlier years in his association with Mr. Forman of some $86,000? A. Yes.

Q. Is that correct? A. That is correct.

Q. Now, it was a coincidence also that all of this alleged income claimed by Mr. Seijas was received by him allegedly in the years barred by the Statute of Limitations at the time of your conference, is that correct?

A. It was alleged to have been received then.

Q. It was alleged to have been received in years barred by the Statute of Limitations?

A. That is correct. [260]

Q. That statute is six years, is that correct, sir?

A. That is correct.

Q. Now, upon receipt of this information, upon receipt of this explanation that was given you, you were likewise advised by Mr. Sager representing Mr. Seijas that all of this income was barred by the Statute of Limitations insofar as Mr. Seijas was concerned? A. Yes.

Q. For any criminal prosecution, of course?

A. Yes, that was their contention.

Q. That was their contention? A. Yes.

Q. Now, upon receipt of that, what did you do, as a result of that conference?

A. I prepared a memorandum, and as soon as I received photostatic—I prepared a memorandum of our conference, and as soon as I received photostatic copies of the documents which had been furnished at that conference, I transmitted the photo-

(Testimony of Woolvin Patten.)

static copies and my memorandum to the Department of Justice for their consideration.

Q. And prosecution then continued for the years 1946, '47 and '48, and Mr. Seijas was tried last year in this court for those years, wasn't he, sir?

A. That is correct, although I believe the recommendations and the charges were substantially enlarged after the [261] receipt of this information.

Q. Yes, after the receipt of this information there were numerous other charges placed against Mr. Seijas? A. Yes.

Q. And Mr. Forman was also involved, then, we will call it, by these so-called declarations or disclosures that Mr. Seijas had made at that time, is that right? A. Yes.

Q. Now, in addition to all these alleged items of income, which Mr. Seijas claimed to have received in the years barred by the Statute of Limitations, did there come to your attention either then or subsequently additional income or money that he had from any other source that he claimed?

A. I do not recall, sir.

Q. You don't recall? A. No.

Q. To refresh your memory, Mr. Patten, was there a claim on Mr. Seijas' part that he received some fifty to sixty thousand dollars from his father?

A. I remembered such a claim in the newspapers, and that is my only connection with it.

Q. Well, as lawyers——

The Court: I can't admonish the witness about not reading the newspapers. [262]

(Testimony of Woolvin Patten.)

Mr. Mead: I am afraid not, your Honor, and the answer was unexpected, too.

Q. (By Mr. Mead): And so firsthand, Mr. Patten, you know of no other claim?

A. No. In your list I believe you omitted $14,000 which his brother gave to him from the Castle Club.

Q. Oh, yes, I am sorry, I think I did omit that. And so these items, the money from the father, these check proceeds of checks for earnings that the father had had, and the money from the Smoke Shop that his brother presumably had, and the Palace Cafe profit, and another brother, Lewis Seijas that had some income from the Castle Club, and then this other alleged income from Mr. Forman's association, those were the different items, were they not, at that time?

A. Yes, that is right. Coming back to your other matter, it's coming back to me now, the first conference I had with Mr. Whittle, he mentioned that Mr. Seijas had claimed to him that his father had given him some money or left him some money, but he hasn't given it effect in his net worth statement. That is my only contact with any other explanation.

Q. Did he tell you any reason why he hadn't given it an effect in his net worth statement?

A. He said he didn't think anybody would go for it. [263]

Q. Did Mr. Whittle tell you why he had not

(Testimony of Woolvin Patten.)

given effect in the net worth statement to the $86,000?

A. The only net worth statement you had was the one prepared by Mr. Whittle in 1951?

A. Yes.

Q. That is correct, isn't it?

A. Yes, that is correct.

Q. Well, at that meeting, was there any revised net worth statement given to you which included these other items? A. No.

Q. There was not? A. No.

Q. And Mr. Whittle, did he make any explanation to you as to why he had not made a revised statement which included these various different items? A. No.

Q. He did not? A. No.

Q. As a matter of fact, most of the talking, then, was done by Mr. Sager, is that right, a lawyer who represented Mr. Seijas?

A. Mr. Sager and occasionally Mr. Seijas said something, and Mr. Whittle said very little during the conference.

Q. Now, then, you had no additional items brought to your attention up to, at least, the time of this conference [264] than the five that we have mentioned? A. No, that is all.

Q. And if there were some additional items that came up at a later time, at least, you had no knowledge of them, did you, sir? A. No.

Q. I think you testified that Mr. Whittle made the observation that he didn't include this item of

(Testimony of Woolvin Patten.)

the inherited money from the father because no one would go for it, as you say? A. Yes.

Q. Did you go for these other items?

A. Not all the way.

Mr. Mead: I think that is all, your Honor. Thank you.

The Court: I would like to conclude with Mr. Patten so he wouldn't have to return.

Mr. Mead: One more question.

Q. (By Mr. Mead): Mr. Patten, you talked with me, just met me the other day when I called on you and handed you a subpoena, didn't you?

A. Yes.

Q. So you have been subpoenaed by us, and I don't think that there is anything we need to go into now.

Mr. Mead: Your Honor, if we [265] need——

The Court: He will be glad to return, but let us keep in mind his convenience as far as can be.

Mr. Mead: No further questions.

Redirect Examination

Q. (By Mr. Obenour): You say you did not go for it altogether, his explanation. What did you do, though, as a result of his explanation?

A. I sent the entire information to the Department of Justice where the file was residing.

Q. Did you make recommendations concerning these additional charges you have referred to?

A. Yes.

Q. What were the recommended additionals?

(Testimony of Woolvin Patten.)

Mr. Mead: Now, the report would be the best evidence, and we would request that that be produced if he wants him to tell about what was in the report.

The Court: Well, the question that you have put on cross was pretty broad. Well, I think I will sustain the objection.

Q. (By Mr. Obenour): Who prepared the indictment, Mr. Patten? A. I did. [266]

Q. Was the indictment prepared in accordance with your recommendations that you had forwarded to Washington?

Mr. Mead: That is objected to as a backhanded way, your Honor, of bringing in what has been objected to.

The Court: I don't know about the backhanded way. I think I can't agree with that or go for it as far as an expression goes.

Mr. Mead: It's objected to, your Honor, because it's a way of proving the purport or the contents of the report without producing it.

Mr. Obenour: If your Honor please, we have to go into what was gone into on cross-examination.

The Court: That creates a problem.

Mr. Obenour: What action this witness took goes along with the cross-examining.

The Court: I think so. Answer the last question.

The Witness: Would you repeat the last question?

Mr. Obenour: I ask that it be read back.

(Testimony of Woolvin Patten.)

The Court: The last question was whether or not the indictment was in conformity with your recommendations.

The Witness: Yes.

Q. (By Mr. Obenour): What was the basis of the first eight counts of the indictment you prepared?

Mr. Mead: That is certainly objected to, your [267] Honor, as having no bearing on this matter, first eight counts against some other defendant, another defendant.

The Court: We are beyond cross now.

Mr. Obenour: If your Honor please, he went into the matter of additional charges and went into this additional.

The Court: That is right, he did. I had forgotten that he did, and, accordingly, you may now bring it out, what they were.

The Witness: It was a rather lengthy indictment, and I frankly don't recall what the first eight charges were.

Q. (By Mr. Obenour): For the purpose of refreshing your recollection——

The Court: Give him the original.

The Witness: I can see here that the first several charges are for the years 1942, 1943, 1944 and 1945 based upon the figure of a false net worth statement.

The Court: That would be the Whittle statement?

The Witness: Yes, sir.

(Testimony of Woolvin Patten.)

Q. (By Mr. Obenour): What was the basis, then, under which that was obtained?

Mr. Mead: That is objected to, your Honor.

The Court: I don't want to go into this too [268] extensively. Just what the nature of the charges were is all that the cross calls for.

Q. (By Mr. Obenour): In these first eight counts is it also alleged that there was a difference between his reported income for '42 and his actual income from '42 through '45? A. Yes.

Q. And what was the basis of the figures you used in preparing the first eight counts of alleged income for the years '42 to '45?

A. Those records.

Q. What records?

The Court: The diaries.

The Witness: The diaries.

Q. (By Mr. Obenour): So you did go for, then, the information submitted to you by Mr. Seijas to the extent of causing eight additional counts to be made against Mr. Seijas for those early years, did you not?

A. Yes, I accepted the diaries as genuine.

Q. And did you also submit a fourteenth count that was in addition to your original recommendations as a result of the information furnished at that conference? A. I did.

Q. And that was against whom?

A. Mr. Seijas. [269]

Q. And you also submitted an additional count against Mr. Seijas in count fifteen, did you not?

(Testimony of Woolvin Patten.)

A. I did.

Q. So as a result, then, of the interview and the information furnished to you by Mr. Seijas, it resulted in your recommending and subsequently causing indictments to be prepared of ten additional counts against Mr. Seijas?

A. That is correct.

Q. And one against Mr. Forman?

A. That is my memory.

Q. And that is the conspiracy count of Count Fifteen? A. Yes.

Mr. Obenour: I believe that is all.

Mr. Mead: I have another question or two.

The Court: Go ahead.

Redirect Examination

Q. (By Mr. Mead): Then, Mr. Patten, there were a total of fifteen counts in this indictment which was prepared. Fourteen counts were against —the first fourteen counts were against Mr. Seijas alone, is that correct?

A. That is my memory.

Q. And they were for tax evasion and for making false statements to revenue agents and the like? [270] A. Yes.

Q. And all involved an evasion of taxes of Mr. Seijas? A. Yes.

Q. Not under Section 145-B, but all having to do with the evading of his taxes, is that right, sir?

A. Yes.

Q. Now, there was nothing in any indictment

(Testimony of Woolvin Patten.)

that you prepared in those fourteen counts or in the fifteen counts or fifteenth count that charges Mr. Forman with evading his tax?

A. I would hate to tell you what the indictment contains when I haven't seen it in several years. That is my impression.

Q. But that is your impression? A. Yes.

Q. It has been a long time ago, and it's a lengthy document, and I appreciate that. A. Yes.

Q. You do know there were fourteen counts against Mr. Seijas only, and there was one count against Mr. Seijas and Mr. Forman because of this claim of Mr. Seijas' and the information disclosed to you at the time of this conference where he was then attempting to avoid or prevent prosecution for the years 1946, '47 and '48?

A. Yes, there were fourteen, as I remember, against Mr. [271] Seijas and one against Mr. Seijas and Mr. Forman.

Q. And the fifteenth count was the conspiracy count against Mr. Seijas and Mr. Forman charging them with the offenses which are more particularly mentioned in that count which I don't expect you to remember too well now, is that right, sir?

A. That is right.

Mr. Mead: Thank you, your Honor.

The Court: I believe that is all, Mr. Patten, and you will not need to return unless there be some need for you. We will appreciate your coming then if you will.

(Witness excused.)

The Court: We will recess, then, until tomorrow morning at 9:30.

(Whereupon, at 4:40 p.m., a recess was taken until 9:30 a.m. of the following day, August 1, 1956.) [272]

August 1, 1956

ARMY A. SEIJAS

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: My name is Army Seijas, S-e-i-j-a-s.

Direct Examination

Q. (By Mr. Obenour): What is your profession, Mr. Seijas? A. I am a lawyer.

Q. How long have your practiced law?

A. Since 1931.

Q. 1931? A. Yes, sir.

Q. And where did you attend law school?

A. The University of Washington.

Q. And when did you finish law school?

A. '31.

Q. Where did you begin your practice of law?

A. In Seattle.

Q. And have you continued to practice and live in Seattle since 1931, as long as you practiced?

A. That is right.

Q. Where did you have your offices? [273]

A. Smith Tower.

(Testimony of Army A. Seijas.)

Q. And particularly what was your office number?

A. I started at 1806 and moved from there to 1812.

Q. Do you know William R. Forman?

A. Yes.

Q. When did you meet him?

A. Sometime before 1931, probably two, three or four years, I don't remember, before that time.

Q. Was this the William R. Forman who is the defendant in this case? A. Yes.

Q. How did you meet him?

A. I knew Mr. Forman's brother, Al. I think Al was a classmate of mine, and Mr. Forman went to college for a period of time, the university for a period of time, and then I knew him in connection with the Florence Theatre which is a Sterling Theatre, and that is owned by the Sterling Theatre Chain and which is next door to the Smith Tower, and he worked there, and I worked in the Smith Tower, and we saw each other frequently.

Q. Incidentally, how old are you?

A. Forty-nine.

Q. The Florence Theatre was adjoining or close to the Smith Tower, did you say?

A. Next door. It's a different building but next door. [274]

Q. What did Mr. Forman do at the Florence Theatre?

A. He was manager of the Florence Theatre.

(Testimony of Army A. Seijas.)

Q. How long did you know him as a manager of the Florence Theatre?

A. Oh, I don't remember.

Q. Did you continue to know Mr. Forman since that time? A. Yes.

Q. Did Mr. Forman do any other jobs with the theatres other than the Florence Theatre during the Thirties? A. Yes.

Q. What was that?

A. Sometime after that, he was moved up to the head office, and then sometime later Mr. Roy Cooper who is the general manager moved to San Francisco, and Mr. Forman was promoted to that job, and he then became the general manager of the Sterling Theatre Company in Seattle.

Q. And who owned Sterling Theatres?

A. Mr. John Danz.

Q. Mr. John Danz? A. Yes.

Q. And what was the relationship between Mr. Danz and Mr. Forman?

A. Mr. Forman was married to Mr. Danz's only daughter, Dorothy. [275]

Q. How long did he continue to be general manager for Mr. Danz's Sterling Theatres?

A. Until about 1941.

Q. What did Mr. Forman do in 1941?

A. In 1941 Mr. Danz — Mr. Forman and Mr. Danz severed their relations, and Mr. Forman came down to my office at my invitation.

Q. And your office then was where?

A. Smith Tower.

(Testimony of Army A. Seijas.)

Q. When you say he came down to your office, what do you mean?

A. Mr. Forman wanted to go in business for himself and wanted to get into different ventures and did not have an office, and I had—he was my friend, and I invited him to use my office and my facilities if he cared to do so, and he accepted the invitation, and he came down to my office.

Q. Now, when you say your office, was your office in an arrangement of rooms?

A. We had a small drawing room, visiting room and then two small offices.

Q. And where were the small offices in connection with the visiting room or entrance?

A. One on each side.

Q. And who occupied these offices? [276]

A. I did and Mr. Forman, and I don't remember whether another lawyer was in there or not.

Q. Did subsequently you acquire more space?

A. Yes.

Q. And did you have any office help of your own at that time? A. Yes.

Q. Who were they?

A. I had a stenographer.

Q. And did Mr. Forman have any office personnel of his own other than yours?

A. No, he was my guest.

Q. After he came to your office, what did he do in the nature of business?

A. He had no business. He was endeavoring to get into business.

(Testimony of Army A. Seijas.)

Q. At that time did he have any theatre interests? A. Pardon me?

Q. At that time did he have any theatre interests?

A. Not at the time he came to my office.

Q. Did he do any acquiring theatre interests?

A. Yes.

Q. What did he do?

A. The first thing that he did was to try and get located in Port Angeles, Washington. There was a theatre up [277] there that was closed and one that was in operation, and he was desirous of getting into that town to see if he could operate those theatres either by lease or by rental or by purchase or some manner trying to get into the Town of Port Angeles.

Q. What did he do in this regard?

A. He made trips up to Port Angeles and interviewed the people involved, and on many occasions I went with him. The ultimate fact was that the people that had the theatre didn't really have the theatre. The theatre really belonged to the town banker by the name of Mr. Phillips.

Q. Now, in this exploratory proceedings, was there discussion between you and Mr. Forman concerning these theatre ventures?

A. Well, I have just told you about the first one.

Q. Yes, sir.

A. There were other ones subsequent to that.

Q. Yes, sir, but at this time was there—what

(Testimony of Army A. Seijas.)

was your interest in these explorations concerning theatres in Port Angeles?

A. I had no agreement with Mr. Forman about acquiring any interest in any of those theatres.

Q. And did you acquire any interest in Port Angeles for Mr. Forman? [278]

A. No, because the deal did not go through. I was to try and secure the financial backing for the purchase of the theatres if that was possible, that if it were possible to buy them, but inasmuch as it was never possible to buy them, why, naturally, I did not secure any financial help for him in the purchase of the theatres.

Q. At that time what was his financial position as to acquiring them himself?

A. At that time he did not have—at least, he told me he did not have the financial means with which to purchase the theatres himself.

Q. And in the course of the investigation of the Port Angeles theatres, did you then develop any other interests in theatres?

A. Yes. After these exploratory trips to Port Angeles, Mr. Forman had the occasion to come back from Port Angeles through Bremerton, and in Bremerton he found a location that he thought would be a fine location for a theatre, and we started then to explore, rather, he did, to explore the theatre possibilities in the Town of Bremerton.

Q. Did you or did he then enter into any theatre venture in Bremerton?

A. No, the exploratory talks were fruitless.

(Testimony of Army A. Seijas.)

Q. Did he develop any other interests in Bremerton at that time? A. Yes, he did.

Q. And what was that?

A. After we had gone back and forth on the theatre deal and that didn't materialize, why, he mentioned to me one day that while he was over there, he noticed that Bremerton did not have any pinball machines in the town, and that he thought that it would be a good town for pinball machines.

Q. And when was this?

A. This was in the spring of 1941.

Q. Did you do anything respecting the pinball situation in the Bremerton area?

A. Yes, we did.

Q. What did you do?

A. Why, we went over and tried to find out why they didn't have pinball machines. All other towns had pinball machines, and what the possibilities of putting in pinball machines were and what the feasibility was of making them a paying venture in Bremerton.

Q. And who was "we"?

A. Mr. Forman and I.

Q. Now, at this time what had been the result of the investigation of the theatre business? [280]

A. About the same time Mr. Forman had come up with another theatre proposition in Longview, Washington, as I recall, that was called the Vision Corporation. That was a corporation that Mr. Forman and I formed for the purpose of going into the theatre business in Longview, Washington, and

(Testimony of Army A. Seijas.)

about the same time his brother, Albert, had run across a schoolmate of ours, a college classmate of ours, by the name of Lawrence Smith who had inherited a theatre in Salem, Oregon, and who did not want to go in the business and stay in the theatre but wanted to get into the radio business, so we had those two theatre propositions to consider at the same time that we had this pinball situation. Now, the Salem proposition was a theatre proposition that had been——

Mr. Mead: I object to pursuing this type of examination in this manner, and this indictment involves these four partnerships and has nothing to do with these other extraneous matters, and I object to the witness explaining in long detail.

The Court: I think we can solve the problem by putting another question to the witness.

Mr. Obenour: Yes, sir.

Q. (By Mr. Obenour): Was any attempt to establish theatres in Port Angeles and Bremerton abandoned at this time? A. Yes. [281]

Q. Did you and Mr. Forman develop the theatre interest in Salem?

Mr. Mead: I object to that, your Honor, for the same reason, that it's incompetent and immaterial and has no bearing on the issues.

The Court: Well, at the moment it's not clear to me. On the other hand, there must be some purpose. What is the purpose?

Mr. Obenour: The purpose is to show in the charge of conspiracy that it is perfectly proper to

(Testimony of Army A. Seijas.)

go into the background in the associations of the conspirators.

The Court: I understand the general background, but I just don't want to get into too many detailed matters that will over extend it, but the reasonable background, I think, is permitted. For that limited purpose, I will admit it.

The Witness: I have forgotten the question.

Q. (By Mr. Obenour): Did you develop the interest in the Salem Theatre?

A. I went down there with Mr. Forman, closed the deal, and the proposition remained a Bill Forman - Al Forman proposition, and which I was to receive from Mr. Forman's half interest, I think it was, one per cent for my fee for services rendered.

Q. How were the finances handled in that Salem theatre?

Mr. Mead: Objected to, your Honor, incompetent and immaterial.

The Court: Well, it seems to me that is a reasonable background. I can see how it might be. Overruled.

The Witness: My recollection is that the Forman brothers bought the theatre for $50,000 and put down $5,000 as a down payment, and that was sometime in August. That is just my recollection—of 1941—and the $45,000 was to be paid over a period of 10 years.

Q. (By Mr. Obenour): Did Mr. Forman—did the Forman brothers have the $5,000 to put down?

Mr. Mead: That is objected to, your Honor, for

(Testimony of Army A. Seijas.)

the same reason. I would like to have a continuing objection.

The Court: Yes. I am not going to go too far with it. I just want the general backgromnd. I think this last question was proper. You may answer.

The Witness: May the reporter read back?

The Court: It is where did the $5,000 come from?

The Witness: My recollection is that Mr. [283] Forman borrowed the $5,000 from his aunt in Portland.

Q. (By Mr. Obenour): Did they develop the Vision Corporation in Longview?

A. That started out, and we were to—that was developed by a real estate broker from Portland whereby the building was to be constructed, a lease given to Woolworth Brothers, and he borrowed on the——

Mr. Mead (interrupting): If your Honor please, I assume I have a continuing objection to this matter he is going into in great detail.

The Court: I don't want too much detail, Mr. Seijas, just the general circumstances.

The Witness: That started and that switched from the Vision Corporation, as I recall, to another theatre, a little theatre that was closed called the Roxy.

Q. (By Mr. Obenour): Did the Vision Corporation acquire a theatre interest in Longview?

A. It did subsequently.

Q. And when was that?

(Testimony of Army A. Seijas.)

Mr. Mead: I have the same objection, I assume?

The Court: Yes.

The Witness: I don't remember, but it was [284] sometime afterwards.

Q. (By Mr. Obenour): What money was put down in that transaction?

A. In the Vision Corporation?

Q. Yes, sir.

A. I don't recall. My recollection is that the Vision deal was abandoned in exchange for the Roxy Theatre, and then sometime subsequently the Vision was picked up again, but that was sometime afterward.

Q. In 1941 was there any money invested by Mr. Forman in the theatre in Longview?

Mr. Mead: Same objection, your Honor. It has nothing to do with this situation.

The Court: Same ruling.

The Witness: In Longview?

Q. (By Mr. Obenour): Yes, sir.

A. I am trying to recollect. I think maybe five hundred. I am not sure. I think that was the money paid into the corporation.

Q. What, then, was being done concerning the pinball business in Bremerton?

A. During this period of time, it developed that the prosecutor thought that pinballs were illegal.

Q. Who was the prosecutor at that time?

A. Mr. Ralph Purvis, and he would not allow them. I tried [285] to tell him that I did not think

(Testimony of Army A. Seijas.)

they were illegal, and they bantered back and forth, so from all this conversation I wanted to bring a test case to determine what pinball machines were classified as games of chance and which were classified as games of skill, and, as a result of which, it was agreeable with him a test case be made to determine the legality of the pinball machine, of certain types of pinball machines, and we purchased either six or twelve machines of various kinds in order to try to have the court pass on which were games of skill and which were games of chance. At that time the Washington State Tax Commission had not determined what pinball games were allowable and which were not allowable.

Q. At this time was the State of Washington licensing pinball machines? A. Yes.

Q. What was Mr. Forman doing in behalf of promoting pinball interest in Bremerton?

A. Well, in the same time that we were trying to get a ruling, we were also trying to line up prospective customers in the restaurants, taverns, drug stores, in the event that pinballs were allowed to be brought into that area.

Q. What did Mr. Forman do in this regard?

A. Well, either Mr. Forman or I or both of us would on occasions go and try and we had a contract prepared which the location would sign stating that if or when pinballs came in, they would put in our machines. In other words, we were soliciting patrons.

Q. The both of you were? A. Yes.

(Testimony of Army A. Seijas.)

Q. Did you institute this test case against Mr. Purvis? A. I did.

Q. And have you been subpoenaed to testify in this matter, Mr. Seijas? A. I have.

Q. And you were issued a subpoenaed duces tecum, is that correct? A. That is correct.

Q. And that in effect is an order of the court to produce certain required papers?

A. That is right.

Q. Do you have those papers with you?

A. Yes, I do.

Q. Do you have with you any papers pertaining to this test suit? A. Yes, I do.

Q. May I have them, please?

The Clerk: Plaintiff's Exhibit No. 80 has [287] been marked for identification.

Q. (By Mr. Obenour): What is Exhibit 80?

A. Exhibit 80?

Q. Yes, sir.

A. Exhibit 80 is a photostatic copy of the summons, the complaint, letter from Mr. Purvis, a motion and affidavit for temporary restraining order, a temporary restraining order and answer by the Kitsap County, and that is it.

Mr. Obenour: I offer Exhibit 80.

Mr. Mead: May I inquire, your Honor?

The Court: Yes.

Examination on Voir Dire

Q. (By Mr. Mead): When was this obtained, Mr. Seijas? A. That photostatic copy?

(Testimony of Army A. Seijas.)

Q. This documentary record.

A. That photostatic copy was obtained sometime previous to the first trial.

Q. You say your first trial? A. Yes, sir.

Q. That was obtained by you? A. Yes, sir.

Q. For some purpose in that connection? [288]

A. It was introduced as Exhibit 23 in the first trial.

Q. And that was a Government's' Exhibit or yours? A. That was my exhibit.

Mr. Mead: No objection.

The Court: Very well, Exhibit 80 is admitted.

(Whereupon, Plaintiff's Exhibit No. 80 for identification was received in evidence.)

Direct Examination—(Continued)

Q. (By Mr. Obenour): What was the purpose of this suit, Mr. Seijas?

A. Mr. Forman and I decided that we would not want to go into the pinball business unless it was put in on a legal basis. Consequently, we wanted a legal determination as to whether it was legal or illegal before we went into it, and the purpose, of course, was to determine what our rights were.

Q. Did you proceed with this suit?

A. We proceeded with the suit down to the time when the prosecutor was changed. The prosecutor, Mr. Purvis, was sent into the service, and the new prosecutor who succeeded him had different views as to the legality or illegality of the machines, and I don't recall—may I look at Exhibit 80 again,

(Testimony of Army A. Seijas.)

please—I don't recall [289] offhand whether or not the restraining order restraining the prosecuting attorney from bothering or arresting, molesting the machines was kept in full force or effect. I don't recall but at any rate, the purpose, then—the matter, then, was presented to the county commissioners who then agreed to abide by the prosecuting attorney's decision and allow the machines to be licensed as legal machines.

Q. Who was the prosecutor then?

A. Mr. Fred Cohen.

Q. And in that Exhibit 80 there was an answer prepared, was there not, from Mr. Cohen?

A. Yes, there was.

Q. Was it Mr. Cohen——?

A. Yes, it was Mr. Cohen.

Q. And that is notarized by whom?

A. It was notarized by myself.

Q. And, as a result of the opinion held by Mr. Cohen, then what action was taken concerning the suit?

A. I don't recall whether the suit was dismissed or whether it was just kept on. I don't recall. At any rate, the lawsuit became of no value.

Q. Yes, sir, and you say it was then referred to the Kitsap County commissioners to abide by the opinion of the prosecutor? [290] A. Yes.

Q. And what, then, did you and Mr. Forman do to further the pinball interests in Kitsap County?

A. I don't recall whether Port Orchard licensed the machines on the basis of the prosecutor's opin-

(Testimony of Army A. Seijas.)

ion or whether the county commissioners did, but at any rate on November 4, 1941, the county commissioners passed a resolution licensing the machines stating what the license fee was going to be, where the money was to go, what type of machines were to be used and what releasing was to be done with the types of machines.

Q. What did you and Mr. Forman do in regard to the preparation of that resolution?

A. Mr. Forman didn't do anything about the preparation of it. I think I submitted a copy of a proposed resolution, and my memory is now that it was based on the ordinance that the Town of Port Orchard had passed and that had been forwarded to Mr. Cohen, Mr. Cohen being the legal advisor. The board of county commissioners prepared this resolution and this document that I am looking at which has not been admitted. It is a photostatic copy of that resolution as passed by the board of county commissioners.

Q. Did you assist Mr. Cohen in the preparation of that resolution? [291]

A. I did not. I had submitted my own.

Q. To Mr. Cohen?

A. I had mailed a copy, one that I thought would be a fair resolution and sent it to him, but he did not accept it, and he drafted his own is my recollection.

Q. And may I have that copy of that resolution?

The Clerk: Plaintiff's Exhibit 81 has been marked for identification.

(Testimony of Army A. Seijas.).

Q. (By Mr. Obenour): And is what has been marked for identification as Exhibit 81, is that the copy of the resolution?

A. Photostatic copy of the resolution dated November 4, 1941, one dated March, 1942, and one dated 1952, which I know nothing about that one.

Mr. Obenour: I offer Exhibit 81.

Mr. Mead: This exhibit, your Honor, I haven't had a chance to examine it. It's many pages long, and we wish to take up the time now for the coverage, but it's obvious that from what the witness just said that part of it has to do with 1952. He doesn't know anything about that.

The Court: The latter portion, of course, has not been sufficiently identified.

Mr. Mead: So the exhibit is objectionable. [292]

The Court: We will consider withdrawing it or not later when you have had an opportunity. It may be that I won't be concerned about disturbing it, and if so, why then there is no problem. You will have time to consider the portion that has been referred to; namely, the resolution of November 4, 1941, and March of 1942. That portion is admitted.

(Whereupon, the above-mentioned portion of Plaintiff's Exhibit No. 81 for identification was received in evidence.)

The Court: I leave it to you to call that to my attention if you want it deleted. I might overlook that.

Mr. Mead: I assume the exhibit in its present form is not admitted.

(Testimony of Army A. Seijas.)

The Court: No, it is not, only that portion of it. Go ahead.

Q. (By Mr. Obenour): Under the resolution what was the method in which pinballs were then authorized to operate in Kitsap County?

A. It's been many years since I have read the resolution, but my recollection is that if a person who wanted to operate pinball machines in Kitsap County had to make an application to the sheriff and to the prosecuting [293] attorney—no, I am wrong. They had to make an application to the board of county commissioners, and then in turn would turn the application over to the sheriff and the prosecuting attorney, and then they, those people, would examine the application and examine the qualifications of the persons making the application, and then if it passed that barrier, so to speak, or that test, then the license would be issued to the operator who would have—who would secure what is known as a master license. He would have a right to put out his machines, and then the location, that is the person in whose place the machine was to be placed, would make an application also to see whether or not his place was a proper place, and particularly where children under 21—people under 21 would not congregate, and then there was another clause in there that provided that the operator had to pay, I believe, so much per machine for the privilege of putting the machine in the location. That is my offhand recollection.

Q. Was that on the basis of a percentage of the

(Testimony of Army A. Seijas.)

gross revenue or a flat fee that the location owner had to pay?

A. The Kitsap County fee schedule, as I recall, was on a flat fee basis. [294]

Q. That was for the location owner?

A. No, that was for everybody.

Q. Yes, sir, but that was separate and apart, the fee for the location owner, as separate and apart from the master license acquired by the machine owners?

A. No, Mr. Obenour, that is not right. Actually, what was done was the location was supposed to pay a fee of $50 for its place of business, and the operator was to pay $50 per machine; if the place had two machines, then the fee would be $100, and in addition to that, the operator had to pay a thousand dollars or fifteen hundred, whatever it was, for the master license. What actually was done was this, the locations were all pooled together. The master license was pooled, and the per machine license was pooled, and it was divided down the middle, and the operator paid half of it, and the other locations prorated the rest of the license.

Q. And the prosecuting attorney and the sheriff had to approve any application for a master license to be obtained in Kitsap County? A. Yes.

Q. And could you obtain a license without the approval of the sheriff or prosecuting attorney?

A. I wouldn't know that. That would be up to the board of county commissioners. [295]

(Testimony of Army A. Seijas.)

Q. Were licenses obtained, then, after the resolution was passed in Kitsap County?

A. By whom?

Q. By anyone. A. Yes.

Q. Who obtained licenses to operate in Kitsap County?

A. The United Amusement Company which was a partnership composed of William Forman and Army Seijas and Heberling Brothers, which was another partnership composed of George Heberling and Chet Heberling.

Q. Were these separate licenses obtained by United Amusement and Heberling Brothers, or was that joint?

A. No, there were two different licenses, one to each partnership.

Q. At that time was there any connection between Heberling Brothers and United Amusement? A. Not at that time.

Q. How was the thousand dollar master license paid? A. I paid it.

Q. And the formation of the partnership, what funds were put into this business?

A. It was to be an equal partnership between Mr. Forman and myself.

Q. What funds did you and Mr. Forman put into the business?

A. As of December 31, 1941, at the end of [296] the year, our books showed that Mr. Forman had invested $451.

Mr. Mead: I object to that testimony, your

(Testimony of Army A. Seijas.)

Honor. He is testifying about books, and that will be the best evidence. Let's have the books.

The Court: Yes, you will have to refer to your recollection about it, Mr. Seijas.

Mr. Mead: The best evidence in any event would be the books, and I object to that.

The Court: You will have to refer to your recollection about it.

The Witness: My recollection is that at the end of the year Mr. Forman had $451 invested in the United Amusement Company and I had 55 hundred invested in the company.

Q. (By Mr. Obenour): What was the reason you did not make equal investments in 1941 in the company?

A. Well, the first place, the expenses piled up a little bit faster than I anticipated, and in the second place, Mr. Forman was using his funds in connection with the theatre ventures and did not put his funds into the pinball business because we were going to adjust that later.

Q. And what funds was this that Mr. Forman was putting into the theatre business?

Mr. Mead: I object to that, your Honor, [297] what funds he might have put into it. What funds he put into the theatre business has no materiality.

The Court: Rephrase the question.

Q. (By Mr. Obenour): Was this financing to which you previously referred as the borrowed $5,000 and the $500 in Vision?

(Testimony of Army A. Seijas.)

A. I still don't understand what you are driving at.

Mr. Mead: Objected to, your Honor, as a leading question and highly improper.

The Court: Well, I don't think it was objectionable on that ground. What you want to know is what the source of the funds were, isn't that what you want, if he knows?

Mr. Obenour: Yes, your Honor.

Q. (By Mr. Obenour): What was the source of the funds that Mr. Forman had in 1941 for investment in the United Amusement Company?

Mr. Mead: That is objectionable, your Honor. There is no issue or no problem with regard to that, and it's incompetent and immaterial.

The Court: Well, if the witness knows what the source was, I think the objection is overruled.

The Witness: Mr. Forman, as I recall his telling me, was that he had $5,000 and could get [298] another $5,000 from his aunt in Portland, and on that basis, I was the one that was putting the money into the partnership.

Q. (By Mr. Obenour): Did he have sufficient funds to make the investments in the theatres and also invest in the United Amusement Company equally with you?

Mr. Mead: Same objection.

The Court: Overruled.

The Witness: I wouldn't know about that. All I know is what he told me and the fact that he didn't, and I put up the money. I put up 55 hundred, and

(Testimony of Army A. Seijas.)

he put up $451, and then we adjusted it at that time.

Q. (Mr. Obenour): What did he tell you about his ability to invest equally from the source of his own funds?

Mr. Mead: Same objection.

The Court: Overruled.

The Witness: He didn't. For that reason I was taking out 100 per cent of the money in the very beginning to make up—to recoup back the money that I was putting out, so that way instead of Mr. Forman putting up money out of his own pocket into the venture, we started to take it out of the venture to reimburse myself so that ultimately we would have an equal amount of cash [299] invested in the business.

Q. (By Mr. Obenour): After you obtained the license, what was done to further the pinball business in Kitsap County?

A. Then, of course, we wanted to go into Bremerton because Bremerton was a county seat—the center of population, and that is where most of the sailors were.

Q. Well, what did you and what did Mr. Forman do to further the pinball operation in the county after you got the license?

A. Well, I don't understand your question. Do you mean the area outside the city?

Q. What did you and Mr. Forman do to operate your county route under your Kitsap County license?

(Testimony of Army A. Seijas.)

A. Well, we hired a couple of mechanics and operated the route out in the county.

Q. Now, at this time did you have machines?

A. Yes, sir, we bought machines.

Q. Who bought the machines?

A. Mr. Forman bought the machines.

Q. Do you know where he bought them?

A. My recollection is that he bought them from the Jack R. Moore Company.

Q. Did you have anything to do with the purchase of the pinball machines? [300]

A. No, I didn't buy the machines.

Q. Did anyone other than Mr. Forman buy the machines?

A. I don't remember. I don't recall at this time as to whether he went up alone or somebody went with him. I don't know.

Q. But in the company itself, United Amusement Company, there were how many partners?

A. Partners?

Q. Yes. A. Just two.

Q. Who called on the location in order to go about fulfilling, executing the contracts to put machines in and actually putting the machines in?

A. Either Mr. Forman or I or both of us.

Q. When the pinballs began operation, how was the collection done of the machines?

A. Well, I think the first few times, one of the service men and Mr. Forman and I, all three of us, would do it. After that, it was just Mr. Forman and

(Testimony of Army A. Seijas.)

the machine man, whoever it might be, and then it was Mr. Meyers.

Q. What is the basis under which machines are put in a location for operation?

A. The machine has to carry the entire load of taxes and licenses, and usually they are put in on a fifty-fifty basis. [301]

Q. Fifty-fifty, between whom?

A. The location and the operator.

Q. And what is the procedure as the collector comes around to the location? What is the procedure with the collection and the distribution of the receipts?

A. The usual procedure is the collector comes by, and sometimes the operator of the restaurant would be present, and sometimes he would not. At any rate, they open the machine and take out the money box. They count out the money. I am talking about the beginning of our operation—and would hold out a certain amount of money for the payment of the licenses and the tax money and then what would be left, we would divide that fifty-fifty between the operator and the location.

Q. Was there any agreement between you and the location owners as to withholding the portion of the receipts for the payments of these taxes and licenses?

A. Yes. In the beginning, many of the locations did not have the money with which to take care of their own obligations, so then we devised this sys-

(Testimony of Army A. Seijas.)

tem as related here just previously where we divided everything fifty-fifty, but even on that basis, many of the locations could not pay their half of the licenses and their half of the taxes, so, naturally, they would look to us to advance them the money with which to pay the license. [302] Well, that meant that we not only had the machines but would have 100 per cent of the total investment for licenses, and they looked to us to take out of their share reimbursment for the licenses, so what we were doing was banking the investments for licenses, so then we had an agreement with the locations that—of course, we tried to avoid advancing the money for the locations if we could—and then we arrived at this business of holding out from their share of the net enough money for the licenses.

Now, the money for the taxes came off of the top because at that time the schedule of taxes, not licenses but taxes, was 10 per cent of the top went to the state of Washington. For instance, if a machine took in $100, $10 of that went to the State of Washington. Then there would be $90 left between the operator and the location, and then of the $90, we would have to hold out from there their portion, enough money to make up for the monies that we had advanced to them for payment or prepayment of their license to the county commissioners, and at the same time we couldn't take it all because we would have to leave enough to make them make it worth while for them to believe that the installation

(Testimony of Army A. Seijas.)

of the pinball machines in their place of [303] business was lucrative for them.

Q. You mentioned that first that it was you and the mechanic and Mr. Forman and then a mechanic and Mr. Forman and a Mr. Meyers. Who was Mr. Meyers?

A. Mr. Meyers had worked for Mr. Forman for the Sterling Theatres. He was a manager of one of their local theatres, neighborhood theatres, I don't recall which one, and Mr. Meyers had been injured and was out of work. He was not rehired by Sterling Theatre. In several months after we had started the pinball business, it was necessary to hire additional help and Mister—the war was now on in December, the 7th of 1941, and so he knew this chap and recommended him and hired him and recommended him to me, and he hired him, and he then—it was his job to be the collector.

Q. How was the acquisition of these machines financed?

A. Then when the thing started—the pinball business started to mushroom, it was necessary to buy a great number of machines. We had gone from six to maybe one hundred fifty or two hundred, and the price jumped from one hundred seventy-five dollars or two hundred to seven hundred fifty dollars, so it was necessary then to get money from the American Discount Company, which is a lending agency in Seattle, and money was borrowed from them. [304]

Q. Who arranged this financing program?

(Testimony of Army A. Seijas.)

A. The pinball financing program of the American Discount Company was arranged with Mr. Sol Esfeld by Mr. Forman.

Q. How long did you operate the United Amusement Company alone?

A. I don't understand your question.

Q. Did you subsequently develop other pinball routes? A. Oh, I see. Yes.

Q. How long did you operate only the United Amusement Company?

A. The United Amusement Company started right after November 4, and then we started in with the United Amusement Company of Bremerton, the Amusement Company and the Bremerton Amusement Company right after the first of the year.

Q. What did you and Mr. Forman do concerning the development of pinball business in Bremerton?

A. Mr. Forman was to open up and try to get pinball machines in Bremerton. However——

Q. What was the situation at that time with respect to pinball machines in Bremerton?

A. There weren't any. There weren't any in Bremerton, and it developed that the mayor of Bremerton at that time didn't get along or didn't seem to hit it off with [305] Mr. Forman, and then I came into the picture, and I took over with the mayor then, and I got no place with him for sometime until finally I sold him on the idea that he should make an examination of the operation out

(Testimony of Army A. Seijas.)

in the county and over in Port Orchard, and sometime in February, my recollection is, maybe March, he instructed the city attorney to prepare an ordinance allowing pinball machines to go into the City of Bremerton.

Q. Did you do anything concerning the preparation of this ordinance?

A. Yes, I worked with Mr. James Bryan who was the attorney for the City of Bremerton at that time, a local attorney. I worked with him for a long period of time in the preparation. It seemed an awful long period of time in the preparation of that ordinance.

Q. Was it presented to the city council?

A. It was presented to the city council and passed.

Q. Do you have a copy of that with you?

A. Yes, I do.

Q. And may I have it, please?

The Clerk: Plaintiff's Exhibit 82 has been marked for identification.

Mr. Obenour: I offer Exhibit 82.

Mr. Mead: May I inquire about the ordinance?

The Court: Yes. [306]

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, the exhibit has a letter attached to it which appears to be a letter of transmittal from the city clerk on the date, May 23, 1955. I assume that that was the date that

(Testimony of Army A. Seijas.)

you obtained this copy of the ordinance, is that correct?

A. Mr. Mead, I haven't read the letter and I haven't read the ordinance for a long period of time. What does the letter say? That is correct.

Q. And you obtained the ordinance at that time for use in this other case of yours last year, is that right? A. That is correct.

Q. It was introduced in that case as an exhibit?

A. Yes, it was introduced as Exhibit 25.

Mr. Mead: We have no objection.

The Court: Exhibit 82 is admitted.

(Whereupon, Plaintiff's Exhibit No. 82 for identification was received in evidence.)

Direct Examination—(Continued)

Q. (By Mr. Obenour): Under this ordinance, what requirements were there to qualify for the obtaining of a master license?

A. Mr. Obenour, may I look at the exhibit a minute, please? [307]

Q. Yes.

Mr. Mead: The exhibit, your Honor, speaks for itself, and if the witness needs to refresh his memory from it, why, I think the exhibit is the best evidence.

The Court: Oh, yes, but to briefly summarize what the content is, I think that it will save time. However, if there is something about it that you think should be confined to language of the docu-

(Testimony of Army A. Seijas.)

ment, that may be done, but I don't want to take the whole time to read the document.

Mr. Mead: I don't think that is necessary right now, but the witness obviously doesn't know the contents which is understandable, and for him to——

The Court: Just briefly call our attention to the portion of the ordinance that is concerned here.

The Witness: This ordinance is a little different than the other ordinance. This provided that the person should be of good moral character, then be approved by the mayor and city council and pay a 15-hundred dollar license fee which would give the licensee the privilege of operating 35 machines in the City of Bremerton. [308] In addition there was a machine—a machine tax of $50 a machine, and I think a location—yes, a location license of $50 a location, and it enumerates the places where the machines could be placed and also provides that the licenses—not the licenses but the tax would be 10 per cent of the gross, which was Mr. Bryan's creation, and which that 10 per cent added to the 10 per cent that went to the state, made 20 per cent tax off the top. Most of the negotiating that I did with Mr. Bryan was to try to eliminate the 10 per cent feature and go back to a flat fee, but Mr. Bryan prevailed.

Q. (By Mr. Obenour): Now, in the issuing of these licenses, did Kitsap County or Bremerton have any restriction as to residence and the persons obtaining a license?

A. I don't remember that. I don't remember

(Testimony of Army A. Seijas.)

that, and I don't want to take the time to read it, but my recollection, if it wasn't in the ordinance, it was the unwritten law that it was to--but I don't recollect that.

Q. Unwritten law to what?

A. That the local industry, local people were to have the licenses.

Q. What did you tell the persons with whom you were dealing in Bremerton was your position in regard to these [309] pinball businesses?

A. Well, that is such a general question it's hard to answer, but I think that what you want to know is whether I took the position as an owner or as an attorney representing the owners.

Q. That is correct.

A. And that is the position that I took.

Q. What position did you take?

A. That I was the lawyer for the people who wanted to put in the pinball business, the United Amusement Company.

Q. Did you tell the people who the United Amusement Company—of whom the United Amusement Company was constituted?

A. I probably told some people but probably didn't tell a great number of them.

Q. Did you tell the people, the council, the mayor, that the business was owned by Mr. Forman?

Mr. Mead: This is all objected to, your Honor, as being incompetent, immaterial to the sole ques-

(Testimony of Army A. Seijas.)

tion that is involved in this case which has to do with partnership.

The Court: It seems to be a little bit beyond what we would be interested in here.

Mr. Obenour: If your Honor please, we would suggest that the manner and operation between these [310] two persons would have a direct bearing upon the ultimate question as to whether they also conducted their business in the manner which *his* defendant is presently charged.

The Court: Well, perhaps, under that theory.

The Witness: May I have the question again, your Honor?

The Court: The question is, did you tell the mayor and the council of Bremerton that Forman was the owner or a member of the United Amusement Company?

The Witness: That Forman was?

Q. (By Mr. Obenour): Yes, sir.

A. Yes, sir, Forman was. Forman was the owner.

Q. Yes, sir, but did you make that fact known at the time you were negotiating with the mayor and the city council?

A. Oh, do you mean for the purpose of securing the license?

Q. Yes, sir. A. No, sir.

Q. Why not? A. We felt that—— [311]

Mr. Mead (Interrupting): Same objection, your Honor.

The Court: Do you mean and Forman felt?

The Witness: Yes.

(Testimony of Army A. Seijas.)

Mr. Mead: I assume we have the same objection.

The Court: That is right, same objection, same ruling. Go ahead.

The Witness: We felt that it would be better if the licenses were in the name of local people.

Q. (By Mr. Obenour): Did the fact that Mr. Forman had difficulty with the mayor have anything to do with not revealing his position with the company?

Mr. Mead: Same objection, and that is certainly not competent or material.

The Court: Well, if you and Forman had any discussion about that, you may relate that, anything that Forman may have said or any agreement between you about it.

The Witness: I don't recall that the previous difficulty was mentioned at the time of taking out the licenses. It may have been a contributing factor, but I don't recall. The other matter that I spoke about just previously is the chief reason why we took the license out in local people's names. [312]

Q. (By Mr. Obenour): How did you go about taking out licenses in the names of local people?

A. Well, one of the men was already in our employ as a machine man and collector out in the county. His name was Ken Crawford, and he had been a previous pinball operator in Bremerton when they had operated on a previous occasion. The other—we had contracts to put out 100, over 100 machines.

Q. Who had obtained those contracts?

(Testimony of Army A. Seijas.)

A. Mr. Forman and myself or both of us.

Q. Where were these contracts—with what establishments were these contracts made?

A. Restaurants, taverns, drug stores.

Q. Where were these businesses located?

A. In Bremerton.

Q. City limits of Bremerton?

A. Yes. We had contracts for maybe 150 machines.

Q. And what, then, with the number of contracts you held, were you required to do in regard to the master licenses?

A. Well, the master licenses limited the operation of each license to only 35. Consequently, we had to divide the master licenses in to different routes to get different master licenses and also a hitch had come up whereby we had to give away a lot of our locations. [313]

Q. All right, sir. Now, first of all, in the negotiation for licenses, who all were the persons that were interested in the attempting to secure licenses to operate in Bremerton?

A. Heberling Brothers. They had operated pinball machines there previously before they had been shut down, McGill brothers, who were local people, the Royal Amusement Company of Seattle, Washington, and others whose names I do not recall, and, of course, ourselves.

Q. How many licenses was it determined would be issued?

A. My recollection is that it was determined that

(Testimony of Army A. Seijas.)

four, maybe five licenses would be issued, but originally we thought that we were to get the licenses inasmuch as we had pioneered, so to speak, the city. McGill Brothers formed a combination Royal Amusement Company, and they—which I didn't know at that time—in which they insisted that they get a license as local people or else nobody was going to get a license, so we had to not oppose the granting of a license to them.

Q. How could McGill say they would get a license or no one would?

A. Well, it was just very easy for them to say. They could have brought lawsuits, I guess, I don't know. They were local people.

Q. And who subsequently then acquired licenses?

A. My recollection is that the license was issued to United Amusement Company of Bremerton, to the American Amusement Company which was taken out in the name of Bob Crawford, I think, then to the Bremerton Amusement Company which license was taken out in the name of the application which was—I forget the first name—but his last name was Parrott, and then McGill Brothers took out a license, and I think they called themselves the Kitsap Amusement Company, which, later we found out, belonged to McGill Brothers and the Royal Amusement Company of Seattle.

Q. Who contacted Ken Crawford concerning obtaining a license in his name?

A. I don't remember whether Mr. Forman did or I did or both of us.

(Testimony of Army A. Seijas.)

Q. Bob Crawford?

A. Mr. Forman contacted Bob Crawford.

Q. And who was Bob Crawford?

A. Bob Crawford is no relation to Ken Crawford. He was a man who had the automobile agency in Bremerton, the Nash agency, but there were no cars to sell.

Q. Was there any relationship between Bob Crawford and the mayor?

A. And the mayor?

Q. Yes, sir. [315]

A. Not to my knowledge.

Q. What was the—do you know of any contact between the mayor and Bob Crawford?

A. I know of none.

Q. How about Ken Crawford? A. None.

Q. Who was Mr. Parrott.

A. Mr. Parrott was a chap I contacted, and he was a local man, and I believe he was selling safes at that time and was a part-time bookkeeper and my recollection is that at this time we did not have a regular bookkeeper, and I had originally contacted this chap on the basis of having him in Bremerton handle our Bremerton books for us.

Q. Who paid for the licenses obtained in the name of Ken Crawford, Bob Crawford and Parrott?

A. The United Amusement Company did.

Q. Now, the United Amusement Company, is that distinguished from United Amusement of Bremerton? A. Yes, it is.

(Testimony of Army A. Seijas.)

Q. Who constituted United Amusement Company?

A. United Amusement Company was a partnership between Bill Forman and Army Seijas.

Q. And the company funds purchased these three licenses in the city? [316]

A. I am pretty sure they did.

Q. Did Mr. Heberling — did the Heberling Brothers get a license?

A. No, they did not. We agreed to split one route with them, the United Amusement Company of Bremerton, I think.

Q. Why didn't they?

A. I don't recall why they didn't *accept* they just didn't get a license. The authorities didn't see fit to honor them with a license.

Q. Why did you agree to split one route with them?

A. Just to keep peace in the family, I guess.

Q. What did the Heberling Brothers have to contribute?

A. That basis, that was worked out between Mr. Forman and George Heberling in which each company—that is, their company and our company would contribute 20 machines apiece making a total of 40 machines for that route, and that was done for the purpose of putting out 35 machines and keeping five in reserve, five spares.

Q. Incidentally, do you have any copies of any agreements between Mr. Forman and Mr. Crawford?

(Testimony of Army A. Seijas.)

A. Mr. Forman and Mr. Crawford?

Q. Concerning the one route.

A. You better take this (indicating). [317]

The Court: We are pretty close to time for our morning break, and that will give you an opportunity to look through our papers. You have found it, have you?

The Witness: Yes.

Q. (By Mr. Obenour): What is that you have there, sir?

A. That is an agreement between William R. Forman and R. T. Crawford.

Q. Is that Bob Crawford? A. Yes, sir.

Q. Dated when?

A. It's dated the 11th of April, 1942.

Q. May I have it, please? A. Yes.

Mr. Obenour: I ask that it be marked.

The Clerk: Plaintiff's Exhibit 83 has been marked for identification.

Mr. Obenour: I offer 83.

The Court: You will have an opportunity to look at that at recess.

We will take our morning recess now, a 15-minute recess at this time.

(Short recess.)

The Court: Go ahead.

Mr. Obenour: I offer Exhibit 83. [318]

Mr. Mead: No objection.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 83 for identification was received in evidence.)

(Testimony of Army A. Seijas.)

Mr. Obenour: I request to read the exhibit.

The Court: You may.

Mr. Obenour: "United Amusement, Smith Tower, Seattle, Washington, agreement: This agreement made this 11th day of April, 1942, by United Amusement Company and Robert Crawford of Bremerton, Washington, Witnesseth that Whereas United Amusement Company has advanced funds to the said Robert Crawford to secure an amusement device operator's license in the City of Bremerton, assignment of which is hereby acknowledge.

It is mutually agreed by and between the parties hereto that the said United Amusement Company employs the said Robert Crawford as manager of the amusement device business as conducted under said license, that the said Robert Crawford receive the sum of $50 per week payable at the conclusion of each week of doing business.

It is mutually agreed between the parties hereto that the said Robert Crawford agrees to work [319] exclusively for and devote his best interests to the amusement device business as conducted by United Amusement Company, and, further that the said Robert Crawford shall still have the right to conduct his automobile business.

Signed R. T. Crawford and William Forman, dated 4/12/'54."

Q. (By Mr. Obenour): Were those the signatures of Mr. Forman and Mr. Crawford upon that?

A. Yes.

Q. And which license did Bob Crawford receive

(Testimony of Army A. Seijas.)

or rather which company did subsequently acquire this Crawford license?

A. American Amusement.

Q. American Amusement? A. Yes.

Q. What did Bob Crawford do, then, as manager of this route for which he received $50 a week. A. Received $50 a week.

Q. Did he do anything else?

A. No, that is all.

Q. Who, then, conducted the operation of the routine in the name of Bob Crawford?

A. We did.

Q. "We" is whom? [320]

A. Mr. Forman and myself.

Q. Who conducted the other two routes, the United of Bremerton and Bremerton routes which were in the names of Ken Crawford and Parrott?

A. We did.

Q. And again who was "we"?

A. Mr. Forman and I.

Q. Who put in the machines in these routes?

A. Do you mean who furnished the machines?

Q. Yes, sir.

A. We did with the exception of the 20 that went into a route we called the United Amusement Company of Bremerton, the "A" route.

Q. And others were called what?

A. "B" and "C".

Q. And the 20 machines were the ones you referred to furnished by Heberling Brothers?

A. Previously, yes.

(Testimony of Army A. Seijas.)

Q. Where was the office for the four amusement companies, United of Bremerton, United, American and Bremerton?

A. I don't remember the address. It was on Naval Street, Fourth and Naval, I think, Third and Naval. I don't remember.

The Court: In Bremerton?

The Witness: In Bremerton. That is where we [321] had all the machines, and we then had ten mechanics, and that is where they congregated there.

Q. Where were the records of the business kept?

A. Records were kept in my office, 1812 Smith Tower.

Q. Was Ken Crawford continued in your employ after he secured the route in his name?

A. Oh, yes.

Q. And what was he paid?

A. My recollection is Ken Crawford was paid either $100 or $125 a week. Mr. Parrott was paid $75 a week, and Mr. Robert Crawford was paid $50 a week.

Q. What did Ken Crawford do for his $100 or $125 a week?

A. He worked every day. He was a mechanic.

Q. And Mr. Parrott?

A. Mr. Parrott didn't do anything either.

Q. He didn't do anything either? A. No.

Q. Who collected these routes?

A. Do you mean who collected money on the routes?

(Testimony of Army A. Seijas.)

Q. Yes. A. Mr. Meyers and Mr. Johnson.

Q. Who is Mr. Johnson?

A. Mr. Johnson was the collector for the Heberling Brothers, so when they collected on the route, [322] the United Amusement Company of Bremerton, Mr. Johnson went along with Mr. Meyers and collected.

Q. Why did he go along with Mr. Meyers?

A. Well, in the first place, he was representing Heberling Brothers, and, in the second place, he knew most—I won't say most, but he was relied on for those accounts on those routes.

Q. And on "A" route, there were two collectors?

A. Yes.

Q. Who collected the "B" and "C" and county routes? A. Mr. Meyers.

Q. How long did Mr. Johnson continue to collect on the "A" route?

A. I believe he finished out the year, at least, until such time as he was drafted and went into the service.

Q. After that who collected all of the routes?

A. Mr. Meyers.

Q. What had been done meanwhile to obtain operation in Port Orchard?

A. We had the license for Port Orchard.

Q. And where is Port Orchard in relation to Kitsap County and Bremerton?

A. Port Orchard is the county seat for Kitsap County, and which is across the bay from Bremerton.

(Testimony of Army A. Seijas.)

Q. And who obtained the license to operate in Port Orchard? [323]

A. Well, I was the principal factor in securing that license.

Q. In any of the obtaining of any of the licenses, did Mr. Forman ever appear before the persons responsible for the issuance of these licenses?

A. Did he ever appear before the mayor and county commissioners or mayor and the councilmen or the county commissioners?

Q. Yes, sir. A. Not officially.

Q. However, at each time the license was obtained, what was his interest in the business which obtained the license?

A. He had a 50 per cent interest along with me.

Q. What instructions were given to Mr. Meyers concerning the manner in which he should collect the receipts from the machines?

A. I don't understand your question.

Q. What were Mr. Meyers' duties as a collector?

A. His duties were to take the money out of the machines, give a receipt of the collection to the local account, bring the money over—at first the money was left in Bremerton, but that, I think, was before he was in the picture—and check with the bookkeeper and then bank the money or have [324] the bookkeeper bank the money. Generally, those were his functions. I don't recall that I ever instructed him to do anything.

Q. Was he given any instructions concerning

(Testimony of Army A. Seijas.)

the manner in which he should report the receipts from the machines?

A. If he was, those instructions were given to him by Mr. Forman. He was hired by Mr. Forman.

Q. What was the receipt he was to give to the location owner?

A. We had a form of receipt, some books of receipts. I could best illustrate it, your Honor, by the blackboard if we have any chalk.

The Court: It's up to counsel.

Mr. Obenour: Yes, if you could.

The Witness: The machines were enumerated here, the income was put here, down here was the tax, down here was the pay outs (indicating).

Mr. Obenour: Excuse me, I believe we have a copy of that.

The Witness: Yes, this is the form.

The Court: Have it marked.

Mr. Obenour: Mark it, please.

The Clerk: Plaintiff's Exhibit 84 has been marked for identification.

Mr. Obenour: I offer 84.

Mr. Mead: Has the witness identified it yet?

The Court: Yes, he did, but rather briefly, but if you want anything further on it——

Mr. Mead: That is all right.

The Court: All right, it is admitted.

(Whereupon, Plaintiff's Exhibit No. 84 for identification was received in evidence.)

Q. (By Mr. Obenour): Will you explain what Exhibit 84 is, Mr. Seijas?

(Testimony of Army A. Seijas.)

A. This is a blank form of checks, slips that—check reports that the bookkeeper and the location had.

Q. Would you hold it up now and show what it contains, what information was entered on that form?

A. Well, it says "Certificate Number" in the upper lefthand corner. Now, each one of these machines had to have a license from the State of Washington and had a certificate. That machine—that certificate could not be taken off that machine, and a report had to be made of each certificate every two months to the State of Washington. We used that certificate for the same purpose in the City of Bremerton and Kitsap County, so the number—the certificate number of the machine would be placed there.

Then the next column says, "Pay out register, total amount in machine, amount of pay outs, taxable balance, amount of tax," so there was quite [326] a setup there of information to be furnished. However, my recollection is the way they were kept, the number of machine was put here (indicating), the certificate number of the machine, and the amount of the machine would be placed in this column.

The Court: Which column is that, Mr. Seijas? How is it designated?

The Witness: Designated as No. 1 in the upper lefthand corner.

The Court: Go ahead. Excuse me.

(Testimony of Arany A. Seijas.)

The Witness: And then beneath that, it says "Total or deduct total pay outs. Item 2." Now, the pay outs was an arrangement whereby the location would be reimbursed for monies that they claimed to have paid out to the public. For instance, a machine might have a hundred dollars in it, but the location might claim that he had to put out, pay out $50 in prizes. We doubted that, and on many occasions because the machines were automatic and the machines paid out themselves, but that was just one feature that we had to contend with, with the location, so you would put down here "Pay outs, $50," and the location would get $50. Then the balance would be placed in the column that says "Item No. 3." That would be the [327] balance that was left. Then from that balance, that would be the net balance, from that you would pay out the tax and the license deductions. The municipal 10 per cent went to the city, as you recall, the Washington state, 10 per cent. Then it said "Other." Now, from that you would deduct monies with which to pay the next license as it became due. In other words, we tried to build up a reserve to pay for the license so when a license would fall due, there would be money on hand with which to pay the license and the operator wouldn't have to dig into his pocket to pay for somebody else's license.

Then it said, "Net amount to divide." That would be down next to the bottom. Then it said "Location percentage," which would be placed in the column

(Testimony of Army A. Seijas.)

underneath. If they got 50 per cent, and everybody was supposed to get 50 per cent, and everybody got 50 per cent, and it was divided on a fifty-fifty basis, they got their amount, and we got our amount, and then the location signed the slip here (indicating), and the owner's collector would sign the slip here in the lower righthand corner of the collection report.

Q. (By Mr. Obenour): How many copies of that were made? [328]

A. There would be three copies.

Q. What happened to the copies?

A. I don't remember which one—I forget the details, but one copy would be left with the location, one copy would come to us for our records, and the third copy would be brought in by Mr. Meyers. He would bring in two copies, really, and one of them would be attached by him to the amount collected, and one we would keep in our records.

Q. Now you say "your records." Who kept your records? A. We hired a bookkeeper.

Q. Where was he employed?

A. In the beginning he rented a room from Mr. Phalen who was my next-door neighbor, and he rented an office space in there. Then we added on more space to our offices, 1812, and then I think from there he ultimately—we had to go down the hall and rent another room to put the bookkeeper in.

Q. Who paid the rent on the bookkeeper?

(Testimony of Army A. Seijas.)

A. Do you mean who paid the rent on the office space?

Q. Yes.

A. We did, the pinball company.

Q. And Mr. Meyers would bring what back to Seattle now, then, after he had checked a route?

A. He would bring back the thin sheet and the [329] yellow slip back. I think the yellow. The original would be left with the location.

Q. And what money would he bring back?

A. He was presumed to bring back the money that would balance or tally with the yellow slips.

Q. In other words, after the pay out and——

A. Plus the taxes.

Q. Plus the tax. A. Yes.

Q. And the amount of receipts, how would that compare with the slip he would bring back?

A. Well, they were all supposed to balance.

Q. And that was given to whom?

A. To the bookkeeper. He took that matter up with the bookkeeper, and they would go over the accounts, and he would bank the money.

Q. What would then be the record the bookkeeper would receive for the receipts of the pinball routes? A. The yellow copy.

Q. At this time had you made an agreement with Mr. Heberling concerning the "A" route?

A. Yes.

Q. Do you have a copy of that agreement?

A. Yes.

(Testimony of Army A. Seijas.)

The Clerk: Plaintiff's Exhibit 85 has been [330] marked for identification.

Q. (By Mr. Obenour): This paper which has been marked Plaintiff's Exhibit 85, is that the agreement to which you have referred?

A. Yes, that is the only one I have here, the only one I have.

The Court: That is the United Amusement-Heberling agreement?

The Witness: Yes.

Mr. Obenour: I offer Exhibit 85.

Q. (By Mr. Obenour): Do you have a supplemental agreement also? A. Yes, I do.

The Court: Supplemental to 85 do you mean?

Mr. Obenour: Yes, sir.

The Court: It would be a good idea to attach it to 85 if there is no objection. Otherwise, call it 85-A or something of that kind.

Mr. Obenour: I believe this should be a separate agreement, your Honor.

The Court: Very well.

Mr. Obenour: Separate exhibit.

The Court: Have it marked, 86, I think.

Mr. Obenour: It is not an agreement between Forman and Heberling. [331]

The Court: I misunderstood you.

The Clerk: Plaintiff's Exhibit 86 marked for identification.

Mr. Mead: May I inquire, your Honor, with respect to 85?

The Court: Yes.

(Testimony of Arany A. Seijas.)

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, this exhibit apparently had other names and other matters which have been deleted?

A. I think just the names, Mr. Mead.

Q. Names with omissions along the side?

A. That is correct.

Q. Did you prepare this agreement?

A. I don't remember whether I did or Mr. Lenihan did. May I look at it, and probably I can refresh my recollection. I think I prepared this one. At least, on the back it shows my name.

Q. Which would indicate that you prepared it?

A. Probably I prepared it, my office, although at that time my recollection is that all the agreements had been prepared by Mr. Emmett Lenihan, an attorney in Seattle.

Q. But this appears to be on your stationery from your office? [332] A. Yes.

Q. And you had this in your possession, I assume, since the time it was executed? A. Yes.

Q. The other name that has been deleted from here appears to be your own name, is that correct?

A. And Chester Heberling.

Q. And this contract was entered into by Mr. Forman, then, and you prepared it, and it was entered into in behalf of the company, of the partnership? A. That is right.

Mr. Mead: We have no objection to 85.

The Court: 85 admitted.

(Testimony of Army A. Seijas.)

(Whereupon, Plaintiff's Exhibit No. 85 for identification was received in evidence.)

Q. (By Mr. Obenour): And 86 is what?

A. I would have to look at it. It says "Supplemental Agreement" but I don't know what it is supplemental to.

Mr. Obenour: I might read this agreement while they are examining this document.

The Court: Would that annoy you in your reading if this document is read?

Mr. Mead: No.

Mr. Obenour: "This agreement made and entered into on this 22nd day of April, 1942, by [333] and between William Forman and—" there was a name deleted, an omission,—"hereinafter named the First Parties, and George Heberling and (name deleted), hereinafter named the second parties, all of Seattle, Washington,

Witnesseth: Whereas, the first parties have heretofore acquired an agreement with one Bob Crawford of the City of Bremerton regarding the management of his pinball operation, and

Whereas, William Forman and (name deleted) and George Heberling and (name deleted) have some excess written agreements with the owners of "locations" wherein pinball machines may be installed in the City of Bremerton, and said locations cannot be used by said William Forman or (name deleted) or George Heberling or (name deleted) now, therefore, it is hereby mutually agreed that all such agreements verbal or written, made

(Testimony of Army A. Seijas.)

with the owners of locations for the operation of pinball machines in said locations shall be transferred to Bob Crawford for his sole use, it is further agreed by George Heberling and (name deleted), that they will contribute 16⅔ per cent of the cost of the operator's license plus 16⅔ per cent of the cost of the pinball games necessary [334] for the initial conduct of the business of the said Bob Crawford and in the advancement by the said George Heberling and (name deleted) of said monies, William R. Forman and agree to transfer to George Heberling and (name deleted) 16⅔ per cent of the net profits of the Bob Crawford pinball operation in the City of Bremerton.

It is mutually agreed by and between the parties hereto that in the event that George Heberling or (name deleted) publish or disclose, either directly or indirectly, to anyone, of the terms above set forth or of this agreement, then, said William R. Forman and (name deleted) shall have the option of terminating this agreement upon the repayment to the said George Heberling and/or (name deleted) the amount of the capital investment advanced by the said George Heberling and (name deleted).

The first parties agree to keep accurate books and records in connection therewith, which said books and records shall be open to the inspection of the second parties, or their representative at all reasonable times.

This agreement is entered into contemporane-

(Testimony of Army A. Seijas.)

ously with a certain agreement of partnership [335] between the parties hereto, creating a partnership business under the name of the United Amusement Company of Bremerton, and an additional consideration for this agreement is the entering into said partnership agreement.

In witness whereof, the parties hereto have hereunto set their hands and seals, the day and year herein first above written. Signed William R. Forman and George A. Heberling."

I offer 86.

Mr. Mead: May I inquire, this agreement which has been identified as 86, has he identified that?

The Court: He hasn't yet. I think you asked to see it again, didn't you?

The Witness: Yes.

The Court: You might not have heard him say that, that he wasn't entirely clear what it was.

Q. (By Mr. Obenour): What is 86, Mr. Seijas?

A. It says "Supplementary Agreement."

Q. Between whom?

A. Army Seijas and William R. Forman.

Q. Dated when? [336]

A. The 9th day of May of 1944.

Mr. Obenour: I offer 86.

Mr. Mead: Now may I inquire, your Honor?

The Court: Yes.

The Witness: I still haven't read it.

Mr. Mead: Give it back to him.

The Witness: Yes, Mr. Mead.

(Testimony of Army A. Seijas.)

Examination on Voir Dire

Q. (By Mr. Mead): This agreement appears to be a supplementary agreement to a previous partnership agreement, is that correct?

A. It says supplementary agreement, but I don't determine what it supplements.

Q. Well, it says supplementary agreement?

A. Yes, it says that.

Q. And it refers to a previous agreement of partnership?

A. What date of the previous agreement, if any?

Q. There is no reference to date. Was the former agreement of partnership between yourself and Mr. Forman such an agreement?

A. There was an oral agreement always. Whether or not we had what we call markers, I don't recall at this time.

Q. Was there ever a written agreement of partnership? [337]

A. That is what I am talking about, what we called a marker. I don't recall offhand whether there ever was, but that was the purpose of this document.

Q. This document refers to the previous agreement of partnership, and my concern was, was the previous agreement of partnership a written partnership agreement or an oral agreement?

A. I am sure it was an oral, and I am not sure whether we had any other written documents before this one.

Q. And so you believe that the previous agree-

(Testimony of Army A. Seijas.)

ment referred to in this document was an oral agreement?

A. I am sure that it was an oral, and I am not sure that there was not a written agreement of some sort. Does that answer your question?

Q. Yes, partially. This agreement was prepared by you, I take it? A. Yes, it was.

Q. And has been in your files?

A. Yes, it has.

Q. And have you searched your files to determine whether there was any other previous written agreement of partnership?

A. I have had my files searched, and this is what I have.

Q. And it does not include the previous written agreement? A. No. [338]

Mr. Mead: No objection to it, your Honor.

The Court: Exhibit 86 is admitted.

(Whereupon, Plaintiff's Exhibit No. 86 for identification was received in evidence.)

Direct Examination—(Continued)

Q. (By Mr. Obenour): Exhibit 85, Mr. Seijas, refers to 16⅔ per cent of the proceeds to Heberling, and 16⅔ per cent to Mr. Forman? A. Yes.

Q. What was Heberling told as to the make-up of the partnership in which he was buying an interest?

A. Mr. Heberling was led to believe that Bob Crawford owned the pinball route, and that Mr. Forman owned a third of it, and that Mr. Forman

(Testimony of Army A. Seijas.)

was willing to share with his friend, George Heberling, a half interest in his one-third, and therefore was selling it to him, but that it must be and should be kept secret, and he was selling it to him at the cost that it cost him.

Q. In other words, George Heberling was buying only a half of what Mr. Forman had in the business?

A. That is right. He was buying a sixth, and Mr. Forman would wind up with the sixth, and [339] Mr. Crawford would wind up with two-thirds.

Q. What was the true fact concerning the ownership of this partnership?

A. The fact was that Mr. Forman and I owned 100 per cent of the route, and Mr. Forman and Mr. Crawford didn't own any part of it.

Q. After you operated, then, for awhile with Mr. Heberling under this condition, the route was operated——

A. I don't understand your question.

Q. This agreement was dated what?

The Court: Exhibit 85 do you mean?

Mr. Obenour: Yes.

The Witness: 85?

Q. (By Mr. Obenour): April 22, 1942?

A. Yes.

Q. And after that date, was this route conducted under the terms of this agreement?

A. Yes.

Q. Was there a subsequent business transaction, then, between Mr. Forman and Mr. Heberling

(Testimony of Army A. Seijas.)

concerning the acquisition of the remainder of this route? A. Yes.

Q. What was that?

A. I don't have the dates readily available, but ultimately Mr. Forman sold it to Mr. Heberling—[340] that is George Heberling—enough of the route to make it—make Heberling a fifty-fifty partner with him in that route.

Q. What was Mr. Heberling told that he was buying?

Mr. Mead: I object unless it is brought out who was present.

The Court: The source of the witness's information should be made clear.

Q. (By Mr. Obenour): Do you have knowledge as to what Mr. Heberling was told he was acquiring?

A. Yes, because my recollection is that I prepared another agreement for Mr. Forman and Mr. Heberling.

Q. At whose request?

A. At their request.

Q. What were the terms of this other agreement that you prepared?

Mr. Mead: Objected to, your Honor. They are referring to an agreement. We would prefer to have the agreement.

The Court: You will have to lay the foundation for oral testimony concerning the agreement.

Q. (By Mr. Obenour): Do you have any copy of that agreement?

(Testimony of Army A. Seijas.)

A. I should have but I don't know where it is.

Q. Did you receive any instructions from Mr. Forman concerning the preparation of this agreement? [341]

A. Well, I don't recall whether it was for Mr. Forman directly or for Mr. Heberling or for the both.

Q. What instructions were you given as to the preparation of this agreement?

Mr. Mead: Objected to, your Honor. He testified that he doesn't even know who gave it to him.

The Court: He said he couldn't recall whether it was one or the other or both.

Do you know that Mr. Forman participated in these instructions?

The Witness: Oh, yes.

The Court: He may answer.

The Witness: The instructions were to prepare an agreement like this, similar to this, whereby Mr. Heberling was buying 33⅓ per cent, which would bring his total interest in the partnership up to 50 per cent, and then that he and Mr. Forman would be equal partners, and that Bob Crawford —in that Bob Crawford operation.

Q. (By Mr. Obenour): Whose interests were they? Who was buying the other 33⅓ per cent?

A. Presumably Mr. Forman was buying 33⅓ per cent from Bob Crawford, and Mr. Heberling was buying 33⅓ per cent from Bob Crawford.

Q. Did Mr. Heberling make out a check to purchase 33⅓ per cent from Mr. Crawford?

(Testimony of Army A. Seijas.)

A. Well, I don't recall that detail.

Q. Did he make a payment for it?

A. He paid for it.

Q. Who got the money?

A. Mr. Forman got the money, Mr. Obenour. The conferences between Mr. Heberling and Mr. Forman were held in Mr. Forman's room. I wasn't present.

Q. Did you receive any proceeds from the sale?

A. Yes.

Q. What proceeds did you receive?

Mr. Mead: I move to strike all this testimony, then, your Honor. The witness has said that he wasn't present. How would he know what the conversations were then?

The Court: Well, he has already said that he knew Forman participated in the instructions. Are you referring to that part of it now?

Mr. Mead: Yes.

The Court: I think that will have to stand. It will be subject to cross. He has indicated, as I understand, in his answer that the negotiations were to some extent or other conducted in this other [333] room, and he gives that as an explanation to not knowing the details. If you want, you can examine on voir dire here to satisfy yourself.

Mr. Mead: Well, he testified, your Honor, as to what happened in these negotiations with regard to it, and he testified that they were conducted in another room, and he wasn't there.

(Testimony of **Army A. Seijas.**)

The Court: I take a different interpretation, and you may be correct, so if you want to examine on voir dire here, I will permit you to do so.

Mr. Mead: Very well, your Honor.

Examination on Voir Dire

Q. (By Mr. Mead): You state, Mr. Seijas, during these discussions between Mr. Heberling and Mr. Forman, they were carried on in another room, and you were not present? A. That is right.

Q. So you have no knowledge with regard to that?

A. I have no knowledge what conversations were going on in that room or what negotiations or anything else. All I know is what they would tell me when they came to my room to give me instructions. You see, every Thursday Mr. Heberling came and called on Mr. Forman. He didn't call on me.

Mr. Mead: I move that portion of the response be stricken.

The Court: That was not responsive. However, the previous answer makes it plain that your motion to strike must be denied.

Mr. Mead: Very well, your Honor. Thank you.

Direct Examination—(Continued)

Q. (By Mr. Obenour): Did you receive any of the proceeds of this transaction with Mr. Heberling?

A. Mr. Obenour, I have no recollection of receiving it, but I know that I did. I mean that I

(Testimony of Army A. Seijas.)

can't say yes, I remember getting a check for whatever it was, but I know that I did.

Q. What did you receive?

A. I don't know what the price was; all I know is that I received my share.

Q. Your share was what?

A. One-half of whatever Mr. Forman got, and I can't tell you what that was.

Q. During this time, what did Mr. Heberling do in the operation of this route?

A. Which route?

Q. The route that you were operating with Mr. Heberling. [345]

A. We were operating two with Mr. Heberling. Which one do you mean?

Q. What were they?

A. Well, we had half interest in the "A" route, and we now had 16⅔ per cent in the "B" route.

Q. And who had the "B" route?

A. Crawford.

Q. Which Crawford? A. Bob Crawford.

Q. And was there any — 85 was the purchase from whom?

A. That was the initial purchase from Bob Crawford.

Q. Yes, sir. When did Mr. Heberling get an interest in "A" route?

A. In the very beginning.

Q. In the very beginning, and who was that license issued, whose name?

A. Ken Crawford.

(Testimony of Army A. Seijas.)

Q. And at that time what was Mr. Heberling's understanding as to the partnership owning the "A" route or Ken Crawford's route?

Mr. Mead: That is objected to, what somebody's understanding is.

Mr. Obenour: What was he told was the make-up of the partnership in which he had an investment with Crawford? [346]

Mr. Mead: If so, by whom and when?

The Court: Yes, by whom. Bring that out, please.

Mr. Obenour: Yes, sir.

Q. (By Mr. Obenour): Mr. Heberling invested in a "B" route? A. Yes.

Q. With whom was he—did he make an agreement with any of the partnership, either the partners, yourself and Mr. Forman?

A. Yes, sir, he did.

Q. And with whom was that executed?

A. That was between Mr. Forman and Mr. Heberling.

Q. You had knowledge of what Mr. Heberling was told as to the make-up of the partnership in which he was investing now known as "A" route?

A. Do you mean the 20 machines he put up?

Q. Yes, sir.

Mr. Mead: Same objection, your Honor.

The Court: Well, he will have to answer that. Then we will come to the next phase, where he gets this information or who did the telling.

The Witness: I have no recollection as to how

(Testimony of Army A. Seijas.)

he got the information or who told him. I just don't remember that. [347]

The Court: The objection is sustained.

Q. (By Mr. Obenour): Was there a subsequent transaction in which Mr. Heberling acquired further interest in the "A" route, the interest of Ken Crawford?

A. No. As far as I recollect, he was a fifty-fifty partner right off the start, and I don't recall any discussion — there may have been when I wasn't present, but I don't recall anything that had to do with Ken Crawford at all. He was in our employ and maybe was taken for granted. I just don't know. All I know is he had a 50 per cent interest right off the bat.

Q. In the operation of the "A" and "B" routes, what did Mr. Heberling do himself personally in its operation? A. Nothing.

Q. Did Mr. Heberling make any collections?

A. Yes, he did. He made a collection or two from some private deal that he had with, I think, maybe one or two accounts, and I don't recall who they were.

Q. Do you recall the two accounts known as Crows Nest and Knetts or the Charlestown Club?

A. Charlestown Clubs, maybe those were the two collections he made, I don't know.

Q. But he did make, you say, two?

A. He made one or two.

Q. And the remainder of the collections were made by whom? [348]

(Testimony of Army A. Seijas.)

A. Made by Mr. Meyers and Mr. Johnson.

Q. What was the purpose for which Exhibit 86 was prepared, Mr. Seijas?

A. I don't have any recollection why it was prepared, except possibly—I just can't say definitely—except that I possibly wanted something in writing to show that I was a silent partner in all of these.

Mr. Mead: It is objected to, your Honor. He says he can't remember why it was executed.

The Court: Yes, the answer will have to be stricken.

The Witness: I have no recollection as to how this came about or anything except that it was done.

Mr. Obenour: I will ask to read Exhibit 86.

The Court: You may do so.

Mr. Obenour: "Supplementary agreement. This agreement made this 9th day of May, 1944, by and between Army Seijas and William R. Forman, is made as an extension of, and supplementary to, the previous agreement of the partnership made between the parties above mentioned, concerning the owning and operating of coin-operated amusement devices in the City of Bremerton.

Whereas William R. Forman has entered into a [349] partnership agreement with George Heberling, whereby George Heberling owns fifty per cent of the United Amusement Company of Bremerton, and the American Amusement Company and the Bremerton Amusement Company, all of which are located in Bremerton, Washington, the remaining

(Testimony of Army A. Seijas.)

fifty per cent of the above-mentioned companies is owned by partner, William R. Forman, and

Whereas Army Seijas has been a full partner with William R. Forman in the above-mentioned enterprises, and both have contributed equal amounts in the above-mentioned enterprises, and

Whereas Army Seijas' name does not appear on any of the above-mentioned records, but has remained as a silent partner of William R. Forman in his interests above-described now; therefore, It is hereby agreed that William R. Forman and Army Seijas are equal partners in the fifty per cent interest held by William R. Forman in the United Amusement Company of Bremerton, and the American Amusement Company and the Bremerton Amusement Company, all of Bremerton. The said William R. Forman and Army Seijas shall share equally in the profits and losses of said enterprises, and the said William R. Forman holds [350] said half interest in the above-mentioned companies in trust for himself and Army Seijas, in equal shares.

Signed William R. Forman and Army Seijas.

Q. (By Mr. Obenour): Are those the signatures of yourself and Mr. Forman?

A. Yes, they are.

Q. Mr. Seijas, what was the result of holding off the top, as I believe you stated, of the pinball receipts for the payment of the licenses, the result as to the amount collected?

A. I just don't know how to answer your ques-

(Testimony of Army A. Scijas.)

tion. I wonder if you could restate it some other way.

Q. What happened to the money that was held off the top for the payment of licenses?

A. In the beginning?

Q. Yes, sir.

A. In the beginning the money was set aside and usually what we did was leave it right in the machine in a paper bag, and then in that way tried to build up a reserve for the payment of licenses as they would fall due. In the usual course of events, two or three of the institutions were robbed, so our reserve in that particular place went out the window. Then the question came up of taking the reserve and bringing it to Seattle. [351] We tried to set aside a certain fund. For instance, if a location had enough money so that in the course of five weeks—let's say it accumulated $50 or $10 a week. That would pay for the location license, and Mr. Forman and I would not have to get the money with which to advance to the location for the purchase of a license, and that money was accumulated in that fashion for a period of time until this industry got on its feet, and the location had an understanding as to how they were to meet their share of the taxes and licenses as they fell due.

Q. Now, this money withheld, was that reported on the receipts of the collector?

A. Yes, sir, it was in the beginning, yes.

Q. In the beginning? A. Yes.

Q. What happened later?

(Testimony of Army A. Seijas.)

A. Later the fund got quite large and the excess was not.

Q. The excess was not. What happened to the excess?

A. The excess was brought over to Seattle, and I would receive a portion of it.

Q. How would you receive a portion of it?

A. In currency.

Q. From whom?

A. From Mr. Forman. [352]

Q. How did it happen that the excess was not reported on the receipts of the collector?

A. In the beginning we had taken out more, not in the very beginning but after we got this thing organized, we were taking out more than the license fund reserve required so there would be an excess. Then in subsequent years, subsequent times, what we did was this, instead we would collect and mark it on the collection slips, as I recall, Mr. Meyers would do that, so much set aside for the taxes right on the slip, but there was more left over than appeared on the slip, and that excess was divided.

Q. That money in excess of that reported on the slip was collected by whom? A. Meyers.

Q. Was he acting on his own or under instructions in collecting this excess of the amount reported on the receipts?

A. He was not acting under my instructions.

Q. What would he then do in this period you have just described in his collections as to what he would report, what he would collect and what he

(Testimony of Army A. Seijas.)

would do with the receipts and the money?

A. As I explained earlier, he would bring in the money and the collection slips, go over them with a bookkeeper, [353] report to Mr. Forman, and explain the operation to Mr. Forman in Mr. Forman's private office, and then Mr. Forman would come in and see me.

Q. What would Mr. Forman do when he would come in to see you?

A. He would tell me collections were up or that collections were down or collections were about the same, and then he would give me a slip of paper and some money.

Q. What would be on the paper?

A. Whatever I wouldn't know. Whatever was on the paper would be to go with figures showing what monies were taken out of what locations.

Q. And who would have written this paper?

A. The paper would either have been typed or printed or written by Mr. Meyers and added by Mr. Meyers.

Q. Would there be any writing of Mr. Forman's on it?

A. On some occasions there would be.

Q. And what would that be?

A. Well, something that would have to do with addition or subtraction or division of the figures.

Q. How would the amount of money you would receive from Mr. Forman tally with the figures shown on the paper you would receive?

A. Generally, it would be 50 per cent.

(Testimony of Army A. Seijas.)

Q. What would happen to the other 50 per cent? [354] A. I wouldn't know.

Q. What did Mr. Forman tell you concerning the other 50 per cent?

A. He never told me anything. He just gave me mine, and I accepted it and didn't ask any questions.

Q. Did you make any record of this money you received? A. Yes, I did.

Q. How did you record it?

A. I recorded it originally in some books that were given out by the insurance companies yearly—supposed to be daily books. If you will recall, that originally we had the girl in the office act as bookkeeper, and we started—I was trying to keep track in my own way of the income and taxes and money that we had to pay for licenses, and then I continued—after we got our bookkeeper, then that was not necessary. I didn't do that any longer, but continued to make a record of the money that was given to me.

Q. By whom? A. By Mr. Forman.

Q. Where are those books now?

A. You have photostatic copies of the books here.

Q. Yes, sir. Where—when were these photostats prepared?

The Court: The question is now, when were these photostats prepared? [355]

Mr. Mead: Where are the books, that was the question.

(Testimony of Army A. Seijas.)

The Court: That question hasn't been answered yet, but, I take it, this is some further preliminary to that.

Go ahead.

The Witness: Which question am I to answer?

The Court: When were the photostats prepared?

The Witness: The photostats were prepared a day or two after a conference between myself, Mr. Sager, Mr. Harry Sager, an attorney from Tacoma who was acting in my behalf, and my accountant, Mr. George Whittle and Mr. Melvin Patten. I think that is his name, Patten, P-a-t-t-e-n, I think, of the legal staff of the Internal Revenue Service. We had a conference at Mr. Whittle's office.

Q. (By Mr. Obenour): Yes, sir. At this time, though, sir, where were the photostats themselves made?

A. The photostats were made at First and Madison in Seattle in the office of some photographer there working for the government. I don't know his name.

Q. Who was present when they were prepared?

A. Mr. Oftedal and myself. [356]

Q. Handing you Exhibits 76, 77, 78 and 79 for identification, can you state what those documents are?

A. These photostats are photostats of the books that I brought down there at the request of Mr. Patten and Mr. Sager by agreement to have them photostated.

(Testimony of Army A. Seijas.)

Q. Have you previously had occasion to examine these photstats?

A. I did during the first trial.

Q. And are those true copies of your original books? A. Yes, sir, they are.

Q. Where are the original books, Mr. Seijas?

A. My contention is Mr. Whittle has lost them. Mr. Whittle says he never had them, and if he did, he gave them back to me. At any rate, when the first trial came up, the day of the first trial, Mr. Whittle did return to me a whole armful of books that I knew he had but which he claimed he didn't have, but he would not return these books, the originals of these books, and he still claimed that I have never given them to him, so between the accountants and the lawyers and myself, the books have disappeared and/or misplaced or lost along with other papers.

Q. Were you subpoenaed to produce the originals, Mr. Seijas? A. Yes, I was.

Mr. Obenour: We offer Exhibits 76, 77, 78 [357] and 79.

Mr. Mead: May I inquire, your Honor?

The Court: Yes.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, where did you last see these original documents from which these photostats were made?

A. What is your question again, Mr. Mead?

Q. When did you last see the original docu-

(Testimony of Army A. Seijas.)

ments from which these photostats were made, Exhibits 76, 77, 78 and 79?

A. To my knowledge the last time I saw them—saw the originals would have been just about the time that these documents were photostated.

Q. So the last time you saw these exhibits——

A. (Interrupting): No, the originals.

Q. The originals of these exhibits were when they were photostated? A. Yes.

Q. They were photostated, as I recall it from your previous testimony, in the government office where Mr. Oftedal took you to have these documents—pictures taken?

A. Mr. Mead, I want to correct my testimony. The last time I saw the originals was in Mr. Whittle's office where [358] we had, as I recall, the internal revenue agents had compiled a list of the total amounts represented in these books which list and which total did not tally with our list and our total. I remember Mr. Whittle and I going over these books and going over them, and trying to check and work out a list of totals, but we never did come to the same total with the internal revenue people, and his total and my total differed. That is the last time I remember seeing them.

Q. Now, Mr. Seijas, did you leave the books at any time in Mr. Whittle's possession, at any time ever let these originals out of your possession, to your knowledge?

A. My recollection is that I left them with Mr.

(Testimony of Army A. Seijas.)

Whittle when we were making those totals. Mr. Whittle tells me he didn't——

Q. So the last—it is your recollection, then, that the last time you saw these originals were in Mr. Whittle's office in whose presence besides yourself and Mr. Whittle?

A. Just Mr. Whittle and I.

Q. At any time prior to that occurrence had you ever let these originals out of your possession?

A. At any time prior to that?

Q. Yes, sir.

A. At no time, Mr. Mead. [359]

Q. At no time had you left them out of your possession? A. At no time.

Q. At the time these documents were photostated, you were present at all times and never permitted Mr. Oftedal to take them for that purpose, but were there when they were photographed, is that right?

A. Mr. Oftedal never took them. He didn't take them.

Q. I am not saying he took them. You never turned them over to him or anyone else prior to the last time you saw them in Mr. Whittle's possession—you never let them out of your possession for Mr. Oftedal or for anybody else, is that right?

A. Well, Mr. Mead, I don't recall. I think we left them in the photographer's office, but I don't recall that because Mr. Oftedal—at lunch Mr. Oftedal and I either took them with me or we didn't. I don't remember just what we did with them, but

(Testimony of Army A. Seijas.)

I know that we went across the street and had a sandwich and came back and started photographing again.

Q. On that occasion, is it not a fact that you did not leave them out of your possession even then with the photographer that took these originals but took these originals with you even when you went to lunch with Mr. Oftedal?

A. I don't recall. [360]

Q. You don't recall?

A. I don't recall whether I took them with me or left them.

Q. Weren't you present during the entire time that these photographs were being taken of each page? A. Yes, sir, I was.

Q. So when the photographs were taken, you were present during the entire time?

A. Yes, sir, I was.

Q. I notice that on various pages of the documents, there appear to be portions of the documents obliterated. Have you noticed that on examining it?

A. I am aware of that.

Q. How was that accomplished?

A. By just placing a piece of paper over it.

Q. And that piece of paper was just a loose piece of paper that was placed over various items in these documents at the time the photographs were taken? A. Yes.

Q. And that was, of course, done in Mr. Oftedal's presence by yourself? A. Yes.

(Testimony of Army A. Seijas.)

Q. And you put the paper over each item yourself? A. Yes.

Q. So that that prevented Mr. Oftedal from examining those items or seeing those items and also prevented the [361] reproduction of those items in these photographs?

A. When you use the word "items"——

Q. I mean items covered, of course.

A. You don't mean money items?

Q. I don't know, whatever they were.

A. Whatever they were, they were covered.

Q. They could be notations or they could be money items or anything?

A. They weren't money items to my recollection, but whatever they were, they were covered because they did not concern Mr. Oftedal or the internal revenue inquiry.

Q. So the items, then, which were covered were not money items but were other miscellaneous notations that you had made?

A. That did not concern the unreported income.

Q. And they were not money items?

A. Generally not money items. They might have been money items, but they were—they had no connection with this.

The Court: I am going to suspend, Mr. Mead, but I should think you would be near the end of your voir dire, wouldn't you?

Mr. Mead: That is right, your Honor. It might be a good time.

The Court: I would like to have you conclude,

(Testimony of Army A. Seijas.)

[362] if you can, on the voir dire. Keep in mind this is not cross-examination but voir dire.

Mr. Mead: I understand, but this is an important matter, your Honor, and I would not like to hurry it.

The Court: I don't want to interrupt. We will just suspend.

We are going to have our lunch period now. I will see you at 1:30.

(Whereupon, at 12 o'clock p.m., the noon recess was taken.) [363]

The Court: You may proceed.

Mr. Obenour: We offered Exhibits 76, 77, 78, and 79, I believe, your Honor.

Mr. Mead: We have examined them, your Honor, and we object on the grounds that the Government's case establishes that these diaries were not received in Mr. Whittle's testimony, and testified to that, and the absence of the original diaries is not sufficiently explained, and, the originals, of course, are the best evidence particularly in a criminal case of this kind.

The Court: I think it is a question of weight and not admissibility.

Mr. Mead: Thank you, your Honor.

The Court: The exhibits are admitted, 76 to 79, inclusive.

(Whereupon, Plaintiff's Exhibits Nos. 76, 77, 78, and 79 for identification were admitted into evidence.)

Q. (By Mr. Obenour): Handing you Exhibits

(Testimony of Army A. Seijas.)

76, 77, 78, and 79, Exhibit 76 is for what year, Mr. Seijas? A. '42.

Q. And 77? A. '43.

Q. 78? A. '44. [364]

Q. And 79? A. 1945.

Q. Would you please refer to 76 and tell the Jury what the entries are there and by whom they were made? Also, tell how they came to be made.

A. Do you want me to start with the first one?

Q. Yes, sir. Would you just show an example of how the entries were made?

A. Well, I will stand up with the Court's permission.

The Court: Yes.

The Witness: Well, on this particular day, this is January 30, 1942,—now, I don't know whether that is the collection for that day or not, but it shows "Taxes $176.06," that was brought in, and it shows "Receipts, $580.60, Ralph's $20.00, and P. O. Pool, $50.00," making a total of $826.66. That is the amount of money that we had in the office or we had in our possession. This was the tax money, $176.06, and the $580, of course, that is our share of the receipts. The $70 is a repayment back to us of some monies either advanced or licenses or loans to the accounts—pardon me, I would like to digress for a moment, but in addition to the license money that we were—not tax money, but license money that we had to advance, many of the accounts would say, "Well, we will put in your machine but you have [365] got to loan us five hundred dollars——"

(Testimony of Army A. Seijas.)

Mr. Mead: I object to that, your Honor. That is highly improper.

The Court: Just stay on the matter now without digressing.

Mr. Mead: I move that the latter remarks be stricken.

The Court: The last remark will be stricken. Proceed.

Mr. Mead: And the Jury instructed to disregard it.

The Court: Of course, the Jury understands that when I strike anything you must disregard it. That sometimes will be difficult to do, but that is part of your duty here to disregard anything that the Court tells you should be disregarded. Go ahead.

The Witness: Now, whether that $70—what that $70 represents, I am not able to tell you at this time because I don't recollect. Obviously though——

Mr. Mead: Same objection, your Honor. The explanation should be to this page and sheet and should not go beyond. It should be by question and answer and not by such dissertations. [366]

The Court: Well, if there is any further difficulty about it, that is the way we will do it. Just give us a brief general description of how the things were done.

The Witness: That is how it was done except that the return of $70, I don't know what it is.

Q. (By Mr. Obenour): Who made the entry therein? A. This is in my handwriting.

(Testimony of Army A. Seijas.)

Q. And from whom did you receive the information that you entered in this book?

A. I don't remember.

Q. Now, were all of the entries in Exhibit 76, the diary for 1942, made by you?

A. Glancing briefly at it, I would say yes.

Q. Now, referring to the—within the first eight or ten pages of Exhibit 76, I believe there are some notations there referring to taxes, city taxes or county taxes or some such. Do you find an example of that in there?

A. Yes, I do, on March the 20th.

Q. And what is the explanation as to the entry made concerning March the 20th?

A. May I glance at it for just a moment?

Q. Yes, sir.

A. Well, may I read what is on this?

The Court: Read the entry and explain it. [367]

The Witness: Well, on top it says "Taxes, $168.27," and it says, "Capital, Federal, $15.00," and then it says, "City—capital, city, $8.00, total $191.27, Receipts $749.64, total, $940.91," and I have got, "Banked 3-21, $832.77, 3-25, $1,080.31." Then I have got "Reese, $90.31, and payment to John Martin, $50.00, and then Roosevelt, $40.00." Then there is "Loan to—" and I can't even make out my own handwriting, but it says there is a loan to somebody for a thousand dollars, and then there is a total of $1,080.31. Then, on the other side I have—which is hard to look because it is in the binding there, but it says, "Bob, $200; P.O. Pool, $50; Ralph's, $40;

(Testimony of Army A. Seijas.)

Parsons, $44; slot, $30," for a total of $364, and—$364, and then it has a division mark divided by two and it says "$182.00."

Q. (By Mr. Obenour): Now, what was the meaning of your entries referring to the taxes?

A. That meant that the $168.27 opposite the word "taxes" meant that that was tax money that was collected and had to be refunded to the Government—or, to the State.

Q. And the receipts, what did that represent?

A. That represented our share of the receipts.

Q. What was the figure that was recorded, then, on the receipt form made out by Mr. Meyers? [368]

A. I wouldn't know.

Q. The entry "Parsons"?

A. This is in March, you see, and I doubt if Mr. Meyers was even working for us at that time.

Q. If it were not Mr. Meyers, who would then have collected it?

A. It would have been collected either by Mr. Crawford or Mr. Forman or Mr. Seijas or both of us or all three of us. I have no way of recollecting.

Q. All right, sir. Your entries as to loans?

A. Well, we have $15 from the capital, fifteen of it which was applied to our Federal license, not tax, and $8 to the City.

Q. What is "Capital"?

A. Well, Capital was a small restaurant or tavern in Port Orchard.

Q. All right, sir.

(Testimony of Army A. Seijas.)

A. As of this time, as I recall, and the loan was to somebody whose name I cannot make out.

Q. Is it shown, the amount deposited?

A. Yes, it does.

Q. What is the amount deposited?

A. The amount deposited is $1913.08.

Q. Does the $1900 include the $364 or the share of $182?

A. The amount banked according to my notes here, is composed [369] of two items, $932.77 and the $1,080.31. That is what these notes indicate made up the amount banked.

Q. Then did the $1900 include the $364?

A. No, it did not. It is made up of the two items I just mentioned to you.

Q. All right, sir. What is the word "Parsons", "P.O. Pool", "Bob's", and I don't recall the others. What did they represent?

A. I can't tell you what they represent at this time.

Q. Were they locations by the name of Bob's and Port Orchard Pool?

A. Yes; I can't tell you whether the return of that $334 was a return to us of money advanced by us or whether it was money that will ultimately show up as hold-out money.

Q. However, it was included in the $1900 banked? A. No, it was not.

Q. No, sir. I mean——

A. It was not included in that because I would

(Testimony of Army A. Seijas.)

take it from this if it was monies that we had advanced.

Q. All right, sir. However, included in the $1900 there was monies returned to the partnership for loans, were there not?

A. Yes. Those were on contract. Now, the John Martin—may I go further and explain? [370]

Q. Well, what do the entries refer to?

A. Now, the thousand dollars is a loan to somebody, and I don't know the name, and it came back to us on that day. The John Martin was a loan that came back to us every week so much a week. That did not come out of the pinball business but came out of his restaurant and tavern business, because, if my recollection is correct at this time, on this particular occasion that was a loan for the remodeling of the place. Do you follow me?

Q. Yes, sir.

A. And that has nothing to do with the pinballs.

Q. If I understand you, then, the $361, you do not know whether that was a return of a loan or hold outs? A. On this occasion?

Q. Yes, sir. A. No.

Q. What did the share mean?

A. What did the share of $182 mean?

Q. Yes, sir.

A. That meant that that was my share.

Q. And who received the other half?

A. Mr. Forman received his share and I received my share.

(Testimony of Army A. Seijas.)

Q. Later in 1942 in Exhibit 76, are there other entries there which do not refer to tax matters?

Mr. Mead: We object to further questioning with [371] regard to these entries, your Honor, as there is no testimony that Mr. Forman knew anything about them or that he gave Mr. Seijas this information, or that he knew anything about these entries, and therefore, he is not bound by them.

The Court: Well, I thought that was pretty thoroughly covered in the preceding testimony. I may be mistaken. At least I think an inference can be drawn to that effect. Whether it is drawn or not, is something else. Overruled.

The Witness: On June 19th.

Q. (By Mr. Obenour): What is the entry on June 19th?

A. On June 19 there is no entry about income at all.

Q. What is the entry there?

A. It says, "Bob, $191.75; Pop, $40; Ralph, $37.50," and a total of $268.25. Then it says, "H.O. $134.12."

Q. What was "Pop"? What did that name "Pop" mean?

A. It referred to some tavern or restaurant.

Q. And "Ralph's" and "Bob's"?

A. The same. They all referred to some tavern or restaurant.

Q. And the amount opposite the names referred to what?

(Testimony of Army A. Seijas.)

A. The amount that was retained out of each of the places.

Q. And were those amounts recorded on the respective receipts of those locations?

A. Do you mean the receipts that we had banked with the [372] bookkeeper, or gave the bookkeeper?

Q. Yes, sir.

Mr. Mead: That is objected to, as the receipts are not here and they would be the best evidence as to whether they were reported or not on those receipts.

Mr. Obenour: It would be impossible to show that.

Mr. Mead: He is testifying that they were not on these receipts, your Honor, and we don't have the receipts. We have no way of meeting it.

The Court: There has been testimony concerning the existence or non-existence of the receipts themselves. Perhaps that should be covered.

Q. (By Mr. Obenour): What happened to the receipts that were made out?

A. The ones we kept?

Q. Yes, sir.

A. The ones that we kept I always bound together and saved for a good many years and ultimately threw away.

Q. Do you have the receipts for these years for '42, '43, '44, and '45? A. No, I don't.

The Court: Are they in existence anywhere, as far as you know?

(Testimony of Army A. Seijas.)

The Witness: My recollection is they have been [373] destroyed.

Q. (By Mr. Obenour): Was the amount recorded on this date? A. June 19th?

Q. June 19, 1942, were the amounts opposite the names Ralph's, Bob's, and Pop's, were they recorded in the receipts of those respective locations on that date?

Mr. Mead: That is objected to, your Honor. They haven't covered that again, and we are not able to meet it, and the testimony is that there were three duplicate copies of these receipts, one of them retained by each of the location owners, two of them going back to Mr. Seijas' office to be delivered, one, I think he said, to his office and the other to the bookkeeper. Now, those receipts would be the best evidence and would put us in a position——

The Court: That still wouldn't prohibit the witness from testifying if he has knowledge of it.

Mr. Mead: Well, he says that these items were not entered on the receipts, your Honor.

The Court: He hasn't said anything about it. He hasn't answered the question yet.

Mr. Mead: He has intimated that, and that, of course, is the purpose.

The Court: I don't know whether that is what [371] he is going to say. It depends if he has knowledge, and if he doesn't have knowledge, that presumably would be his answer, but I can't be sure about that.

(Testimony of Army A. Seijas.)

Mr. Mead: I am sure your Honor understands the purpose of my objection.

The Court: I do understand it, and I am trying to listen attentively and concern myself with the objections that are made. I think the witness perhaps should indicate his knowledge or lack of knowledge on this subject before he answers the question. Perhaps you better put some suitable question to him to that effect.

Q. (By Mr. Obenour): Mr. Seijas, the information that you received for entry in these books was obtained from whom?

A. The information at this time was either obtained from Mr. Forman or from Mr. Forman and myself.

Q. Did you have any knowledge as to whether or not the money recorded in your book from the information supplied by yourself——

A. In 76, do you mean?

Q. In 76. ——that the money recorded there was included on the receipts for those respective locations on that date? A. Yes, sir, I do.

Q. What was the source of your knowledge?

A. By looking at June 19th, the figure I have in front of me, from my notes, my information is that that was unreported income.

Q. And in what manner was it unreported?

A. It was unreported to nobody.

Q. I beg your pardon?

A. It was unreported to nobody. In other words, it was not reported to anybody.

(Testimony of Army A. Seijas.)

Q. And what records were maintained at this time which ostensibly were the records of the income of this business?

A. I don't understand your question.

Mr. Mead: That is objected to, your Honor. Counsel says "ostensibly were the records of this business," and it hasn't been established that those records are not available, three copies—one of the copies, and we object to this inquiry.

The Court: Well, I think it will have to be reframed because the witness said he didn't understand the question. Rephrase it and we will consider your objection as made to the reframed question.

Q. (By Mr. Obenour): What records were maintained at this time by your partnership?

The Court: I think there is no objection to that. Go ahead. [376]

The Witness: We had a bookkeeper at that time —at this time, I mean, June the 19th, and the bookkeeper kept ledgers and journals, whatever they may be, whatever they mean——

Q. (By Mr. Obenour): Did those ledgers and journals constitute the record of the receipts of your partnership? A. Yes, they did.

Q. And they were kept by whom?

A. Our bookkeeper at that time was a chap by the name of Mounger.

Q. What was the source of the information used by your bookkeeper in making the entries into the ledgers and journals?

(Testimony of Army A. Seijas.)

A. He received the information either from Mr. Forman or Mr. Meyers and from the collection slips, Exhibit No.—whatever it is there.

Q. 84. A. 84.

Q. And these receipts were supplied to him by whom? A. By Mr. Meyers.

Q. Was any of the money recorded by you in these books, Exhibits 76, 77, 78, and 79, for the years '42 to '45——

Mr. Mead: He said he didn't have anything to do with the books, your Honor. That is objected to. The bookkeeper had charge of the books.

The Court: He might have had knowledge of it, [377] nevertheless. It wouldn't necessarily be the bookkeeper. However, I do think that we have not had any explanation of where these books are or whether they are still in existence or not.

Mr. Mead: That is the point.

The Court: I think that we have to have this other matter attended to. If the books that are referred to are in existence, then they are the best evidence of what is in them.

Q. (By Mr. Obenour): Where are the books of the partnership—of the four partnerships, Mr. Seijas?

The Court: I presume you mean now the books kept by Mr. Mounger?

Mr. Obenour: Mr. Mounger and Mr. Renstrom.

The Court: You better identify which books you are talking about so that we will be certain what we are talking about.

(Testimony of Army A. Seijas.)

Q. (By Mr. Obenour): Where are the ledgers and journals maintained by your employees for the United Amusement Company, Mr. Seijas, the United Amusement Company of Bremerton, the Bremerton Amusement Company, and the American Amusement Company for the years 1942, '43, '44, and '45?

A. I don't know where they are. I thought some of them were down in the Marshal's office. I don't remember. I don't know. I don't even remember whether we had them here at [378] the last trial.

Q. Do you recall an affidavit submitted to the Internal Revenue by Mr. Phalen? A. Yes.

Q. What was that?

Mr. Mead: Now, your Honor, that is highly objectionable. Are you attempting to impeach the witness? If you are, let us produce the document. It is a leading question, your Honor.

The Court: We will have to have a further explanation about it before the contents of the affidavit can be presented.

Mr. Obenour: The question was—what was it? We are not asking for anything on it.

The Court: The question is put in such a way that the witness might well respond with the contents rather than a description of how it came about, how it was made, and so forth. That is all that the question should call for, but it is too broad in its present form.

Q. Who is Mr. Phalen?

(Testimony of Army A. Seijas.)

A. Mr. Phalen was the attorney that had an office next to ours, next to mine, and from whom we rented a room for our bookkeeper during the years '42, '43, and '44, because we didn't have enough room in our offices. [379]

Q. Were any records of your amusement companies left in the offices of Mr. Phalen?

A. Yes. The records were kept there in that office. When I said that the records were brought over to my office in Seattle, I was speaking loosely. That was considered a part of my office.

Q. Did anything occur in the office of Mr. Phalen concerning the records of your amusement companies? A. Yes.

Q. What happened?

A. The building office was cleaning the offices, redoing the office of Mr. Phalen, and sometime in the first part of March of 1945, as I recall, all of the books were—and the papers that we had in there, were thrown—I say "all," I mean all that I can recall at this time, were thrown out and destroyed, which made it very difficult for us to keep books. We had to start all over again.

Q. What books were destroyed or thrown out at that time?

A. I don't recollect except that they were books of account of our operations over in Bremerton. If I had the affidavit I could refresh my recollection from it.

Q. Where is Mr. Phalen?

A. Mr. Phalen now?

(Testimony of Army A. Seijas.)

Q. Yes, sir.

A. Mr. Phalen has passed away. [380]

Q. Prior to his death had he presented or made an affidavit concerning this subject matter?

A. Prior to his death I had him make an affidavit advising that that matter had occurred.

Q. Do you have a copy of that affidavit?

A. I do. I don't know whether I have it here, wherever it is.

Q. If it isn't here, would it be in the Marshal's office?

A. It might be. I don't recollect what I have got there.

Q. And included in the books destroyed were these ledgers and journals for your amusement companies for the years 1942, '43, '44, and '45?

A. My recollection is right now that—may I have the last question?

Mr. Bischoff: May the last question be read?

The Court: He said, included in the records destroyed were these ledgers and journals for the years 1942 to 1945.

The Witness: My recollection is that there were, but not '45. I think it was only one or two months of '45.

The Court: I think you said the damage occurred, whenever it was, at that time?

The Witness: Yes. Yes, Judge, you are right. It occurred maybe in February or March of 1945.

Mr. Obenour: We will subsequently produce the [381] the affidavit at recess.

(Testimony of Army A. Seijas.)

The Court: Go on from there.

Q. (By Mr. Obenour): Were the amounts recorded in your books for the years '42, '43, and '44 included in the receipts recorded and the journals and ledgers kept by your bookkeepers for their respective times?

A. The amounts that I have in these, we call them diaries, for a want of a better name, that were held off are not reported in the partnership ledgers for those years.

Q. Over how long a period of time did this practice of holding out part of the receipts of the pinball machines from the receipts recorded in your books and records of the amusement companies continue?

A. Well, offhand I would say that it started sometime around June or July of '42, or maybe later, and continued to on or about the last part of December of '45.

Q. Would you refer to Exhibit 79 which is the diary for 1945. What is the last entry you have there reflecting hold outs of the receipts of the pinball businesses in that year? A. The last one?

Q. Yes, sir.

A. December 3, I think—December 27th.

Q. December 27th? A. Yes, sir. [382]

Q. And what is the amount shown to have been held off in the collections of December 27th?

A. $700 total.

Q. And would you read that entry, please?

A. It says, "December 27, 1945, total—" it has

(Testimony of Army A. Seijas.)

a list of figures, and a total of $700, "No Dock, one-half, $350, and No Jerry."

Q. All right, sir. Would your hold that up, sir, and how does that differ, your entry there, from the entries in Exhibit 76 that you have just shown the Jury?

A. That one comes on a tape that is taken off of an adding machine, and the names of the locations are written in there—not written in, but printed, printed in by hand, and then the total, of course, is over the typewriter—adding machine ribbon, and then it says, "No Dock," which is also printed in. Then, next it says, "One-half equals $350," and that is in my handwriting, and then "No Jerry," and that is in my handwriting. Whereas in June, June 19, it is all in my handwriting.

Q. And in whose handwriting is the printing?

A. Do you mean on Exhibit 79?

Q. Yes, sir.

A. The handwriting there—part is Mr. Meyer's handwriting, and the other part, that is written is mine.

Q. All right, sir. Would you refer to Exhibit 79 for the [383] entry of June—or rather, May 12.

A. Yes, sir.

Q. Do you have that there? A. Yes, sir.

The Court: May 12, 1945?

Mr. Obenour: Yes, sir.

Q. (By Mr. Obenour): And would you hold that up, sir? A. All right.

(Testimony of Army A. Seijas.)

Q. And is that from—what is the nature of that entry?

A. Well, it is another one of these sheets that is in Mr. Meyer's handwriting, and it says, "P.O. Pool, $100" written in there.

Q. When you say "sheet," do you mean——

A. It is just a little slip.

Q. Adding machine tape?

A. It looks like it but it isn't. It is just a little slip of paper that is pasted into the book.

Q. How is it pasted?

A. Pasted with cellophane.

Q. Scotch tape or some such?

A. Whatever it is. Then, the next one is "Pasttime, $150, Star, $50, Chuck, $75," and that makes a total of $375.

Q. And in whose handwriting is that?

A. Do you mean what I have just quoted to you?

Q. Yes, sir. [384] A. That is Mr. Meyer's.

Q. Is there anyone else's handwriting upon it?

A. Yes, sir, there is.

Q. Whose? A. Mr. Forman's.

Q. What is in Mr. Forman's handwriting?

A. He has got a long division mark and the figure "2," and he has got—he has divided $375 by two which gives $187.50, and that is multiplied by two receiving a total of $375, and there is some other handwriting that says "No Ralph," and that is in Mr. Meyer's handwriting.

Mr. Obenour: I ask that the Jury examine that, your Honor?

(Testimony of Army A. Seijas.)

The Court: All right.

Q. (By Mr. Obenour): Did you receive any of the money that is shown on the entry of May 12 of $375? A. Did I receive that $187.50?

Q. Yes, sir.

A. I have no independent recollection, but I assume I received half.

Q. And who received the other half?

A. I don't know, except I received $187.50 from Mr. Forman.

Q. And from whom did you receive the information—the paper reflecting the figures and the total?

A. I received the slip of paper and the money from Mr. Forman. [385]

Q. The slip of paper and the money?

A. And the money.

Q. And the entire amount?

A. No, the half, my money. My share of the money.

Q. When did you make these entries in these diaries, Mr. Seijas?

A. Well, I made them about the time that I got the slip of paper.

Q. And when did you make the entries in your own writing for where there is no slip of paper but a direct entry on Exhibit 76?

A. At the time I got the information.

Q. And that would be when?

A. Well, whenever Mr. Forman would give it to me or whenever I received it. I don't——

(Testimony of Army A. Seijas.)

Q. (Interrupting) Would it be on the date in which you have recorded it or would it be some other date?

A. Generally it would be the date that it was recorded. For instance, Friday, June 30, information probably was received on Friday, June 30, or Saturday, January 31—I don't mean June, I mean January.

Q. What year?

A. Well, in Exhibit 76 it would be 1942.

Q. Are all of the entries contained in these diaries made on the dates shown or were they made on a day thereafter? [386]

A. All were made either on the date shown or approximately that date, with the exception of certain ones where Mr. Forman would be out of the office for a week or two and then we would do it all at one time, and I would go back and put it in the date which it corresponded to.

Q. When Mr. Forman was out of the office, who would receive the money and the tapes shown or the papers from Mr. Meyer?

A. Sometimes Mr. Meyer would give me an envelope, a sealed envelope, if Mr. Forman was not in his office, or he were out of town, or he would keep them and wait until Mr. Forman returned.

Q. How would this money and the paper be delivered to your office by Mr. Meyer?

A. Read the question again, please.

The Court: Do you mean in what form of container?

(Testimony of Army A. Seijas.)

The Witness: It was always brought in an envelope.

Q. (By Mr. Obenour): In an envelope. And the envelope would contain what?

A. Well, it would be sealed, as far as that was concerned.

Q. And on these instances when it was brought to you, would you open the envelope? [387]

A. No.

Q. When would you open it?

A. I would give it to Mr. Forman, that is, if he left it with me.

The Court: If Meyer left it with you?

The Witness: Yes, sir.

Mr. Obenour: I had some other matters in the book, your Honor.

The Court: All right.

Q. (By Mr. Obenour): Refer now to May 16 in Exhibit 79. A. May 16?

Q. Yes, sir. A. Yes, sir.

Q. Would you hold that up, please, and read that entry.

A. On May 16 I had posted in a book here for May 16 a typewritten slip of paper, it says "Crow's Nest $325.00, Knett's $75.00, Doek $125.00, Beach $100.00, Aldrich $25.00, Louis $25, New York Cafe $50.00, Red Rooster none, Pop's Inn $50.00," and it totals $750.00, and that is the figures in that column and the addition of those figures was in the handwriting of Mr. Meyer. To the right of that,

(Testimony of Army A. Seijas.)

in the figure $750.00, divided by 2, equals $375.00, in Mr. Forman's handwriting.

Q. Now, the names of all those places and locations is where your machines are located, Mr. Seijas? [388]

A. Well, to the best of my recollection, yes.

Q. All right, sir, May 19 in the same exhibit.

A. May 19 shows a slip of paper, and this is all computed in Mr. Meyer's handwriting, with the exception of the division, which is in Mr. Forman's handwriting. It says Blue Moon $100, Irene's $50, Silverdale $25, Keyport $25, Chuck's $50, Port Orchard Pool $100, Pasttime $150, Star $50, Sinclair $25, total $575, and that is all in Mr. Meyer's handwriting. And divided by 2, it isn't divided by 2, it's got a division mark and $282.50 multiplied by 2, which adds up to, multiplies out to $575, and that is Mr. Forman's handwriting.

Q. June 6?

A. June 6, that is a typewritten slip of paper and it has Crow's Nest $300—the Crow's Nest is printed, typed rather, $300 is in Mr. Meyer's handwriting, Mr. Knett $75, in Mr. Meyer's handwriting, Dock $100, Beach $50, Aldrich $25, Lois (a mark) Pop's Inn $50, total $600, and then there is a line underneath and $500, and off to the left it's got a line and $100, and I have here in my handwriting "one-half, $250." Someplace it was reduced from $600 to $500 so we divided it into $250.

Q. What was the source of the information under which [389] you made the division of $500?

(Testimony of Army A. Seijas.)

A. Well, my half was $250 and I got the information and the $200 from Forman, Mr. Forman.

Q. June 9?

A. June 9. It's printed by Mr. Meyers or at least in his handwriting $200, P. O. Pool $100, Star $40, Chuck's $50, and then the total is $390, by Mr. Meyers, and then it's got a division mark and it's divided, which leaves a figure of $195, which is what I received. That is in Mr. Forman's handwriting.

Q. In all of these instances where the entry is by a slip in any of these diaries, from whom was this paper containing the information received?

A. I received all of the slips and all of the money from Mr. Forman.

Q. Mr. Seijas, do you have any copies of your tax return and the return of your wife for the years 1942 and 1943?

A. I thought we had them in the first trial.

Q. Do you have them there?

A. I do not. No, I do not.

The Court: He says he does not have them.

Q. (By Mr. Obenour): Can you identify these documents, sir?

The Court: I want a number on them.

Mr. Obenour: Yes, your Honor. [390]

The Clerk: Plaintiff's Exhibit 87 has been marked for identification.

The Court: 87 marked for identification.

Q. (By Mr. Obenour): What is 87, sir?

A. 87 is a copy of my 1942 income tax return.

Q. Pardon? A. 1942 income tax return.

(Testimony of Army A. Seijas.)

Q. For whom?

A. For Army Seijas. And one for 1943 for Betty L. Seijas. That is my wife, 1943 income tax return of my wife. There is three of them.

Mr. Obenour: I offer 87.

The Court: Are these carbons of the original, Mr. Seijas, or are they typed copies, or what kind of copies are they?

Mr. Mead: In pen, your Honor, handwritten.

The Court: All right.

Mr. Mead: Some pencil, too, on some of the sheets.

The Court: Yes.

Mr. Mead: May I inquire, your Honor?

Examination on Voir Dire

Q. (By Mr. Mead): I see these are marked in some instances, Mr. Seijas, [391] with "Case No. so-and-so." They were introduced in evidence, were they, in your trial?

A. I don't know. Let me look at them, please, again. I can't tell you. It says so, but I don't know.

Mr. Mead: We object to them, your Honor. They are not binding on the defendant Forman.

The Court: That ground is overruled. Admitted.

(Whereupon Plaintiff's Exhibit No. 87 was admitted in evidence.)

Mr. Obenour: I ask these be marked as one exhibit.

The Clerk: Plaintiff's Exhibit 88 has been marked for identification.

(Testimony of Army A. Seijas.)

Direct Examination—(Continuing)

Q. (By Mr. Obenour): Handing you Exhibit 88, can you identify that, sir.

A. They all purport to be partnership returns for the year 1942 of the Bremerton Amusement Company, and '43, '42 and '43 partnership returns.

Q. Which one? A. Bremerton.

Q. Is there also '44 included there?

A. You are right, two for 1942, one for '43 and one for '44.

Q. And who were the partners in the Bremerton Amusement [332] Company?

A. In the beginning it was Seijas and Forman, and then it went to Seijas, Forman and Heberling, and winds up Heberling, Seijas and Forman.

Mr. Obenour: I offer 88.

Mr. Mead: May I inquire, your Honor?

The Court: You may.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, you identified these as a copy of the partnership return for the Bremerton Amusement Company for the years 1942, '43 and '44, as I recollect it.

A. I said they were purported copies.

Q. And there appears to be the first two returns, one is a white copy and the other is a yellow copy, and both of them purport to be copies of the '42 return, and they are in different amounts. Do you know the explanation for that? A. Yes.

Q. What is the explanation for that?

A. The first one is a partnership that says date

(Testimony of Army A. Seijas.)

of organization May 1, 1942, and the yellow copy is on date of organization July 1, 1942. So the white would be for a period of two months, three months—two months, and the other one would be for a period of six months. [393]

Q. So they are partial-year returns, is that correct?

A. Mr. Mead, I can't tell you, but that would be my deduction from what it says on there.

Q. These returns have been in your possession from the time they were prepared right up to the present time? A. No.

Q. They haven't been? A. No.

Q. In whose possession have they been?

A. I don't know a thing about them.

Q. You don't know where they came from?

A. I don't know anything about them.

Q. When did you last see them?

A. This is the first time I have ever seen them.

Q. First time you have ever seen them?

A. As far as I know.

Q. Do you have any knowledge as to who signed those returns?

A. I see one here that looks like it's on my typewriter, but the other ones I don't know whose handwriting it is. The one for 1943 and 1944 seems to be on the typewriter we used at our office.

Q. But this, to your knowledge, is the first time you have seen any of those copies?

A. Well, that is my testimony right now, because I haven't seen any of this for a long time. [394]

(Testimony of Army A. Seijas.)

Q. How can you identify them as retained copies of the returns that were filed if you have never seen them before?

A. I can't. That is why I said purported.

Q. That is what you meant by the word "purported?" A. That is right.

Mr. Mead: Thank you.

We object to the exhibit, your Honor.

The Court: I don't think they are sufficiently identified.

Mr. Mead: The witness said he has never seen this.

The Witness: I don't recall having seen them.

The Court: Not sufficiently identified.

(Whereupon Plaintiff's Exhibit No. 88 for identification was rejected.)

The Clerk: Plaintiff's Exhibit 89 has been marked for identification.

And Plaintiff's Exhibit No. 90 has been marked.

Plaintiff's Exhibit 91 has been marked for identification.

Direct Examination—(Continuing)

Q. (By Mr. Obenour): Handing you Exhibits 89, 90 and 91 for identification, can you identify those exhibits, Mr. Seijas?

A. Well, let's start with 89. 89 purports to be the partnership return for 1942 of United Amusement Company of Bremerton, and of United Amusement Company of Bremerton for 1943, in somebody's handwriting, and United Amusement Com-

(Testimony of Army A. Seijas.)

pany of Bremerton 1944 partnership return, which purports to be as if it came from our typewriter.

The Court: Those three are all part of 89, are they?

The Witness: Yes, they are, your Honor.

The Court: Thank you.

A. (Continuing) And partnership return for 1945 for United Amusement Company of Bremerton, which, if I remember correctly, seems to be in the handwriting of our bookkeeper, Mr. Renstrom. And also a partial return for the three months of 1945 of the United Amusement Company of Bremerton, also in the handwriting of Mr. Renstrom.

Q. (By Mr. Obenour): And 90 is what?

A. Pardon me. I forgot. Now, 90 is the partnership return for 1942 for the American Amusement Company and the 1943 partnership return of the American Amusement Company, which purports to be like the ones we made up in our office. [296]

91 is the partnership return for the calendar year 1942 for the United Amusement Company in somebody's handwriting, and the 1943 is a carbon copy of a partnership return like the ones, similar to the ones that we prepared in our office, and I think it has some of Mr. Renstrom's initials on it, and the 1944 partnership return for the calendar year of the United Amusement Company, like the ones we prepared in our office, and I believe it has Mr. Renstrom's initials—Mr. Renstrom was our bookkeeper, and the 1945 return of the United

(Testimony of Army A. Seijas.)

Amusement Company in somebody's handwriting that I do not recognize.

Q. Can you identify any of these as copies of the partnership returns for the respective companies on those respective years?

A. Yes. The ones that are typed in look like duplicate originals of the ones we sent in to the Internal Revenue office.

Q. And those are which ones?

A. All the ones that I have seen that are typed.

Q. And the others?

A. The others, the ones that are in the handwriting of Mr. Renstrom, I recognize as his handwriting. Those I identified.

The Court: It may be easier to single out [397] the ones you can't identify and keep track of them.

The Witness: At this time I do not recognize the partnership return for 1942, Plaintiff's Exhibit for identification No. 89, that is, 1942, '43. The rest of the partnership returns in that exhibit I can identify.

Mr. Obenour: I offer the returns for '44 and '45 for the United Amusement Company of Bremerton in Exhibit 89.

The Witness: There are two in 89.

Examination on Voir Dire

Q. (By Mr. Mead): May I inquire whether the witness knows as to those returns which he has identified copies of, first, whether he has seen them before.

(Testimony of Army A. Scijas.)

A. Do you mean at sometime in the past?

Q. Yes. A. Oh, yes.

Q. You recognize these returns as ones you have seen?

A. I recognize the returns and by whom they were made.

Q. Do you know who signed them?

A. Is there a signature on those you are holding? Just tell me if there is not. On the duplicate originals, on which there is the typewriting, there is no signature. My recollection is that they were signed, of course, before [398] they were sent to the Internal Revenue Department.

Q. That would be a conclusion, and you are not able to state who signed them, though, are you, Mr. Scijas? You are not able to state who signed each one of these returns?

A. They would be one of two people who signed the return, Mr. Mead.

Q. But you don't know who signed them?

A. I don't know which one of the two signed it.

The Court: Who are the two that you refer to?

The Witness: Mr. Forman or myself.

Mr. Mead: Those returns which he has identified as having seen before, are objected to, your Honor, in that they are not complete copies, and he does not know who signed them, and the best evidence, of course, would be the original. These are only copies.

The Court: I think we should account for the originals.

(Testimony of Army A. Seijas.)

Mr. Obenour: That was done with Mr. Burdick, your Honor.

The Court: I had overlooked that, I am sorry. It had been done. With the exception of the two returns, or purported returns, for [399] '41 and '43, Exhibit 89 is admitted.

(Whereupon Plaintiff's Exhibit No. 89 for identification was admitted in evidence.)

Direct Examination—(Continuing)

The Witness: Do you want me to proceed?

Q. (By Mr. Obenour): Yes, on Exhibit 90.

A. 1942 partnership return on Exhibit 90 is in some person's handwriting who I do not recognize, and the partnership return for the year 1943 seems to be a duplicate original of the one we sent in and it is initialed by Mr. Renstrom who was our bookkeeper, and that I recognize.

Mr. Obenour: We offer the '43 return, in Exhibit 90, for the American Amusement Company.

Mr. Mead: Same objection, your Honor. If it is in Mr. Renstrom's handwriting and he is familiar with the return, he should identify it.

The Court: I don't think it is required.

Mr. Mead: We object to it on the same grounds as the former return, your Honor.

The Court: The objection is overruled and the return for '43 in Exhibit 90 is admitted. The other purported return, for '42, is not admitted. [400]

(Whereupon, that part of Plaintiff's Exhibit No. 90 above referred to was received in evidence.)

(Testimony of Army A. Seijas.)

Direct Examination—(Continued)

Q. (By Mr. Obenour): Exhibit 91.

A. Pardon me. The partnership return for, in Exhibit 91 is in some person's handwriting and I do not recognize it.

Q. For which year?

A. '42. And I do not recognize it at this time. The return, the partnership return for 1943 of the United Amusement Company seems to be a duplicate original of the, or a duplicate of the original, which looks like one we made up in our office and it has initials of the bookkeeper the same as for 1944. And then 1945 is in the handwriting of some person unknown to me.

Mr. Obenour: We offer the returns for '43 and '44 in Exhibit 90 for the United Amusement Company.

The Court: 91?

Mr. Obenour: 91, pardon me.

Examination on Voir Dire

Q. (By Mr. Mead): Are you able to state, Mr. Seijas, who signed any of these returns? Do you know? A. Are you talking of Exhibit 91?

Q. Any of the returns that are parts of Exhibit 91.

A. No, I am not. It would be either one of two people.

Mr. Mead: Same objection, your Honor.

The Court: Same ruling. They are admitted. I should say copies of the returns for '43 and '44 in

(Testimony of Army A. Seijas.)

Exhibit 91 are admitted; those for '42 and '45 are not admitted.

(Whereupon those parts above referred to of Plaintiff's Exhibit No. 91 were received in evidence.)

Direct Examination—(Continued)

Q. (By Mr. Obenour): Who prepared——

The Court: Excuse me. I don't have any recollection of ruling on 88.

Mr. Obenour: I am sorry.

The Clerk: You sustained the objection to it, your Honor.

Q. (By Mr. Obenour): Were you able to identify any of those? A. I don't know what that is.

The Court: That purports to relate to the Bremerton Amusement Company returns for '42, '43 and '44, according to my notes. Are there any of those you can identify?

The Witness: Yes, sir. [402]

The Court: Which ones?

The Witness: I can identify the partnership return for '43 and '44.

The Court: But not '42?

The Witness: But not '42.

The Court: The offer has been previously made, and I take it you make the same objection, Mr. Mead?

Mr. Mead: Yes, your Honor.

The Court: Very well, it is overruled and the

(Testimony of Army A. Seijas.)

exhibit is admitted, with the exception of the purported return for '42.

Mr. Obenour: There are two of those returns in that exhibit, I believe, two returns for '42.

The Court: Two for '42, neither of which has been identified.

Mr. Obenour: Yes, sir.

(Whereupon, Plaintiff's Exhibit No. 88, previously rejected, was admitted in evidence, with the exception of those portions above referred to.)

The Court: That brings us—I think also you have something more on this immediate subject—to the recess time. I think we should have our afternoon recess at this time. [403]

(Whereupon a short recess was had.)

The Court: Proceed.

Direct Examination—(Continuing)

Q. (By Mr. Obenour): Mr. Seijas, during the recess did you find a copy of that Phalen affidavit?

A. I have.

Q. May I have it, please. A. Yes.

The Clerk: Plaintiff's Exhibit 92 has been marked for identification.

Mr. Obenour: We offer 92.

Mr. Mead: May I inquire of the witness, your Honor?

The Court: You may.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, this appears to

(Testimony of Army A. Seijas.)

be a yellow copy or an office copy of an original document.

A. That is right.

Q. Where is the original, do you know?

A. I think the Internal Revenue Department has it. If I recall, we sent the original in support of an application for continuance for a filing of returns.

Q. And so the original would be in the hands of the [404] Internal Revenue Department, is that right? A. I suppose.

Q. And the purpose of obtaining this document was to procure a continuance for the filing of returns? A. Yes. May I see that, please.

Q. Yes.

A. That is my recollection.

Q. Do you know where this copy came from, Mr. Seijas? A. Yes.

Q. Where did it come from?

A. That copy came from my files and—which we used in the first trial in this case.

Q. And when you say the first trial, do you mean your trial about a year ago in this Court?

A. That is right, my individual trial.

Q. Your individual trial? A. Yes.

Q. And this document was used in the course of your trial, is that right?

A. Yes, it was introduced as an exhibit in that case.

Mr. Mead: It is objected to, your Honor, Exhibit

(Testimony of Army A. Seijas.)

92, on the ground that it just appears to be an unsigned copy, whereas the original is in the hands of the government, and for the further reason that it does not support the proposition [405] that the journals and ledgers of account of these partnerships are lost or destroyed, but that the document refers only to deposit books, employees' records, payout slips and other miscellaneous items, but not the ledgers and journals, and it is my recollection of the witness' statement that he believed that the last time he saw those books was in the Marshal's office.

The Court: I am of the opinion that the document itself is not admissible in evidence.

Mr. Obenour: On what grounds, your Honor? First as to the testimony of the witness.

The Court: Well, first of all, it is not—the absence of the original is not accounted for. That would be the very first occasion. And, in the second place, I doubt whether an affidavit of this kind in the face of objection can be admitted in this particular trial. I will hear from you later at a different time. The testimony of Mr. Seijas is already in with respect to loss of books and records, but the affidavit, as such, I think, is not admissible.

(Whereupon, Plaintiff's Exhibit No. 92 for identification was rejected.)

Mr. Mead: In view of your Honor's ruling, [406] I understood counsel to say that they would support the proposition that these books and records were lost or destroyed, I mean by that the

(Testimony of Army A. Seijas.)

journals and ledgers and records of the partnerships, and that this testimony of the witness with respect to that was admitted on that basis, and in view of your Honor's ruling——

The Court: I didn't mean it to be limited on that basis. I think the witness has testified concerning it, and that testimony was admissible. If there be something else to base it on, that could be added, but the testimony of the witness was not admitted simply because it was going to be supported by this affidavit.

Mr. Mead: I understand, your Honor, but for the purpose of the record we would like to move that this testimony with respect to the records and what the records show, and that these items were not included in the records and the like, be all stricken from the record.

The Court: It is entirely appropriate for you to make such a motion, and the motion is denied.

Mr. Mead: Thank you, sir.

Q. (By Mr. Obenour): In the course of operation, what [407] reports were furnished to the partners by the bookkeeper?

A. Do you mean what reports did Mr. Renstrom furnish to Mr. Forman and I?

Q. That's right.

A. Oh, I don't remember whether we got a profit and loss statement or not.

The Clerk: Plaintiff's Exhibit 93 has been marked for identification.

(Testimony of Army A. Seijas.)

(Thereupon, Plaintiff's Exhibit No. 93 was marked for identification.)

Q. (By Mr. Obenour): Handing you Exhibit 93, can you identify that, sir? A. Yes.

Q. What is that, sir?

A. It says "Profit and Loss Statement and Balance Sheet," and a detail of the partners accounts from January 1, 1944, to December 31, 1944.

Q. For what company?

A. United Amusement Company of Bremerton, the "A" route.

Q. Did you and Mr. Forman receive copies of this statement from Mr. Renstrom at the time the statement had been prepared? A. Yes.

Mr. Obenour: We offer Exhibit 93. [408]

Mr. Mead: May I inquire of the witness?

The Court:

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, where did this document come from? Did it come from our files or some other records, do you know?

A. I don't know where it came from, Mr. Mead.

Q. And I notice that it purports to be an instrument referring to the year 1944. I think you stated previously to identifying it that you could not recall whether you had been furnished with any profit and loss statement. Do you remember specifically this profit and loss statement as having been furnished to you in 1944—some twelve years ago?

A. I remember having been furnished a profit and loss statement like that.

VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 779

WILLIAM R. FORMAN, PETITIONER,

v.

UNITED STATES

PETITION FOR CERTIORARI FILED MARCH 18, 1959

CERTIORARI GRANTED MAY 4, 1959

No. 15324

United States
Court of Appeals
for the Ninth Circuit

WILLIAM R. FORMAN, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

(In Four Volumes)

VOLUME II.

(Pages 449 to 944, inclusive)

Appeal from the United States District Court for the Western District of Washington, Southern Division

(Testimony of Army A. Seijas.)

Q. But you have no individual recollection of having received that?

A. I have no individual recollection of having received that particular paper. I have a recollection of receiving one just like it, if not that one, for each company, as I recall.

Mr. Mead: Is it offered?

Mr. Obenour: Yes.

Mr. Mead: We object to the document as [109] incompetent, irrelevant, and immaterial, and there is no identification or evidence up to this point that this information was brought to the attention of Mr. Forman.

The Court: Overruled. Admitted.

(Thereupon, Plaintiff's Exhibit No. 93 for identification was admitted into evidence.)

The Clerk: Plaintiff's Exhibit No. 94 has been marked for identification.

Q. (By Mr. Obenour): Can you identify Exhibit 94, sir?

A. This purports to be a profit and loss statement, balance sheet and detail of partners' accounts in duplicate for the Bremerton Amusement Company.

Q. That was prepared by whom, Mr. Seijas?

A. It appears to be like the ones that were prepared in our office.

Q. And who particularly would have prepared it in your office?

A. Well, the girls would have prepared it from information given them by the bookkeeper, and he

(Testimony of Army A. Seijas.)

would write it out in longhand and the girls would prepare it as he requested it.

Q. And the bookkeeper was whom?

A. Mr. Renstrom.

Q. And to whom did Mr. Renstrom furnish copies of that [1104] document?

A. He furnished copies to all of the partners involved.

Q. And who were they?

A. This indicates that on May the 15th they were Heberling, Forman, and Seijas. It also indicates the drawings that were made by the various members during the year 1944—not during the year 1944, but for the five and a half or four and a half months during that time.

Mr. Obenour: Offer 94.

Mr. Mead: May I inquire, your Honor?

The Court: You may.

Examination on Voir Dire

Q. (By Mr. Mead): Do you have an independent recollection of this profit and loss statement?

A. I do not have an independent recollection of that particular document, but it looks like the documents that we got.

Q. And do you know where this document came from and from whose files?

A. I do not. I have an idea, but I do not know.

Q. It hasn't been in your possession, I take it?

A. No, it has not.

Mr. Mead: That is objected to, your Honor,

(Testimony of Army A. Seijas.)

[411] for the same grounds as the previous exhibit, and on the grounds it is not properly identified.

The Court: Overruled. Admitted.

(Thereupon, Plaintiff's Exhibit No. 94 for identification was admitted into evidence.)

The Clerk: Plaintiff's Exhibit 95 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 95, sir, can you identify that?

A. This appears to be a yearly profit and loss statement, profit and loss statement, and balance sheet detail of partners' accounts for the United Amusement Company ending for the year December 31, 1944.

Q. Who prepared the document?

A. This document was prepared by somebody in the office, some girl in the office, and from Mr. Renstrom's books under his supervision.

Q. To whom did Mr. Renstrom furnish copies of the document?

A. To Mr. Forman and myself.

Mr. Obenour: Offer Exhibit 95.

Mr. Mead: Do you have an independent recollection or do you know whose files it came from?

The Witness: I do not know from whose [412] files it came from, and I have no independent recollection of that particular piece of paper.

Mr. Mead: Same objection, your Honor.

The Court: Admitted.

(Thereupon, Plaintiff's Exhibit No. 95 for identification was admitted into evidence.)

(Testimony of Army A. Seijas.)

The Clerk: Plaintiff's Exhibit 96 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 96, can you identify that document?

A. This is a profit and loss statement detailing partners accounts and balance sheet from January 1, 1945, to March 31, 1945, and from April the 1st, 1945, to December 31, 1945, prepared in our office and typed in our office, and wherever the handwriting appears it is the handwriting of Mr. Renstrom.

Q. And to whom was it furnished?

A. Mr. Forman and I got a copy of that document.

Mr. Obenour: Offer Exhibit 96.

Mr. Mead: May I inquire of the witness, your Honor.

The Court: You may.

Examination on Voir Dire

Q. (By Mr. Mead): I assume, Mr. Seijas, the same answers to this document [413] would be true that you gave to the other profit and loss statements that you have no independent recollection of this particular one, or do you, sir?

A. Not of this one. My answer to your questions would be the same.

Q. Do you know why the balance sheet and profit and loss statement was made up as of part of a year, sir, for example, January 1, 1945, to March 31, 1945, and from April 1, 1945, to December, the end of the year? A. Yes.

(Testimony of Army A. Seijas.)

Q. What was the reason for that?

A. The reason for that was this, in December of 1944 we had a meeting, Mr. Forman, Mr. Chester Heberling, Mr. George Heberling, and myself, in which many things were discussed, one of which was the retirement of the Heberling brothers from the pinball operation in the City of Bremerton, and whereby they gave me an option to buy out their interest in the United Amusement Company of Bremerton until, which expired, rather, on March the 30th, 1945, and on that date I exercised the option and bought out the Heberling brothers' interest in the pinball routes in the City of Bremerton, which in turn we amalgamated with the interest that was represented in Mr. Forman's name which then gave us a hundred percent interest in all of the [414] pinball routes in which Mr. Forman and George Heberling were interested. Consequently, the Heberling brothers-Forman — George Heberling-Forman partnership terminated March 31, 1945, and United Amusement Company then became Forman and Seijas as of April 1, 1945.

Mr. Mead: Same objection, your Honor.

The Court: Overruled. Admitted.

(Thereupon, Plaintiff's Exhibit No. 96 for identification was admitted into evidence.)

The Clerk: Plaintiff's Exhibit 97 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 97, can you identify that, sir?

A. This is a profit and loss statement, balance

(Testimony of Army A. Seijas.)

sheet, distribution of partnership's accounts, prepared in our office, from January 1, 1948, to December 31, 1948, between A. A. Seijas and H. T. Morin.

Q. And that was prepared by whom?

A. This one was prepared by Mr. Renstrom.

Q. Who was furnished a copy of it?

A. Mr. Renstrom furnished—not him, but the girls furnished a copy to Mr. Morin, myself, and Mr. Forman.

Mr. Obenour: Offer 97.

Mr. Mead: This is objected to, your Honor, on the same grounds as the previous [415] exhibit, and on the further grounds that it could have no materiality to the issues involved in this case, being for a period from January 1948 to December 31, 1948, and a partnership in which Mr. Forman had no interest.

The Court: As far as the record appears at the present time, it is not clear to me what the admissibility of this is.

Mr. Obenour: A copy was furnished to Mr. Forman.

The Court: I understand that, but this far I will have to reserve on that one.

The Clerk: Plaintiff's Exhibit 98 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 98, can you identify that, sir?

A. This appears to be a profit and loss statement for the year 1945 terminating as of December 31,

(Testimony of Army A. Seijas.)

1945, of the United Amusement Company, a balance sheet, and a detailed of the partner's account.

Q. Prepared by whom?

A. This was prepared in our office by one of the girls under the supervision of the bookkeeper, Mr. Renstrom.

Q. Copies were furnished to whom?

A. Mr. Forman and myself. [416]

Mr. Obenour: Offer 98.

Mr. Mead: Same objection to this as 96 and the previous exhibit.

The Court: Admitted.

(Thereupon, Plaintiff's Exhibit No. 98 for identification was admitted into evidence.)

Q. (By Mr. Obenour): In Exhibits 76, 77, 78, and 79, there are entries referring to George. To what do those entries refer?

A. Do you want to call my particular attention to something to refresh my recollection?

Q. The first page of Exhibit 79.

A. January the 2nd. It says, "George $125, $12.50, total of $137.50, one half equals $67.75," and one half of that, $67.75, I received.

Q. Does it say "George" or does it say something different?

A. It says "GEO" with a period, which evidently is an abbreviation for the word George.

Q. Who is George? A. George Heberling.

Q. What does that entry—to what does that entry refer, Mr. Seijas?

A. I can't recall offhand what that would mean,

(Testimony of Army A. Scijas.)

whether George brought in some money or not, to Mr. Forman. At any rate, I received one half which is $67.75.

Q. Was Mr. Heberling making collections on occasions, [417] particularly Knett's or the Crow's Nest?

A. Well, my recollection is that he made some collections, and one, I believe, was Knett's, and I don't recollect offhand whether the other one was the Crow's Nest or not.

Q. Was he making similar hold outs as Mr. Meyers?

A. I don't know what Mr. Meyers—Mr. Heberling was doing.

Q. Referring to Exhibit 77, the volume for 1943, and your entry of July 12, Monday, what, sir, is that entry?

A. That says "George, HO, CX, $150, KET $50, $200, one half equals $100, one quarter equals $50."

Mr. Mead: Pardon me, but may I inquire of the date to which you are referring?

The Court: Give him the date.

The Witness: This says July the 12th.

Mr. Mead: The year?

The Court: '44, I think.

Mr. Obenour: '43, I think.

The Witness: '43 is right.

Q. (By Mr. Obenour): What does "GEO" mean? A. "GEO" would be George.

Q. George Heberling? A. Yes.

Q. What does "HO" mean?

(Testimony of Army A. Seijas.)

A. Hold off. [418]

Q. And what does that mean?

A. That means unreported income.

Q. And how much?

A. Well, this indicates that he had taken $200.

Q. From what locations?

A. "CN" which would be the Crow's Nest, and Knett's which would be $50. [419]

Q. And what was the total, then, that he held off?

A. Well, as represented to me, it was to be $200.

Q. What did you receive? A. I got $50.

Q. What happened to the rest of it?

Mr. Mead: I object to that, your Honor. By whom was it represented to him?

Q. (By Mr. Obenour): By whom was it represented to be $200? A. By Mr. Forman.

Q. And what happened to the rest of it?

A. Mr. Forman came in to tell me he had received $200 and gave me $50, which would be one half of the one half that he presumes to have received.

Q. Referring to Exhibit 78, diary for 1944, and the entry for Monday, October 2, what is that entry?

A. It says, "George Ho. 175," and circles is $37.50, and then underneath it says, "George paid 25 from 9/27/44."

Q. Wherever there are entries referring to "Geo," is that in each instance you refer to a hold out by George Heberling from the Crows Nest or

(Testimony of Army A. Seijas.)

Knotts for the amount the respective entries signifies?

Mr. Mead: Objected to as leading.

The Court: It is leading. If you want to go through each one, you must do that. [420]

Q. (By Mr. Obenour): Would you please, sir, refer to the first exhibit, Exhibit 76, go through the four exhibits, listing those which were received from Mr. Heberling, and the indication you have there that the date and the amount and the location.

The Court: Can you assist the witness by referring his attention to the pages and so forth?

Mr. Obenour: No, I cannot.

The Court: That would take too long to do on the stand, so you will have to attend to it at recess.

Q. (By Mr. Obenour): How many persons did you have in the amusement company businesses who were holding out receipts?

A. As far as I know, there is only two.

Q. And those were whom?

A. Mr. Heberling and Mr. Meyers.

Q. Did you record all of the monies so held off by Mr. Meyers and Mr. Heberling of which you were made aware?

A. I recorded all monies that I received from whatever source.

Q. What would be the sources that you would receive these hold outs?

A. From whatever Mr. Forman told me would either be Mr. Meyers or Mr. Heberling.

(Testimony of Army A. Seijas.)

Q. How would you enter the monies received from Mr. Heberling? [421]

A. I don't understand your question.

Q. What would be your entry in the books, 76, 77, 78, 79 to indicate the monies as having been received from Mr. Forman as holdouts of Mr. Heberling?

A. Well, whatever monies I received I would put down the amount and from the source, from where that money came as reported to me by Mr. Forman.

Q. And if the entry in these diaries, wherever they appear as "Geo," what is the source, then, of the monies indicated?

A. To my knowledge, it would have been represented to me to be from George Heberling.

Q. And if the entries are "HO" and the initials "CX" and "CC", or "CX" and "Knett's" without the name "George," what would that entry refer to?

A. I don't follow you, Mr. Obenour.

The Court: Take them one at a time.

Q. (By Mr. Obenour): If the entry has a single entry of "HO" and the further initials of "CX" and then an amount, to what would that refer?

A. That would refer that the hold off came from that particular location.

Q. And that location is what?

A. Well, you said Knett.

Q. And who collected that? [422]

A. Knett was generally collected by Mr. Heberling.

Q. And the Crows Nest?

(Testimony of Army A. Seijas.)

A. Generally collected by Mr. Heberling at least in the beginning.

Q. And what do the initials in your book "CN" as to location mean?

A. CN would have been my hieroglyphics for Crows Nest.

Q. And "CC?"

A. I don't follow you on "CC."

Q. Did the Knetts also have another name?

A. If it does, it escapes my mind at the present time.

Q. Was there a location of the Charlestown Club?

A. Charlestown Club was not a club. It was Knett's place.

Q. But those two locations were both collected by Mr. Heberling generally? A. Yes.

Q. And all other locations other than those two were then the hold outs of whom?

A. They would be the hold outs as represented to me of Mr. Meyers.

Q. Now, the entries which have been covered over in the photostats, to what do they refer?

A. I can't tell you because I have no knowledge.

Q. Do they refer to any monies received by your partnership and which were not reported income?

Mr. Mead: Objected to. He stated he had no knowledge. How can he tell?

The Court: I think the form of the answer was that. You perhaps better refer to him general

(Testimony of Army A. Seijas.)

terms as to what it was. I think the form of the question might have been a little misleading there.

Q. (By Mr. Obenour): When were the entries covered in those photostats, Mr. Seijas?

A. When they were photographed.

Q. By whom?

A. They were covered by myself.

Q. What was the occasion under which those documents were produced, the photostats?

A. Do you mean what was the reason?

Q. Yes, sir.

A. The reason was that it didn't concern Mr. Oftedal and had nothing to do with unreported income.

Q. Did that have anything to do with the partnership of Seijas and Forman?

A. It had nothing to do with Mr. Forman and myself.

Q. Have you at any time made a total of the hold outs reflected in the diaries for the years '42, '43, '44 and '45? A. Yes, I have. [424]

Q. What is the total as you computed from the diaries, Exhibits 76, 77, 78 and 79 of the amounts held off of the receipts of the pinball machines of the four companies, which amounts so held off were not reported in the respective years on the books of the amusement companies?

A. My totals amount to $86,200 as monies that I received.

Q. What was the total held off in this manner

(Testimony of Army A. Seijas.)

you have described and unreported in the records of the amusement company?

Mr. Mead: Objected to again, your Honor. We have our previous objection that the records have not been explained, and that, therefore, they are improper for him to testify with regard to those records whether they were reported or not.

The Court: That same point was raised before. Same ruling. Objection overruled. You may answer.

He wants to know the total.

The Witness: He wants to know the total. I can't give you the totals because I have never made a tape of the totals. I presume it would be two times eighty-six——

Mr. Mead (interrupting): Objected to, your Honor, as being he presumes it and guessing it, [425] and he said he didn't make a record of the total.

The Court: Yes, I think the presumption must be stricken.

The Witness: Let me correct that.

Mr. Bischoff: No——

The Court: Put another question to him.

Q. (By Mr. Obenour): At any time did you take any proportion of the monies held out and reflect it on the information furnished by Mr. Forman? A. What?

Mr. Mead: That is objected to, your Honor, because he has stated that he did not take a record of the tape.

(Testimony of Army A. Seijas.)

The Court: The question is a little different. He was stumbling a little on the presentation of the question. Start over.

Mr. Mead: I am sorry, your Honor.

Q. (By Mr. Obenour): At any time, Mr. Seijas, did you ever receive any sum different than one-half of the respective hold outs during this four-year period as based upon the information furnished you of the total amounts held off?

Mr. Mead: Objected to, your Honor, as being, in the first place, a very confusing question. I don't whether the witness understands it or not. [426]

The Court: He wants to know if to his knowledge at any time during this period he ever received any less than half of the amount represented to him as a hold out. I think that is very understandable.

Mr. Mead: I can understand your Honor's statement of it, but I wouldn't recognize that.

The Court: Maybe I have improved on it. I think the question is proper and may be answered.

The Witness: To my knowledge I generally received 50 per cent of whatever monies were claimed to be unreported income.

Mr. Mead: I object to that, your Honor, as not being even responsive to your Honor's statement of it, but he states that he generally received 50 per cent.

The Court: Yes, it doesn't answer the specific question.

Mr. Mead: I move it be stricken.

The Court: The question is, to your knowledge,

(Testimony of Army A. Seijas.)

did you ever receive anything other, either less or greater, than one-half of the amount represented to you as a hold out. Do you have any recollection of ever having deviated [427] from that practice?

The Witness: Well, in a very minor way, your Honor. We just went over one item where it was a hundred dollars short, do you recall?

The Court: Yes.

The Witness: In trying to be exact and trying to answer your question exactly, with that exception my answer would be no, I never received anything more or less than one-half as reported to me.

Q. (By Mr. Obenour): And who received the other half of the amount as reported to you?

Mr. Mead: Now, that is objected to, your Honor, because he stated several times that he didn't even know, No. 1, and it would not be, No. 2—it would not be material to the issues involved in this case in any event.

The Court: Well, whatever inferences to be drawn will have to be drawn on the testimony presented because Mr. Seijas has previously gone over that matter that he received it from Mr. Forman, and that is all he knows about it.

Didn't you say that?

The Witness: I said that, your Honor.

The Court: Objection sustained. [428]

Q. (By Mr. Obenour): Handing you Exhibits 1, 2 and 87—— A. 1, 2 and 87?

Q. Yes, sir. A. Yes, sir.

Q. Exhibit 1 is what, sir?

(Testimony of Army A. Seijas.)

A. Exhibit 1 is the individual income tax return for Army and Betty Seijas.

Q. And 2?

The Court: For what year?

The Witness: 1944, but I thought I said that.

The Court: All right. Maybe you did, I didn't hear it. Go ahead.

The Witness: The next one is the individual income tax return for the year 1945 for Army and Betty Seijas.

Q. (By Mr. Obenour): And 87?

A. Exhibit 87 is the individual income tax return for Army Seijas for '42, '43 for Betty Seijas, '43 for Army Seijas.

Q. Sir, would you refer to the return of Army Seijas for the year 1942 as contained in Exhibit 87?

A. Yes, sir.

Q. What was the income reported by you in 1942? A. In 1942 I reported $40,663.

Q. What was the source of the income you reported thereon? [429]

A. You are talking about '42?

Q. Yes, sir.

A. Sixty-seven hundred dollars from the profession, Town House, loss four hundred eighty-nine dollars; United Amusement Company, ten thousand five hundred forty-three dollars; United Amusement Company of Bremerton, fifty-nine hundred fifty dollars. I am not reading the cents, your Honor. The American Amusement Company, forty-seven hundred sixty-three dollars; Bremerton

(Testimony of Army A. Seijas.)

Amusement Company, hold, fifteen hundred fifty-seven dollars; Bremerton Amusement Company, thirty-eight hundred sixty-six dollars; dock concessions, nine hundred seventy-two dollars; Smoke Shop, six hundred fourteen dollars.

Q. What was the source of the included items of the four amusement companies as reported in your return?

A. I would have to figure that out. It's not broken down here.

Q. I am sorry. How did you receive the information as to the amount which you reported from each of the respective partnerships which you then reported in your own return?

A. I don't follow you there.

Q. Did you receive partnership returns for each of these amusement companies when he made out your tax return? [430] A. Oh, yes.

Q. From whom? A. From the bookkeeper.

Q. How, then, did you use the information you received from these various partnership returns, specifically the four amusement companies? How did you then use the information contained in those returns and as enclosures in your own return for that year?

A. By taking the information off of the partnership information returns and attaching it under Paragraph 10 under Partnership Income.

Q. Did you report in your return for 1942 the amount of money shown in the information return

(Testimony of Army A. Seijas.)

for each of the four amusement companies for that year? A. Yes, sir, I did.

Q. Did you then report in 1942 the hold outs received by you which were not reported on the books of the respective amusement companies for that year?

A. That amount was unreported income; not reported and not reflected in the income tax returns for 1942.

Q. Did you furnish a copy of your tax return to Mr. Forman during this period?

A. My recollection is that during the time that we had formed a partnership, duplicate copies of my individual tax returns were furnished to Mr. Forman. [431]

Q. Did Mr. Forman receive the same copies of the partnership returns which you received?

A. Yes, he did. All he had to do was put in an extra carbon.

Q. Did Mr. Forman then know that you were not reporting the hold outs given to you by him for the year 1942?

Mr. Mead: That is objected to as calling for a conclusion.

The Court: That is a conclusion that the jury will have to draw from the facts already elicited.

Q. (By Mr. Obenour): Would you refer to the second document that is your wife's?

The Court: Unless there was some conversation about it or something of that kind, if that is what you are getting at——

(Testimony of Army A. Seijas.)

Mr. Obenour: Yes.

Q. (By Mr. Obenour): Do you recall any conversation, Mr. Seijas, concerning the returns filed by you in this year? A. No, I do not.

Q. The second document of Exhibit 87 is what, sir?

A. Is the 1943 income tax return of Betty Seijas.

Q. And the third?

A. The reported copy of the individual tax return for 1943 of Army Seijas. Evidently, we split the returns that year. [432]

Q. What was the amount of income reported by you in the year 1943?

A. In 1943 I reported $27,830.

The Court: That is total community income?

The Witness: Yes, your Honor.

Q. (By Mr. Obenour): How was that then reported on your separate returns?

A. Well, I just told you.

Q. I mean was that the total?

A. That is the total.

Q. That was split between you and your wife?

A. That is right.

Q. And the second document, your wife's return simply reflects the same information as your own return? A. Yes, sir.

Q. What partnership income did you report in 1943?

A. In 1943, according to this document, I reported United Amusement Company, $510; American Amusement Company, $824; United Amuse-

(Testimony of Army A. Seijas.)

ment Company, $13,494; Seijas and Forman West Seattle property, $596; dock concessions $2,377; Town House, net loss $500.

Q. Did you receive partnership returns for each of these partnerships in the year 1943?

A. Did I receive them? Yes, of course.

Q. And how did you reflect the information contained in [433] those returns upon your own return for each partnership?

A. By being added to Line 9 of the face of the 1943 return on a separate piece of paper.

Q. Just put on a separate piece of paper and attached to the document referred back to—did you report the same amount of distributed partnership income for each the partners as was shown on the partnership——

A. (Interrupting) Pardon me. Before you start asking another question, I just found another sheet back here that I was unaware of. It has another schedule of other returns but not partnership returns with Mr. Forman.

Q. Did you reflect the partnership income received from the partnership with Mr. Forman?

A. Yes.

Q. Did you reflect in your own return the same amount of money as your distributive share of each of the partnerships as was shown on the respective information partnership returns?

A. Well, I would have to check with our 1943 partnership information returns to check and see if they corroborate or coincide with these figures.

(Testimony of Army A. Seijas.)

Q. Would you refer to the 1943 return for Bremerton Amusement Company in Exhibit 88?

A. I don't have it here. [434]

Q. It's attached to the second document, I believe.

A. Partnership return for Bremerton Amusement Company. It says "twenty-seven hundred eleven dollars and fifty-nine cents," and on my personal individual return it says "twenty-seven hundred eleven dollars and fifty-nine cents."

Q. Did that amount include the hold outs made by the collectors from the Bremerton Amusement Company in 1943? A. It did not.

Q. Would you refer to the 1943 Amusement company returns included in Exhibit 90?

A. Yes, sir, the American Amusement Company return, partnership return, indicates an ordinary—I received $824.96 and the American Amusement Company is shown on my individual return as having given me a net income of $824.96 which coincides with the partnership for return.

Q. And the '43 return for the partnership of the United Amusement Company, Exhibit 91?

A. Partnership return for 1943 shows the partnership share as $13,491.77, which is accurately reflected in my individual return for the whole year.

Q. That includes the hold out for that company in that year? A. No, it does not. [435]

Q. Would you turn, sir, to Exhibit 1, your tax return for Army Seijas for the year 1944?

A. Yes, sir.

(Testimony of Army A. Seijas.)

Q. What income did you report in 1944?

A. United Amusement Company of Bremerton, $4,375; Bremerton Amusement Company, $909; United Amusement Company, $9,630; Seijas and Forman rents, $1,617; dock concessions from January 1 to June 30, $579, and dock concessions July 1, 1944, to December 31, 1944, $1,040.

Q. Total income reported by you that year?

A. Of partnership earnings, $18,123.22.

Q. Sir, would you refer to the 1944 partnership returns for the Bremerton Amusement Company contained in Exhibit 88? A. 88?

Q. Yes, sir.

A. Now, what was that you wanted, what year?

Q. '44.

A. For the Bremerton Amusement Company?

Q. Yes, sir.

A. What is it you want to know?

Q. Did you report the same amount of money on your own tax return as having been received by you from the Bremerton Amusement Company as was shown as your distributive share of the information return for that company for that [436] year?

A. Bremerton Amusement Company, yes. The partnership return for 1944 indicates that I as a partner in that year received $909.28, and Plaintiff's Exhibit 1, which is my individual income tax return for 1944, shows partnership earnings reported as $909.28 as having been received from the Bremerton Amusement Company.

(Testimony of Army A. Seijas.)

Q. Did that amount include the hold outs you received from the collections of that company for that year?

A. That did not reflect the hold outs of unreported income.

Q. Will you turn to the '44 partnership return for the United of Bremerton, United Amusement Company of Bremerton contained in Exhibit 89, and you might at the same time, if you would, refer to the '44 return for United Amusement Company in Exhibit 91.

A. Let me take 89 first, please. Exhibit 89 for United Amusement Company of Bremerton indicates on the schedule that I received $1,375.13, and your Exhibit No. 1 indicates that I received $1,375.13 from United Amusement Company of Bremerton.

Q. Did that amount include the hold outs from the collections of that company for that year?

A. It did not.

Q. Would you refer to Exhibit 91? [437]

A. 91?

Q. The 1944 return for United Amusement Company. Did you show in your return for 1944 the same amount shown in the information return for that year?

A. The information return for that year 1944 of the United Amusement Company shows that I received $9,630.76, which is exactly the same figure as reported in my individual income tax return

(Testimony of Army A. Seijas.)

for the year 1944 as having been received by me and upon which a tax was paid.

Q. Did that include hold outs from the company for that year? A. It did not.

Q. Similarly in your 1945 return, Exhibit No. 2?

A. Exhibit No. 2, what is it you want to know? What is your question?

Q. In Exhibit 2, you are taking the return for 1945? A. Yes, sir.

Q. That was the joint return filed by you and your wife in that year? A. Yes, sir.

Q. And Exhibit 3 is her return?

A. No. 3?

Q. Her joint return. A. No. 3,

Q. No. 3, yes. A. I don't have it. [138]

Mr. Obenour: We offer Exhibit 3 at this time, your Honor.

The Court: The point there, if I am not mistaken, there is an attachment you were going to look at and give further consideration to. Let's use the return part for now, and we will consider the matter of the attachment later, to get on with it.

Is that agreeable to you?

Mr. Mead: Perfectly agreeable, your Honor.

The Court: All right. Go ahead.

Q. (By Mr. Obenour): Exhibit 3 is the separate return of your wife for 1945?

A. Yes, sir, it is.

Q. And it simply reflects the information as to details which is shown on your return, Exhibit 2?

A. Yes.

(Testimony of Army A. Seijas.)

The Court: At least insofar as these amusement companies are concerned.

Mr. Obenour: Yes.

The Witness: There is quite a bit attached here, your Honor.

Q. (By Mr. Obenour): We are referring simply to the original return and not to the attachment.

A. Yes, yes, it keeps making reference to—to my individual return. [439]

Q. On your return do you reflect income from the four amusement company partnerships?

A. Yes.

Q. And what was the source of the entries you made in your '45 return as to the amounts you report and the respective partnerships?

A. Do you want the amounts?

Q. No, sir. Did you receive similar partnership returns from each of those companies in that year?

A. Yes.

Q. And was the amount you reported the same as shown on the respective partnership returns?

A. I have no way of comparing, but my answer would be yes. I mean I don't see any partnership returns for '45 here.

Q. Well, 1 or 2 have not yet been identified. I would refer, though, to Exhibit 89, the 1945 United of Bremerton. A. All right.

The Court: You can check that later at the recess.

The Witness: I have it in front of me.

(Testimony of Army A. Seijas.)

The Court: All right, go ahead.

The Witness: Now, the 1945 income tax return. [440] My individual shows two sets of amounts, as you recall, from January 1, 1945, to March 31, 1945, $658.78, which is the same figure as shown in the partnership return for that year, I mean for that portion of the year, and my individual income tax return shown in Exhibit 2 reflects a figure for the last nine months of '45, $5,708.04, which is exactly the same figure as shown in the partnership return for the year 1945, from April 1, 1945, to December 31, 1945, as shown in Exhibit 89.

Q. (By Mr. Obenour): At any time in the year 1945 did you report any of the monies held off of the receipts, if any, of the four pinball machine routes in your return for 1945?

A. The money that was held off was not reported.

Q. At any time in the years '42, 1943, 1944 and 1945? A. That is correct.

Q. In each of these years according to your recollection, Mr. Forman received copies of the same partnership returns from which you prepared your returns?

A. Mr. Forman received a duplicate copy of all partnership returns in which he was a partner.

Q. To the best of your knowledge, did Mr. Forman receive copies of your own tax returns for each of these years? [441]

A. He also did.

Q. This money that you received in the holdoffs,

(Testimony of Army A. Seijas.)

was that in form of cash or currency or coins, checks or what?

A. It was mostly in currency.

The Court: Go ahead with your answer.

The Witness: I did answer it.

The Court: I thought you were pausing for Mr. Obenour.

Q. (By Mr. Obenour): Mostly in currency?

A. Yes, sir.

Q. What did you do with this currency that you so received, Mr. Seijas?

A. Sometimes I would keep it in the desk and sometimes in the office, and sometimes I would put it in a safety deposit box.

Q. How many safety deposit boxes did you have?

The Court: I take it you mean between '42 and '45?

Mr. Obenour: Yes, sir.

The Witness: Oh, I would say about a half dozen.

Q. (By Mr. Obenour): Where were they?

A. I don't remember whether—I do know I had one with my brother Lewis in San Francisco.

Mr. Obenour: I ask this to be marked. [442]

The Clerk: Plaintiff's Exhibit 99 has been marked for identification.

Q. (By Mr. Obenour): Exhibit 99 is what?

A. No. 99 is my brother Lewis's box in San Francisco.

Q. And who took out that box?

(Testimony of Army A. Seijas.)

A. He took out the box, but I had access to it.

Q. Is that document what?

A. This is Exhibit 99.

Q. Yes, sir, but the card itself is what?

A. The card itself is an agency card or a co-renters—denominated as co-renters' agreement. The date is July 27, 1944.

Mr. Obenour: I offer Exhibit 99.

Mr. Mead: No objection.

The Court: It is admitted. Go ahead.

(Plaintiff's Exhibit No. 99 for identification was received in evidence.)

Q. (By Mr. Obenour): Was this one of the boxes in which you kept the currency to which you have been referring?

A. I don't remember whether I had any money —I see from the card it was my brother's box. I thought it was mine, but it appears to be his. I don't remember whether I had any money in there or not.

Q. Did you keep money in your safety deposit boxes?

A. That was the purpose of taking out the boxes.

Q. Do you have any recollection of the purpose of the box in San Francisco as far as you were concerned?

A. I don't recollect; what you are driving at is to find out whether I had any money in there. I don't recollect whether I did or did not.

Q. Handing you Exhibits 60, 44 and 50, being identified as safety deposit box signature cards,

(Testimony of Army A. Seijas.)

Canadian Bank of Commerce, Seattle Trust and Savings and 60 is Pacific National, did you have those safety deposit boxes during this period in which you made various deposits of this currency to which you have been referring?

A. Let's start with 44.

Q. Also Exhibit 46, the Puget Sound National Bank.

The Court: The question now is, Mr. Seijas, if I understand it correctly, is whether or not you had some of these funds in this deposit referred to by Exhibit 44 which is a safety deposit box at Seattle Trust and Savings Bank.

The Witness: I am trying to find out where this box is. What did you say?

The Court: Exhibit 44 is for the Seattle Trust and Savings Bank.

The Witness: I don't remember about—I have no independent recollection of the Seattle Trust and Savings Bank. [444]

Q. (By Mr. Obenour): Is that your signature?

A. Yes, it is.

Q. And is that for a safety deposit box?

A. No, this is Henry's box, but I had access to it, but I don't remember—I don't recall whether I had money in that box or not.

Q. As a matter of fact, who was the only person who made entries into that box during the period of 1942 to 1945, Mr. Seijas?

A. I wouldn't know.

Mr. Obenour: I offer Exhibits 44 and 45, 44

(Testimony of Army A. Seijas.)

being the signature card and 45 being the entry slips.

Mr. Mead: No objection.

The Court: Exhibits 44 and 45 are admitted.

(Plaintiff's Exhibits Nos. 44 and 45 for identification were received in evidence.)

Mr. Obenour: I ask to read the signatures on Exhibit 45 as to the person making the admissions in it.

The Court: All right.

Mr. Obenour: "April 4, 1945, Army Seijas"—reading in order—"Army Seijas," one "Henry Seijas, Army Seijas, Army Seijas, Army Seijas, Army [445] Seijas, Army Seijas, Army Seijas, Army Seijas, Army Seijas, Army Seijas, Army Seijas, Army Seijas, Army Seijas."

Q. (By Mr. Obenour): Was this one of the boxes in which you kept currency, Mr. Seijas?

A. Well, I still don't have any independent recollection of having money in that particular box. The entry slips indicate I went in there, but I can't tell you offhand that I had money in that particular box.

Q. All right, sir, No. 46, the Puget Sound National Bank of Tacoma. A. Yes, sir.

Q. Is that your signature for a safety deposit box in Puget Sound National Bank?

A. Yes, sir.

Q. And when was that obtained?

A. I don't know.

(Testimony of Army A. Seijas.)

The Court: January 20, [illegible], according to my notes of the previous testimony.

The Witness: What was it?

The Court: January 25, 1945.

The Witness: I can't determine it from here.

The Court: The witness who identified it previously gave that date. Go ahead.

Mr. Obenour: I offer Exhibits 46 and 47, your Honor. [446]

Mr. Mead: We have no objection.

The Court: They are admitted.

(Plaintiff's Exhibits Nos. 46 and 47 for identification were received in evidence.)

Q. (By Mr. Obenour): I will ask you, Mr. Seijas, referring to Exhibit 47 if you are not the only person who had access to that box during 1945 as shown on Exhibit 46?

A. No, my wife had access to it, but my wife never went.

Q. I will ask you if you were not the only one who made entry to that box during that time.

A. Yes, sir, that is correct.

Q. And would you refer to 48?

The Court: I am not sure he has 48.

The Witness: '48?

The Court: Yes.

The Witness: Yes. Now, this was the bank in Portland.

Mr. Obenour: And that was——

The Court: Canadian Bank of Commerce of Portland safety deposit application.

(Testimony of Army A. Seijas.)

The Witness: That was taken out, it says here, in 1943, and persons that had access to the box were myself and my wife and my brother, and I [447] don't think that anybody went into *the but* myself.

Mr. Obenour: I offer 48 and 49.

Mr. Mead: No objection.

The Court: They are admitted.

(Plaintiff's Exhibits Nos. 48 and 49 for identification were received in evidence.)

Mr. Obenour: Is there any we haven't covered?

The Court: No. 50 has not yet been admitted.

The Witness: No. 50 is not mine.

The Court: I realize it is not, but you asked if there were any that hasn't been admitted.

Mr. Obenour: No. 60, excuse me; 60 is Pacific National Bank.

Q. (By Mr. Obenour): And is that a safety deposit box rented by you in the Pacific National Bank?

A. Let me see here. There is two of them rented by me, and the other one belongs to an estate which was transferred to me. It was opened May 15, 1946, in the Sam McNab estate and contents taken out and transferred to— My recollection is I transferred it to my secretary, but the other two, No. 172 and 1679—no, 1679 shows that I took out that box, and then that box was transferred on August [448] 9, 1946, to another box numbered 172.

Q. The second box was larger or smaller than the first box, Mr. Seijas?

A. Well, I don't remember whether it was larger

(Testimony of Army A. Seijas.)

or smaller. All I remember is that boxes were hard to get there for a while, and you had to take what you could get until something else turned up.

Mr. Obenour: I offer 60 and 61.

Mr. Mead: No objection.

The Court: They are admitted.

(Whereupon, Plaintiff's Exhibits Nos. 60 and 61 for identification were received in evidence.)

Q. (By Mr. Obenour): Do you also have safety deposit boxes at Day and Night? A. Yes.

Q. How many boxes did you have there, Mr. Seijas?

A. I had one box to which my father had access, and he had a box to which I had access.

Q. And if we could summarize, you had boxes in the Day and Night, two boxes in the Day and Night?

A. Yes—well, let's say I had access to two boxes.

Q. Had access to two boxes in Day and Night. Day and Night is what?

A. Day and Night is a safety deposit around the corner from the Smith Tower.

Q. In Seattle? [449] A. In Seattle.

Q. And you had a box at Seattle First?

A. Not Seattle, Pacific National, Seattle Trust.

Q. That is *give*, and the bank here in Tacoma?

A. The bank in Portland.

Q. That would be six, and in San Francisco, that would be seven.

Mr. Obenour: I could recess here.

(Testimony of Army A. Seijas.)

The Court: Are you concluded now?

Mr. Obenour: Other than offering Exhibits 50 and 51, your Honor, the application of Mr. Forman at the Canadian Bank of Commerce and entries of Mr. Forman to that box.

Mr. Mead: We object to that as being immaterial.

The Court: I beg your pardon?

Mr. Mead: We object to that, those last two exhibits of Mr. Forman. We object to those, your Honor.

The Court: The boxes of Mr. Forman at Portland?

Mr. Mead: It is incompetent and immaterial, and having no bearing.

The Court: Objection overruled, and they are admitted. [450]

(Whereupon, Plaintiff's Exhibits Nos. 50 and 51 for identification were received in evidence.)

The Court: Anything else with respect to this subject so we can conclude?

Mr. Obenour: No, I believe not, your Honor.

The Court: All right. We will take the recess now for the evening, ladies and gentlemen.

(Whereupon, at 4:30 o'clock p.m., August 1, 1956, the court was adjourned until the following day, August 2, 1956, at 9:30 o'clock a.m.)

(Whereupon, on the 2nd day of August, 1956, at the hour of 9:30 o'clock a.m., the following further proceedings were had:)

The Court: Are you ready?

Mr. Obenour: Yes, sir.

The Court: Proceed.

ARMY A. SEIJAS

called as a witness on behalf of the Plaintiff, having been previously sworn, resumed the stand, and testified:

Direct Examination—(Continued)

Q. (By Mr. Obenour): Yesterday, Mr. Seijas, I believe, in your tax returns you listed the sources of your income from various partnerships during the years 1942 to '45, do you recall?

A. Yes, sir.

Q. And one of them, I believe, you referred to as the Dock Concessions? A. That is right.

Q. What was Dock Concessions, Mr. Seijas?

Mr. Mead: That is objected to as immaterial and irrelevant, your Honor. It has no bearing upon the items involved in this case which are solely these four pinball partnership businesses.

The Court: I can't tell at this point whether that is so or not. I will have to hear a little further [452] explanation of this and its connection with the other evidence.

Q. (By Mr. Obenour): What was Dock Concessions?

A. Dock Concessions was a business comprised of the waiting room concessions at the dock at Bremerton where the ferries would come in, and they served food and popcorn and magazines, down at the dock, so the people could buy them while

(Testimony of Army A. Seijas.)

they were waiting for the boats to come in. There was a lease from the people who owned the dock to the operators of this concession.

Q. What was your interest in the Dock Concessions, Mr. Seijas?

Mr. Mead: Same objection, your Honor.

The Court: Yes. I want you to bring out the connection between that if there *by* any claimed, and the matter.

Mr. Obenour: Do you want an offer of proof?

The Court: No. I meant you to proceed. I am just explaining what I have in mind. I just want to be sure that we are together on it. Go ahead.

Q. (By Mr. Obenour): What was your interest in this, Mr. Seijas?

A. I had one-half interest of whatever interest Mr. Forman had in the venture.

Q. Is there reference to Dock Concessions in your diaries, Exhibits 76 to 79? [453]

A. My recollection is that there was, or is.

Q. And how are they noted in your diaries?

A. Goldstein.

Q. Were there receipts recorded in your diaries from Dock Concessions? A. Yes.

Q. Were there receipts recorded in your diaries that were not reported in the partnership returns for Dock Concessions?

Mr. Mead: That we object to, your Honor, as being incompetent and immaterial and has no bearing on the matters in this case.

The Court: I would like to have the connection

(Testimony of Army A. Seijas.)

shown, if there be one, with these other enterprises that are named in the indictment and this Dock Concessions.

Q. (By Mr. Obenour): Who were the partners of Dock Concessions, Mr. Seijas?

A. In the original instance the partners were Mr. Sol Esfeld, and—his name escapes me—Goldstein, Mr. Goldstein, and Mr. Forman.

Q. Who originally—when did this partnership begin?

A. My recollection is that it began sometime in 1942—'42.

Q. '42?

A. That is my recollection of it offhand. [454]

Q. Who had the Dock Concession prior to that time?

A. A fellow by the name of Rex Bliss.

Q. Who is he?

A. Rex Bliss was a friend of mine and a son of Pat Bliss who was prominent in Republican politics.

Q. As among the members of this partnership, who was the first to learn of the possibilities of of the business of the business of the Dock Concessions? A. I was.

Q. And how did you learn of it?

Mr. Mead: I assume, your Honor, we have a continuing objection?

The Court: Yes. I am examining the indictment, and it seems to me that the partnership—evidence of the partnership would not be limited to the ones

(Testimony of Army A. Seijas.)

named in the first paragraph of the indictment because the language is broader than that. The issue is narrowed in the alleged offense conspired to be committed, but in the earlier allegations it is plain that the evidence would be admissible on that theory, so that you do have a continuing objection to any evidence concerning the Dock Concessions matter. However, you may repeat it if you feel better about doing that. As far as I am concerned, [455] and I take it is agreeable to you, Mr. Obenour, to have a continuing objection?

Mr. Obenour: Yes, sir.

The Court: Very well, go ahead.

Mr. Mead: Thank you, your Honor.

Q. (By Mr. Obenour): You were the first to learn of this business as between the members of the partnership? A. Yes, sir.

Q. And what did you do when you learned of the possibilities of this business?

A. I discussed the matter with Mr. Forman, brought it to his attention.

Q. And where was this?

A. That was in Seattle.

Q. What was decided between you and Mr. Forman concerning this business?

A. Mr. Rex Bliss had been drafted and the business was for sale. The question we discussed was that of whether we would buy the business or not, buy the business, and it was decided that we would buy into the business at that time.

Q. Decided as between whom?

(Testimony of Army A. Seijas.)

A. Mr. Forman and myself.

Q. How did you then go about buying into the business?

A. At that time I had a finance company in the City of Bremerton known as Bremerton Finance [456] Company, a state licensed finance company, and, at any rate, we decided to go to the American Discount Company, which is another finance company in the City of Seattle, owned and operated by Sol Esfeld. Mr. Forman had a friend of his, by the name of Goldstein, who was in the motion picture business, and motion picture business was at a low ebb at that time. Mr. Goldstein wanted to get out of the motion picture business, and we wanted to buy the business, but at the same time we didn't want to put up any money for the business. So, it was agreed that Mr. Forman was to put his friend in as the operator of the business. He was to buy in for 25 percent of the business. Mr. Forman was to secure 37½ percent. Mr. Esfeld, who was the man who put up the money through his finance company to buy the business, was to buy in for 37½ percent of the cost of the venture. The partnership documents were prepared between the three parties by Mr. Vernon, Mr. Goldstein and Mr. Esfeld.

Q. Do you have a copy of that agreement?

A. Yes, I do.

Q. May I have it please? A. Yes, sir.

The Clerk: Plaintiff's Exhibit 100 has been marked for identification. [457]

(Testimony of Army A. Seijas.)

Mr. Obenour: Offer 100.

Mr. Mead: I assume, your Honor, that we have our continuing objection to inquiry into this particular matter?

The Court: Yes, you do. Admitted.

(Thereupon, Plaintiff's Exhibit 100 for identification was admitted into evidence.)

Q. (By Mr. Obenour): Handing you Exhibit 100, that is an agreement between whom again, Mr. Seijas?

A. This is an agreement between Albert M. Goldstein, William R. Forman, and Sol Esfeld.

Q. Dated when?

A. 27th day of August, 1942.

Q. Under the terms of the agreement, what was the partnership distribution or share, again?

A. William Forman 37½ per cent, Sol Esfeld 37½ per cent, and Albert M. Goldstein, 25 per cent.

Q. Now, under the agreement, what part was each to play in this business?

A. Well, it was presumed to have been Mr. Goldstein's business, and Mr. Forman and Mr. Esfeld were to be silent partners.

Q. What was Mr. Goldstein to contribute to the business?

A. He was to put up his percentage of the money and receive a salary in the operation of the business. [458]

Q. What was to be Mr. Esfeld's contribution?

A. Mr. Esfeld was to contribute $2250.

(Testimony of Army A. Seijas.)

Q. Was he to do anything in the performance of the work itself? A. Not that I recall.

Q. What was Mr. Forman supposed to do in the business? A. He was to contribute $2250.

Q. Was he to do anything in the operation?

A. Not that I recall.

Q. And, then, how were the profits of the business to be split?

A. Without reading the document, my recollection is that the final outcome was that the profits and losses were to be sustained by the various partners on the basis of their interest in the partnership, 25 per cent, 37½ per cent, 37½ per cent, respectively.

Q. Did Mr. Forman put up his $2250?

A. Mr. Forman put up $2250 out of the United Amusement Company Funds, as I recall.

Q. And Mr. Esfeld put up what?

A. $2250. Then, as I recall, Mr. Goldstein did not put up all of his money and either Mr. Forman or the Discount Company loaned him the balance of his initial capital investment to make a total of $6000.

Q. Does the contract of agreement there of [459] partnership provide in any way for the position of Mr. Forman and Mr. Esfeld to be kept as silent partners?

A. I haven't read the agreement. If you want me to take time, I will.

Q. If you would, please.

A. I haven't read the agreement for a long time.

(Testimony of Army A. Seijas.)

That is what I meant to say. Yes, sir, I see right here, the second paragraph, it says, "The business is to be conducted by Albert M. Goldstein, and it is agreed that Sol Esfeld and William R. Forman are not to be publicly associated with the ownership of said business.

Q. What was the "said" business?

A. The business was a usual concession business of a restaurant and candy stand, magazine stand, just a regular concession as you would have on most docks, I guess, for the taking care of people that are waiting to get on the boat.

Q. Who maintained the records of the business?

A. Mr. Goldstein.

Q. Did you have an interest in this business?

A. I had a divided one-half interest in the Mr. Forman's interest.

Q. And you had a half of 37½, then?

A. That is right. [460]

Q. Did Mr. Esfeld and Mr. Goldstein know that you had such an interest in their business?

A. I don't know what they knew. I don't think I told them. I don't know who else might have told them.

Q. Did you ever participate in any way in that business? A. Not at this time.

Q. Did you subsequently make your—rather, actually acquire an interest in the business to the knowledge of the other persons? A. Yes.

Q. When was that?

A. I don't remember when that was, but my

(Testimony of Army A. Seijas.)

recollection is that—oh, probably the next year or year after that.

Q. What happened then?

A. At that time Mr. Goldstein and Mr. Forman decided that Mr. Esfeld should no longer be a partner and so they bought out Mr. Esfeld's interest so that—and I was to become a partner, so that Mr. Goldstein's interest would be increased to 50 per cent, Mr. Forman's interest would be increased to 50 per cent except that I was to be half owner of Mr. Forman's 50 per cent, so technically his 37 per cent would be reduced to 25 per cent and I would have 25 per cent. At any rate, Mr. Goldstein [461] would have a half interest, a larger share as distinguished from 25 per cent, he now had 50 per cent.

Q. Prior to that time did Mr. Goldstein know you already had half of 37 per cent interest in this business?

A. I don't know what Mr. Goldstein knew about it. At any rate, as far as I knew, he had no business contact with me, to my knowledge.

Q. What was your understanding, then, was the make-up of the partnership prior to your acquiring an interest that was entered on the books of the partnership?

Mr. Mead: That is objected to, your Honor, as the partnership agreement speaks for itself, and if the books are going to be discussed, they would, of course, be the best evidence.

The Court: Yes, I think that is right.

(Testimony of Army A. Seijas.)

Mr. Obenour: However, this witness wouldn't be in a position to identify the books, and we are not referring to the contents but to the——

The Court: The question calls for his understanding of it, and I do not think his understanding, if there be a written agreement, and apparently there was, that is controlling.

Mr. Obenour: It has been shown that the agreement, your Honor, varies to this extent—— [462]

I will rephrase the question, your Honor.

The Court: Yes. I think the question is improper in its present form.

Q. (By Mr. Obenour): Did you know of any other partners in this business when the business was formed, other than Esfeld, Goldstein, Forman, and your half of Forman's interest?

A. That was my understanding.

The Court: Well, specifically your answer would be "no" that you did not know of anyone else?

The Witness: Your Honor is right. That would be my answer.

Q. (By Mr. Obenour): Now, you have mentioned that there are entries there on Dock Concessions in your diaries. Do you have them, the diaries before you, Exhibits 76 to 79?

A. Yes, sir.

Q. Would you find such an entry in your diaries in these exhibits, and please refer to it.

A. I am looking at Exhibit No. 78, sir, January 10.

Q. What is the entry there?

(Testimony of Army A. Seijas.)

A. It says, "Goldie, HO, $543, check $300, total $843; one-half, $421.50."

Q. What does "HO" mean? [463]

A. That means unreported income.

Q. And how much unreported income was there from Dock Concessions on January 10, 1948; from Dock Concessions?

A. You don't mean '48, do you?

Q. Pardon me, '44. Exhibit 78, you say?

A. Yes.

The Court: But in the year 1944?

Mr. Obenour: Yes.

The Witness: The notes indicate $543.

Q. (By Mr. Obenour): How much did you receive of that? A. I received $421.50.

Q. And to the $540, what else was added?

A. A check for $300.

Q. What was that from? A. I don't know.

Q. And the total of your entries was what?

A. $843.

Q. And how was that distributed?

A. I received a half, $421.50.

Q. From whom? A. Mr. Forman.

Q. Where did you receive the information from which you made that entry?

A. At the time I received the $421.50?

Q. From whom? [464]

A. From Mr. Forman.

Q. And of your four hundred some dollars, there was included half of the $520 hold out for that day?

(Testimony of Army A. Seijas.)

A. Well, it would figure that way, the $543 together with $300 adds up to $843, and one half of $843 is $421.50.

Q. Would you refer to another entry in the diary——

Mr. Mead: I assume we have the continuing objection to this line of inquiry with regard to this item bearing on Dock Concessions?

The Court: Yes. My understanding is that you have a general objection to any testimony concerning Dock Concessions at all.

Mr. Mead: That is right.

The Court: Now, if there is some particular objection in addition that you want to make from time to time, feel free to do so.

Mr. Mead: I want to make the further objection and move to strike this particular testimony on the grounds that the witness has testified that the item that he has identified as being one-half of the so-called hold out comes from a source that he is not even able to identify. $300 of this he stated was a check that he had no independent recollection about. It is very [465] objectionable, and we move that the entire testimony on these entries be stricken.

The Court: I must deny the motion.

The Witness: June 6, 1944, Exhibit 78.

Q. (By Mr. Obénour): What is that entry?

A. It says, "Goldie, hold off, $241, dividend, $450, and totals up to $691; one-half equals $345.50."

(Testimony of Army A. Seijas.)

Q. From whom did you receive that money?

A. I received that money from Mr. Forman.

Q. And the information from which you made the entry? A. From Mr. Forman.

Q. When did you make the entry in the book?

A. Well, I wouldn't know when I made it. I presume that it was about the date that it appears in this book, which would be Tuesday, June the 6th.

Q. What does the "HO" mean in this instance?

A. Hold off.

Q. And was that money reported in the records of the Dock Concessions?

Mr. Mead: That is objected to, your Honor, as the witness has testified that he had no knowledge as to those books or records. The records would be the best evidence, your Honor.

The Court: That is right. Have we accounted for the records? [466]

Mr. Obenour: Well, in that regard, your Honor, you have a negative.

The Court: Well, of course, if there are records and they are available, the old familiar rule that the records themselves are the best evidence applies. Thus far I haven't heard any explanation of where these records are or any explanation of their availability. If that be the case, then, of course, the second rule comes into play that parol evidence can be admitted under those circumstances, but I haven't heard any explanation as to where these Dock Concession books are.

Mr. Obenour: Yes, sir, except in this case, your

(Testimony of Army A. Seijas.)

Honor, I would suggest that where it is a negative the books couldn't show what isn't there.

The Court: I still think an explanation of the books themselves is a prerequisite. That is the ruling.

Q. (By Mr. Obenour): Do you know where the books are, Mr. Seijas?

A. I don't remember whether Mr. Lockwell, the bookkeeper, I know he was in the other trial, I don't remember whether he has them or doesn't, or whether he had them at the other trial. I just don't recall. [467]

Q. And where is Mr. Goldstein?

A. Mr. Goldstein has passed away.

Q. In addition to the hold out, what does the word "dividend" mean in there?

A. The word "dividend" indicates that that was the share of the profits during the preceding month.

Q. And what was your share of the profit?

A. My share of the profit would be one-half of the $450.

Q. In addition to the holdout, was there any other money—that is, in addition to the money marked "holdout" under the Goldie entry in your books, was there any other money that was received from Dock Concessions in the form of holdouts?

A. I notice on May 17 there was the pinball holdout of—it says, "City Dock, $125."

Q. Was the Dock also a location on one of your routes, Mr. Seijas?

(Testimony of Army A. Seijas.)

A. It was a pinball location. There were pinball machines there.

Q. And who collected that?

A. Well, I wouldn't know who collected it on that day. It was Mr. Meyer's obligation. He was the collector.

Q. He was one of the men whose collection that was? A. Yes.

Q. And was the same practice of holding out on [468] the receipts of the pinballs followed with Dock Concessions in addition to the entries marked as holdouts under the monies received from Goldie?

A. That is my understanding.

Q. On all four of those books are there entries throughout that refer to the Dock Concession under the name of either Dock Concession or Goldie?

A. Yes. Whatever name was used on that particular occasion when the report came in was what we used, either Goldie or Dock, or City Dock or—they would refer to the same person.

Q. So, any entries in the four books, 76 to 79, marked either "Goldie" or "Dock" has reference to the transaction?

A. Refers to the City Dock or the Goldstein transaction.

Q. Do you also have a copy of an agreement between you and Mr. Forman concerning your acquisition of the interest in Dock Concession?

A. I don't recall offhand. I will see what we have here. Yes.

Q. What is that, sir?

(Testimony of Army A. Seijas.)

A. Well, let's see — well, this indicates that I have a half interest in the William R. Forman interest in the Dock Concessions.

Q. And who is the agreement between? [469]

A. Well, it really isn't an agreement. It is a bill of sale which is unsigned from Mr. Forman to myself.

Q. And is that bill of sale executed as between you and Mr. Forman?

A. Well, I should have a signed copy some place, but I don't — it is not here. I have an unsigned copy.

Q. However, is that a copy of the bill of sale as between the two of you?

A. Yes. It is a duplicate, a carbon copy.

Mr. Obenour: I ask that document be marked, and I offer Exhibit 101.

The Clerk: Plaintiff's Exhibit 101 has been marked for identification.

Mr. Mead: We have a continuing objection, of course, to this exhibit, and on the further reason that the original, of course, signed, would be the best evidence.

The Court: That is right. The original has not been accounted for.

Mr. Obenour: If your Honor please, the matter of duplicate copies when they are carbons are the same as originals.

The Court: There should be some explanation of the absence of the original before a copy is admissible. [470]

(Testimony of Army A. Seijas.)

Q. (By Mr. Obenour): Do you know where the original is, Mr. Seijas? A. I do not.

Q. Were you subpoenaed to bring the original?

A. Yes, sir, I was.

Q. Have you also been subpoenaed to bring the original partnership returns for the dock concessions for the years '42 to '45 as well as the earlier partnership returns for the four amusement companies?

A. I was subpoenaed to bring the records of the American Amusement Company, Bremerton Amusement Company, United Amusement Company, United Amusement Company of Bremerton for the years 1941 to '48, inclusive, all ledgers, journals, cancelled checks, bank statements, check registers and retained copies of partnership tax returns together with a copy of my partnership agreement on the dock concessions, the records for the dock concessions, including copies of tax returns filed for the years 1942 to 1949, inclusive.

Q. Did you make an examination of your records, the papers in your possession, to comply with the subpoena in all of these requests?

A. Yes, I have. I have searched for them and these are the records that I have right here before me.

Q. To your knowledge, where would the [171] originals be of any of the documents which you have been requested to produce but have been unable to produce?

(Testimony of Army A. Seijas.)

The Witness: May I have the question, Mr. Reporter.

Q. (By Mr. Obenour): To your knowledge, where would the originals of the requested information be, that you are unable to comply with the subpoena?

A. All of these records were kept in my office, but my office has been closed and the contents there of a great number of contents of the files that I had have been destroyed or thrown away or disposed of by other persons.

Q. Sir, then, to your knowledge, would these records which you have been unable to produce, specifically the tax returns for the four amusement companies, for the dock concessions, for the years 1942 to '45, have those documents been lost as far as you know?

A. I don't think they have been lost. I think they have been disposed of.

Q. Where, sir, would be the executed copy of the bill of sale of Mr. Forman's partnership interest to you?

The Court: Exhibit 101.

The Witness: The executed original copy of that should be or should have been in the files in my office. [172]

Q. (By Mr. Obenour): Did you search for the original copy? A. Yes, I have.

Q. And were you able to find it?

A. I was not.

Q. Do you know where it is? A. I do not.

(Testimony of Army A. Seijas.)

Mr. Obenour: We offer 101.

Mr. Mead: May I inquire, your Honor?

The Court: You may.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, from what files or records did you obtain this unsigned yellow copy?

A. Mr. Mead, you will note attached to 101 is an envelope. That was placed in the envelope and the envelope was in one of the filing cabinets that had been down in my office.

Q. You found this copy in an envelope and the envelope in turn was found in a filing cabinet which had been in your office? A. That is right.

Q. And when did you have this subpoena served on you, please? A. Last Friday. [473]

Q. And what search did you make since last Friday to obtain the originals, and where did you search?

A. The files that were in my office had been turned over to another attorney, that is, the current legal matters. The personal legal matters had been sent out to my home, and I went out to my house and searched in those three filing cabinets out there.

Q. And did you find the file which had contained what information you had on this particular enterprise at your home? A. That is right.

Q. But you did not find the other file?

A. I did not find the executed original copy of

(Testimony of Army A. Seijas.)

the bill of sale from Mr. Forman to me. I found the envelope in one of the drawers.

Q. And I notice that there are notations on the back of the envelope.

A. I can see from here there are notations. I don't recall what they say.

Q. Without stating what they say, *would state* whose handwriting they are in, Mr. Seijas?

A. It is my handwriting.

Mr. Mead: We object to the exhibit, your Honor, on the grounds that the original would be the best evidence; that these are not even copies of [471] the signed copy, because they do not bear the name even of the notary who presumably might have taken acknowledgment of the signature by which we could make an inquiry into the subject. So, it is not a copy, and on the further ground that it has attachments to it which are incompetent and immaterial.

The Court: Mr. Seijas, as I understand your testimony, your know of your own knowledge, direct knowledge, that the original of this document which this purports to be a carbon of, was executed by Mr. Forman on the date that is indicated by the notarial acknowledgment, do you?

The Witness: It was executed to me on or about the same day.

The Court: And you received the original of this?

The Witness: Yes, I have.

(Testimony of Army A. Seijas.)

The Court: And that is the original which you have not been able to find?

The Witness: Yes.

The Court: The objection of best evidence is overruled and it is admitted.

(Thereupon, Plaintiff's Exhibit No. 101 for identification was admitted into evidence.)

The Court: With respect to the attachments, do you request the removal of the envelope?

Mr. Mead: Yes, your Honor.

The Court: Do you object to the removal of the envelope?

Mr. Mead: No, your Honor.

The Court: The envelope will be removed. Otherwise, Exhibit 101 is admitted.

Mr. Obenour: Might it be returned to Mr. Seijas at this time?

The Court: Yes.

Q. (By Mr. Obenour): How long did the Dock Concessions operate?

A. I don't remember. I think it closed about 1948 or '49.

Q. And during that time who were the partners in the Dock Concessions?

A. Well, in the beginning it was Mr. Goldstein, Mr. Forman, Mr. Esfeld, and then after 1944, I think it was Mr. Goldstein, Mr. Forman, and Mr. Seijas.

Q. You received information copies of the partnership returns through this period?

A. Yes, I did.

(Testimony of Army A. Seijas.)

Q. What did you report on your tax returns for the Dock Concessions for each of the years '42 [476] through '49, not the amount, but the source of it.

A. I don't recall about the first part, but after my name became placed on the contract, then it would show my name—it would show up in the partnership information returns and whatever information was on the partnership information returns is the amount that I would report in my individual income tax returns for the respective years involved.

Q. Did Mr. Forman receive a similar copy of the information returns for the partnership?

A. Yes, he did.

Q. Was the amount—did the amount you showed as income of Dock Concessions include the holdouts from Goldie or the holdouts from the pinball machines?

Mr. Mead: We want a specific objection to that, of course, your Honor, on the same grounds that it is incompetent and immaterial.

The Court: Yes. Overruled.

The Witness: My individual tax returns for the years in which I reported income from the Dock Concessions reflected the income as shown in the partnership returns. It did not reflect unreported income as shown from these books, Exhibits 76, 77, 78, and 79.

The Court: Unreported income being referred [477] to as holdouts heretofore mentioned?

(Testimony of Army A. Seijas.)

The Witness: Mr. Obenour refers to it as holdouts, yes.

The Court: I want to be sure that what you are speaking of is the same thing as he is.

The Witness: I refer to it as unreported income, and he refers to it as holdouts.

Q. (By Mr. Obenour): However, it is "HO"?

A. It is "HO" in the book. You call it holdouts and I called it unreported income, which was not reported. It is reflected in the individual income tax returns for these four years.

Mr. Obenour: Offer Exhibits 11, 12, and 13, 14, and 15.

The Court: Those being the partnership returns for Dock Concessions for the years '45 to '49, inclusive?

Mr. Obenour: Yes, sir.

Mr. Mead: We object to the introduction of the partnership returns for Dock Concessions, being Exhibits 11, 12, 13, 14, and 15, for the years 1945 through to the year 1949, inclusive, on the grounds previously mentioned that they are incompetent on the basis of materiality and have no bearing on any [478] of the issues involved here, and extended for a number of years after the times involved in the indictment.

The Court: The objection is overruled. Each of the exhibits referred to is admitted.

(Thereupon, Plaintiff's Exhibits Nos. 11, 12, 13, 14, and 15 for identification, were admitted into evidence.)

(Testimony of Army A. Seijas.)

Q. (By Mr. Obenour): When was the partnership dissolved, Mr. Seijas?

A. My recollection is that it was dissolved in '48, '49, or '50, possibly '49.

Q. Do you have a copy of this dissolution?

A. I don't recall whether I do or not—yes, I do.

Mr. Obenour: I also offer at this time Exhibits 4, 5, 6, 7, 8, 9, and 10, being the returns for Army Seijas and or Betty Seijas for the years '45 through '49.

Mr. Mead: We take specific exception, your Honor, to the exhibits which are marked, 4, 5, 6, 7, 8, and 9, being returns of Mr. Seijas and or his wife or both of them for years not involved in this matter and not covered by the period of the partnership operations that are charged in this offense.

The Court: The objection is overruled. [479] Exhibits 4 to 9, inclusive, are admitted.

Mr. Obenour: 4 to 10, your Honor.

The Court: You offered 4 to 9.

Mr. Obenour: I am sorry. I thought I offered 10 also.

The Court: I take it the same objection to 10, and the same ruling. Do you wish to add anything further?

Mr. Mead: Nothing except on the general grounds of materiality.

The Court: That objection is overruled, and Exhibit 10 is admitted.

(Thereupon, Plaintiff's Exhibits Nos. 4

(Testimony of Army A. Seijas.)

through 10 for identification were admitted into evidence.)

The Clerk: Plaintiff's Exhibit No. 102 has been marked for identification.

The Court: There still is No. 3 not admitted, and, as I recall, or according to my notes, there was an attachment to No. 3 and that counsel were going to take a look at it. Have you had an opportunity to look at that now?

Mr. Bischoff: Your Honor, we have no objection to the attachment.

The Court: As far as the attachment, you are not concerned with that? [480]

Mr. Mead: No, your Honor.

The Court: Very well.

Mr. Bischoff: That portion of the objection is withdrawn.

The Court: All right. The exhibit is admitted over the same objection, and the same ruling, except that now there is no complaint of the attachment. Go ahead.

(Thereupon, Plaintiff's Exhibit No. 3 for identification was admitted into evidence.)

Q. (By Mr. Obenour): What is Exhibit 102, Mr. Seijas?

A. 102 is my duplicate original copy of the dissolution of the partnership composed of Goldstein, Forman, and Seijas.

Mr. Obenour: Offer 102.

Mr. Mead: In order to save the time of inquiry on this, may I voir dire?

(Testimony of Army A. Seijas.)

The Court: Yes.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, where did you find this signed copy of the dissolution agreement with respect to this partnership?

A. That was in the file cabinet too.

Q. And you found it subsequent to the service upon you of the subpoena? [481]

A. That is correct.

Q. And you found it at your residence?

A. That is correct.

Q. And in the files having to do with the Dock Concessions, is that right? A. That is right.

Mr. Mead: We have the same objection, your Honor.

The Court: Same ruling. Admitted.

(Thereupon, Plaintiff's Exhibit No. 102 for identification was admitted into evidence.)

Q. (By Mr. Obenour): And what is the date of that dissolution, Mr. Seijas?

A. The date of this is March 25, 1950.

Q. Did the practice of holding out the receipts or having unreported receipts, that is your term, continue until the dissolution of this partnership?

Mr. Mead: Specifically we object to this on the grounds that have been mentioned on the previous exhibits, and as to materiality and competency because it goes on much after the times alleged in the indictment, and our opinion is it would be improper.

(Testimony of Army A. Seijas.)

The Court: I must call your attention to the fact that the indictment charges a continuing [482] conspiracy from 1942 to 1953.

Mr. Mead: To evade Mr. Seijas' income taxes for the years 1942 to 1945 and not for any subsequent years or subsequent offenses occurring in other years except with regard to those particular years of Mr. Seijas' taxes.

The Court: I think you unduly limit it. The indictment charges four things, one of which was keeping books not showing the true income in violation of a certain section, and so forth. I think the evidence is admissible. I think it best not to comment any further about it.

Mr. Mead: Thank you, your Honor.

The Court: Objection overruled. Go ahead and answer it.

The Witness: What is the question?

The Court: The question was, did this practice with respect to unreported income on Dock Concessions continue until the dissolution of the partnership?

The Witness: Not to my recollection.

Q. (By Mr. Obenour): How long did it continue?

A. I can't tell you when it stopped, but I am sure that it stopped a long time ago, possibly back in 1945.

Q. What is the last entry you have, Mr. Seijas, in your book? [483]

A. About Dock Concessions?

(Testimony of Army A. Seijas.)

Q. Yes. A. December, 1945.

Q. And your last entry as to holdouts from pinballs?

A. December 27th, and it says "No Dock." December 27, 1945.

Q. And that was the pinball? A. Yes.

Q. When did your practice of holding out on the receipts of the pinball companies cease?

A. What is that?

Q. When did the practice of holding out on pinball receipts of the companies cease?

A. That was it, December 27, 1945.

Q. And there were no further holdouts of either pinballs or Dock Concessions, then, after 1945?

A. I don't see any.

Q. Well, then——

A. The last one I see prior to that would have been November the 13th, 1945.

Q. Yes, sir. You have diaries for years after December 31, 1945, Mr. Seijas? A. I do not.

Q. Did you keep them? [484]

A. I did not.

Q. Was there any reason why you didn't keep them after that time? A. What is that?

Q. Was there any reason why you ceased to keep them after that time?

A. Yes. There were no more holdouts.

Q. No more holdouts?

A. Yes, sir.

Q. However, January 1, 1946, was the period under which you were under investigation when

(Testimony of Army A. Seijas.)

they brought forth these diaries, were they not, January 1, 1946? That was the beginning of the period under which you were under investigation at the time you brought the diaries? A. No.

Q. It was not?

A. No. You investigated me back to 1938.

Q. Yes, sir. But I mean the prosecuted period that would still be in existence under the statute at the time you brought forth the diaries was January 1, 1946, was it not?

Mr. Mead: Are you impeaching the witness, Mr. Obenour?

Mr. Obenour: No, sir.

The Court: The manner of the question might be objectionable, but the content is proper. [485]

Q. (By Mr. Obenour): What was the beginning date yet open for criminal prosecution, Mr. Seijas, at the time you brought forth these diaries?

A. I don't understand your question. I don't know what you are trying to find out, and I don't understand. I don't know how to answer your question, Mr. Obenour.

Q. Do you know what a statute of limitations is, Mr. Seijas?

A. Well, there are a lot of statutes of limitations. Which one do you have reference to, to the income tax statute of limitations?

Q. Yes, sir.

A. Yes, sir. There is a three-year statute of limitations and a six-year statute of limitations.

Q. Yes, sir. A. Yes, sir.

(Testimony of Army A. Seijas.)

Q. And income tax prosecution for evasion is how many years, Mr. Seijas? A. Six years.

Q. And at the time you brought them forward, what years were still open for criminal prosecution under tax matters?

A. Well, go back from 1952, go back six years, and you filed the return for the calendar year the succeeding year. That would bring it back to 1945. [486] '45 would be open, '46 would be open, '47, '48, '49, '50, '51, and '52.

The Court: It is my recollection that these diaries were first produced in April of 1953?

The Witness: That's right.

Q. (By Mr. Obenour): And in April of 1953, sir, your 1945 returns would have been filed when?

A. In March of 1946.

Mr. Mead: We object to this question unless it is on the ground of impeachment, and if that is the purpose, that is perfectly proper.

The Court: In any case, the basic matters that may be brought out have been brought out, and anything else is—any inference anyone may wish to draw are now available. I think this particular inquiry has gone far enough.

Q. (By Mr. Obenour): I believe, Mr. Seijas, you reported on your returns income from the Smoke Shop on your returns from '42 to '45?

A. No, I reported income from the Smoke Shop for two months in '42.

Q. What was the Smoke Shop, Mr. Seijas?

A. The Smoke Shop was a restaurant—excuse

(Testimony of Army A. Seijas.)

me, your Honor, may I ask the reporter to mark his notes there?

The Court: Yes. [487]

The Witness: Would you mark that place there that we just finished?

The Court: Go ahead, Mr. Obenour.

Q. (By Mr. Obenour): When did you first learn of the Smoke Shop, Mr. Seijas?

A. When?

Q. Yes, sir. A. Sometime in 1942.

Q. From whom?

A. Mr. George Heberling.

Q. Who had the Smoke Shop at that time?

A. A man by the name of Eddy Fischler.

Q. And it was what type of business?

A. It was a restaurant.

Q. And for what purpose did he advise you of the Smoke Shop?

A. Mr. Fischler was going to sell the Smoke Shop and had offered it to Mr. Heberling. I was friendly with Mr. Fischler's brother, and Mr. Heberling knew it and wanted to know whether or not I would go in with him in the purchase of that location.

Q. Did you? A. Yes, I did.

Q. And what was the manner in which the Smoke Shop was set up? I am referring to the Smoke Shop as a business. [488]

Mr. Mead: We object to any inquiry on this line, your Honor, on the same grounds as to the Rock Concessions, that it is not a partnership in-

(Testimony of Army A. Seijas.)

volved in this controversy, and it is, therefore, incompetent on the grounds of materiality.

The Court: Do you wish to suggest the connection between the Smoke Shop and your purpose in the inquiry?

Mr. Obenour: Showing the association between this witness and the defendant during the period in which they were operating other businesses.

The Court: On that representation, the objection is overruled.

Mr. Mead: And in order to save time, your Honor, may we have a continuing objection to all this line of inquiry involving this venture, and unless there is some specific exception, we will not make further objection.

The Court: Yes, that will be agreeable to me, and I take it that will be agreeable to you?

Mr. Obenour: Yes, sir.

The Court: Very well.

The Witness: What was the question again, Mr. Reporter?

Q. (By Mr. Obenour): What was the manner in which the Smoke Shop business was set up? [189]

A. Mr. Heberling came to me and advised me that the place would be bought for $15,000 plus inventory, that it was a good place, that it was a money making place, and so we decided to look around to see who we could get to operate the place. At that time there was a young chap who was working in another place on a salary, and we had confidence in this young fellow.

(Testimony of Army A. Seijas.)

Q. Do you recall his name?

A. Yes. His name was Wendall Arnold. We had confidence in his ability, and we approached him—pardon me, when I say "we" I am misquoting myself. Mr. Heberling approached him, and the young fellow said he would accept the employment and wanted to accept it. Mr. Heberling at that time had a habit of putting up young fellows or other people in business, and, then, after he got his money back by giving them a half interest in the business for nothing, and he also did not tell Mr. Arnold that he had already discussed the matter with me, and that I would be his partner in the venture. At any rate, Mr. Arnold was brought into the picture. The three of us sat down. We wrote up an agreement and subsequently changed it because Mr. Arnold didn't know he was going to have me for a partner, and I didn't know. [490] Mr. Arnold expected to get a half interest for nothing as soon as the place was paid off, so we had to do some bargaining and compromising back and forth. The net result was that we bought the place for $15,000 plus inventory, this chap was to get $100 a week to manage the place. After we had recouped our money then he was to get a half interest in the partnership, but I had the feeling that after he got a half interest in the partnership that he would then declare to have the partnership dissolved, and then either buy or put up a buy or sell proposition which meant that after we got our money back we would have no profit making

(Testimony of Army A. Seijas.)

venture because obviously we were not in a position to operate a restaurant or tavern. So, consequently, in that agreement, as I recall, I put a limiting clause in it to the effect that after the money was recouped he would receive a bill of sale to a one-half interest in the business but that the partnership could not be dissolved for a period of time. I believe that was a year.

Mr. Mead: If the Court please, we object to the witness testifying about agreements and contracts, and I move that these portions of the testimony be stricken.

The Court: Yes, I think in some respects it [491] has been so. The motion will be granted to that extent. Just the bare outline of the transaction is all that is necessary.

Q. (By Mr. Obenour): At the time Mr. Arnold came into the interview with you, had he previously known—he had not previously known that he was to be a partner of yours?

A. That is my understanding.

Q. What, sir, did you do with your interest in the partnership, then?

A. My interest was divided with Mr. Forman on an equal basis for a period of about two months.

Q. At that time did you tell either Mr. Arnold or Mr. Heberling you had given half of your interest to Mr. Forman?

A. No. He was a silent partner in that venture as I was a silent partner in the Dock Concessions.

(Testimony of Army A. Seijas.)

Q. And who put up the money for the purchase of this Smoke Shop?

A. We didn't put up any money. We borrowed —signed a note with Mr. Esfeld of the American Discount Company, and none of the three ostensible partners, Arnold, I or Heberling, put up any money at all of our own. We signed a note.

Q. For the entire sum of the Smoke Shop?

A. For the entire sum.

Q. During the time of the existence of this partnership did either of the other partners know of the interest of Mr. Forman?

A. I don't know what they knew. As far as I was concerned, Mr. Forman was a silent undisclosed partner.

Q. Was his name shown on the information tax return of the Smoke Shop partnership?

A. No, it was not.

Q. How long did you retain your interest in the Smoke Shop, Mr. Seijas?

A. I think we retained it a couple of months to the end of the year, '42.

Q. Then what happened?

A. Then we gave a bill of sale——

Mr. Mead: This is objected to on the further grounds that the witness is now testifying that the defendant has long since been out of this business, and what he did with it later certainly has no materiality to any issue here.

The Court: The immediate question now is when the business was concluded, is that right?

(Testimony of Army A. Seijas.)

Mr. Obenour: What he did with his interest, yes, sir. Not the business concluded, what he did do with his interest. [493]

The Court: That is what I meant, what if any relationship the defendant here had with that. We are not concerned with what happened after that. Go ahead.

The Witness: Mr. Forman and I, inasmuch as we hadn't put up any money for it, transferred our interest, both his undisclosed interest and mine, to my brother, Henry, who was about to go into the service.

Mr. Mead: May I inquire, your Honor, if the witness is referring to a written document of this transfer of interest, and if so, this testimony would be incompetent unless the written document is produced, that being the best evidence.

Mr. Obenour: The act of producing such a document, though, certainly is not under the best evidence rule.

The Court: That is right. Go ahead and find out if there was a written document.

Q. (By Mr. Obenour): Was there such a written document, Mr. Seijas?

A. My recollection is that we did give him a bill of sale in writing.

Q. To whom? A. To my brother Henry.

Q. When?

A. Sometime in December of 1942.

Q. Where is your brother Henry now?

(Testimony of Army A. Seijas.)

A. My brother Henry is in the Veterans' Hospital in Walla Walla.

Q. For what reason?

A. Well, he is incapacitated. He has a disease.

Q. At this time where was your brother Henry?

A. My brother Henry at that time was in Bremerton.

Q. Did he go into the service?

A. Pardon me?

Q. Did he go into the service?

A. Yes, sir, he did.

Q. When?

A. He went into the service, as I recall, just about the time we gave him the interest in the place.

Q. And while he was in the service, who made out his tax return?

A. I think Mr. Renstrom, our bookkeeper, made it out.

Q. Who caused it to be filed?

Mr. Mead: This is objected to again, your Honor, as calling for a conclusion and it has no bearing at all on this matter.

The Court: Yes, I think so.

Mr. Obenour: The basis of the evidence already [495] introduced, this is one of the items which was introduced earlier in the case, your Honor.

The Court: In this type of case, of course, there is a rather wide range of evidence that is admissible, but it seems to me going into the details of Henry Seijas' tax return——

(Testimony of Army A. Seijas.)

Mr. Obenour: I am referring to the matter now that was brought into at length in cross-examination with Mr. Patten.

The Court: But the immediate question now put is who made out—who filed Henry Seijas' return. I think we are about at the morning recess. We will let you ladies and gentlemen of the jury have your recess while we give this further thought.

(Thereupon the Jury withdrew from the courtroom.)

The Court: What is your theory on it?

Mr. Obenour: This is one of the items Mr. Seijas gave an explanation to Mr. Patten in 1953, that he had $6,000 on the diaries, $21,000 that he had received from this Smoke Shop.

The Court: I have that fully in mind, but how does that become material now?

Mr. Obenour: The witness would testify as to circumstances under the transactions which he offered [496] in explanation.

The Court: Yes, but we are not trying in this case, as I see it, all of the details involved in Mr. Seijas' tax liability in the period. All of the evidence that need be produced on that, as I see it, is practically presented already. As I view the case, it isn't necessary for us to take the time to go down through and explore every facet of the matter that was covered in the previous trial.

Mr. Obenour: No, your Honor. However, the witness gave an explanation at that time as to the source of funds one of which being the diaries and

(Testimony of Army A. Seijas.)

which he stated he received half of $170,000, Mr. Forman getting the other half, from the opening statement of defense, from the questions put to Mr. Patten. There was a question of the veracity of the story told by this witness to Mr. Patten in the Internal Revenue, and that was an attempt, if I recall correctly, an implication of Mr. Forman in order to save himself, and that the veracity was questioned, that it was simply a scheme to evade prosecution for '46, '47, and '48, and in so doing implicated Mr. Forman for the reason he is sitting here today. [497]

The Court: I recall that.

Mr. Obenours: It was shown in addition, that he also gave explanation of $100,000 which, if you use the term implication and why it is here, he had his brothers and his father as a source of funds, one of which being this transaction, $20,000 or $21,000 that he got that his brother Henry reported, a sum from the Castle Club which Lewis reported, and a sum which his father reported.

The Court: Now, let me hear from Mr. Mead.

Mr. Mead: Well, your Honor——

The Court: As I understand the situation, Mr. Mead, in your opening statement you indicated that your contention or your client's contention was going to be that Mr. Seijas in effect manufactured these diaries to account for his opening cash figure for the prosecution period that he was then involved in, and under that theory it seems to me that anything reasonably close to the contentions

(Testimony of Army A. Seijas.)

made by Mr. Seijas at that time as accounting for the excess cash on hand, or excess cash under the net worth theory, would be admissible. I had overlooked that phase of it when your objection was made. Now, what have you to say of that? [498]

Mr. Mead: I agree with your Honor's statement. The only portion of the testimony that I now take an exception to and the question which is pending before your Honor at this time at the time the Jury was excused, was with respect to who caused Henry Seijas' income tax returns for these years to be filed. That was, as I recall, the exact question.

The Court: I think that is the present question.

Mr. Mead: That was objected to, and that, of course, would clearly be objectionable because certainly Mr. Forman is not accused of having done anything with respect to Henry Seijas' income tax returns, and, therefore, who caused them to be filed and the like, would be utterly immaterial. That was the question that was objected to.

The Court: I have that in mind, and at that moment I was inclined to go along with your thought on it but I overlooked this other phase of it temporarily. It seems to me that who caused Henry Seijas' tax return to be filed, what connection, if any, Henry Seijas had with this Smoke Shop, since it was one of the items of explanation made by Mr. Seijas in an attempt to [499] account for his excess income at the time of the investigation. I believe now under that theory it is admissible.

(Testimony of Army A. Seijas.)

Mr. Mead: My specific objection, your Honor, went to who caused Henry Seijas' income tax returns to be filed.

The Court: Yes.

Mr. Mead: Which——

The Court: Well, if the witness did it, for example, what is the basis of the objection?

Mr. Mead: We don't know what his answer is going to be.

The Court: On the other hand, you cannot ask a leading question about it.

Mr. Mead: I am in a position, your Honor, as you know, that I can't anticipate what the witness' answer is going to be, and we, therefore, must object to the question.

The Court: I understand that, and I have the same difficulty in ruling on these matters many times because I cannot anticipate exactly what the thought is, and counsel on direct examination are always limited by the no-leading rule. I have to sometimes act somewhat in the dark on these matters. It seems to me that inquiry concerning—reasonable inquiry, without too prolonged and detailed, at least on direct, the matter challenged on cross, and further details, can be developed, but I think Mr. Seijas' testimony concerning that Smoke Shop transaction and anything reasonably closely related to it as indicating the interest of Mr. Seijas in that transaction, is admissible.

Mr. Mead: Of course, if I may impose another facet into it, your Honor, the question is likewise

(Testimony of Army A. Seijas.)

objectionable on the basis that it calls for a legal conclusion or a conclusion of fact.

The Court: Let me ask you the question now in the absence of the Jury, Mr. Seijas. Who did prepare and file or cause to be filed Henry's return?

The Witness: I don't remember. I suppose that it was our bookkeeper.

The Court: You now have no memory?

The Witness: I don't remember it.

The Court: Well, we spent a good deal of time on that.

The Witness: That is the way it is.

The Court: All right. At this time we will take our recess.

(Thereupon a short recess was taken.) [501]

Q. (By Mr. Obenour): Mr. Seijas, in April of 1953 you had a meeting with Mr. Sager, your attorney, and Mr. Whittle, your accountant, with two attorneys of the Internal Revenue Service, Mr. Paine and Mr. Patten? A. Yes, sir.

Q. What was the occasion of that conference, Mr. Seijas?

A. I had been informed that the—that Mr. Patten had recommended that criminal prosecution be instituted against me for non-payment of taxes, income taxes and——

Q. For what years?

A. I don't remember what years.

Q. Do you mean that Mr. Patten told you what years he had recommended prosecution for?

A. I don't remember what he had told me about

(Testimony of Army A. Seijas.)

what years were involved at this time. Anyhow, at any rate, the purpose of the meeting was to have a discussion with the Internal Revenue attorneys for the purpose of trying to persuade them to reconsider recommendations to the Department of Justice that prosecution be started.

Q. What did you tell them in way of explanation—pardon me. Prior to this time had you engaged Mr. Whittle to do certain work for you?

A. Yes, sir.

Q. Was the nature of his engagement to prepare a net worth statement for you? [502]

A. Yes.

Q. For the years of '41 to 1944? A. Yes.

Q. And you had received a copy of the net worth statement prior to this time? A. Yes.

Q. And in this net worth statement which Mr. Whittle prepared, was there a substantial shortage or unexplained increase in net worth for the years '46, '47 and '48 of some $160,000?

A. I don't remember the figures, but a substantial amount of money was unreported according to Mr. Whittle's findings.

Q. Now, on the occasion of this conference with Paine and Patten, what explanation did you give, either yourself or through Mr. Sager or Mr. Whittle, to the internal revenue attorneys as to this increase in your net worth for the years '46, '47, '48 and '49?

A. As I recall, the position that we took was that——

(Testimony of Army A. Seijas.)

Mr. Mead: I beg your pardon, your Honor, we object to any statements that Mr. Seijas made at that time as being not binding upon the defendant in this case. We object to that on that basis. [503]

The Court: Have you concluded?

Mr. Mead: Yes.

The Court: Overruled. Go ahead.

The Witness: As I recall, I was called upon to make an explanation of the unreported income and how I got it. Now, as I recall, Mr. Sager did the talking and, at any rate, or Mr. Whittle did the talking, and, at any rate, it was brought out that $86,000 was unreported income for the years '42 to '45 or through '45.

Q. (By Mr. Obenour): From what source?

A. From the pinball business, and I advised Mr. Patten and Mr. Paine was advised that the rest of the money was money that was available to me and subject to my use which was used by me. Does that answer your question? Mr. Whittle's net worth statement, as I recall, was a preliminary net worth statement in which he stated to them orally the same thing that he had stated to them in the statement, the written statement, that that net worth statement was inconclusive.

Q. Mr. Seijas, what was the explanation of the other sources of funds that made up the unexplained increase in your net worth from '46 to '49?

Mr. Mead: Can I have it clarified at this time as to who made these representations, [504] Mr. Seijas, Mr. Whittle or Mr. Sager?

(Testimony of Army A. Seijas.)

The Court: Well, that is right, that should be done, although I think the witness pretty well covered it already, but on this particular phase of it——

Q. (By Mr. Obenour): Who gave the explanation of the difference between $86,000 and the balance of the unexplained net worth increase?

A. My recollection is that Mr. Whittle gave the explanation.

Q. Who gave the explanation of the source of the difference?

A. Mr. Whittle was explaining the net worth statement, and it was Mr. Whittle who did most of the talking.

Q. Did Mr. Whittle give the explanation of where he had got the balance of the money?

A. When you say the balance, do you mean the $86,000 or the difference?

Q. The difference between $86,000 and the $165,000 or thereabouts that was shown on Mr. Whittle's statement.

A. Mr. Whittle was the man with the pencil and the man that was doing the figuring, and he had received that information from me at that time.

Q. What was his explanation?

A. The explanation boiled down to this proposition, that there was $86,000 of unreported income as shown from [505] these books to go with monies available that were from my brother Henry, my father and my brother Lewis, all of which money was subject to my use and my control.

(Testimony of Army A. Seijas.)

Q. What money did your brother Henry receive that was left at your disposal?

A. My brother has the interest in the Smoke Shop. He also had the interest in Pop's Inn which was another tavern, and later had an inferest in Seven Seas Tavern which didn't amount to anything.

Q. What money was it that your brother Henry had that he made available? Where was it from?

A. From the Smoke Shop.

Q. How much was it?

A. In round figures, I think it was around $20,000.

Q. How did he receive it?

A. I received it for him until he got out of the service.

Q. You received it for him from whom?

A. Mr. Wendall Arnold.

Q. Did your brother ever get it at all?

A. Yes.

Q. When?

A. Well, he never actually got it because I had used it in various ventures, but it was available to him when he got out.

Q. This was during the years '42 and '43, was it not? [506] A. '43 and '44, wasn't it?

Q. '43 and '44, a two-year period? A. Yes.

Q. And you used it which accounted for your increase in net worth between '46 and '49?

A. It was part of the money that was available to me which I used. When I used it, I don't recall.

(Testimony of Army A. Seijas.)

Q. And who reported this $21,000 on tax returns?

A. My brother Henry reported it as income received by him.

Q. And who caused the money in the Smoke Shop to be so reported by your brother Henry?

Mr. Mead: That is objected to as a conclusion.

Mr. Obenour: In the terms of the statute, it is cause to prepare——

The Court: Did you have anything to do with the reporting, Mr. Seijas. That is the question.

The Witness: Well, as I said before, I don't recall whether I did.

Mr. Mead: We object. This is a matter that has been gone into previously.

The Court: Rephrase the question and address it to the witness as to what he had to do with it. That will be permitted. [507]

Q. (By Mr. Obenour): Did you have anything to do with the affairs of your brother Henry while he was in the service?

A. Yes, sir, I looked out for his affairs.

Q. Did that include the Smoke Shop?

A. Yes.

Q. And what did you do in connection with his interest in the Smoke Shop?

A. I collected the money.

Q. Did you do anything concerning this reporting the money?

A. Well, I have no independent recollection of

(Testimony of Army A. Seijas.)

that at all, but I don't have any independent recollection of collecting money but I know that I did.

Q. You also know without a definite recollection that there was a tax return filed in each of the years for your brother Henry which reported this $21,000 from the Smoke Shop?

Mr. Mead: That is objected to. The witness said he didn't have any recollection about it, your Honor. How can he know then? He——

Mr. Obenour: The same manner in which he answered——

Mr. Mead: If I may complete my objection? The returns, your Honor, would be the best evidence of it. The witness testified he didn't know [508] about them and had no recollection and now they are asking him to testify with respect to these returns as to what they report.

The Court: The question has become slightly confused. Is your question now to the witness—what is your question. Repeat it, please.

Q. (By Mr. Obenour): Do you have any knowledge of the fact that the tax return was prepared for each of the years for your brother Henry which reported this $21,000?

A. I have no independent recollection that he reported or didn't report it. I just don't remember what my brother Henry did with regard to it.

Q. What did you tell Mr. Patten and Mr. Paine?

A. Are you speaking now about the reporting of the 20 or the 21 thousand dollars from the Smoke Shop?

(Testimony of Anny A. Seijas.)

Q. Yes, sir. A. That wasn't discussed.

Q. That wasn't discussed?

A. Not the question of whether an income tax was filed.

Q. Could it be reported by your brother without an income tax report being filed?

Mr. Mead: I object to that as argumentative and speculative.

The Court: Yes, I think that is argumentative.

Q. (By Mr. Obenour): Was his name on the partnership information return, Mr. Seijas?

A. No.

Q. Whose name was on the information partnership return? A. My name.

Q. Did you report it on your return?

A. No, I don't think I did. I would have to look at the return to make sure, but I don't recollect that I did for the years '43 and '44.

The Court: Those returns are in evidence and whatever they show is available. Go ahead.

Q. (By Mr. Obenour): What was the source of the funds your brother Lewis made available to you during this period?

A. The source was the Castle Club in Vancouver, Washington.

Q. What did your brother Lewis receive from the Castle Club?

A. My brother Lewis received certain funds from the Castle Club for servicing their machines in the Castle Club, overhauling certain machines in the Castle Club.

(Testimony of Army A. Seijas.)

Q. During what period of time?

A. I don't remember. It would be——

Q. Was it within the period of '42 to '45?

A. Well, I would think so. That matter I don't have an independent recollection of, whenever it was. [510]

Q. Was your brother also in the Merchant Marine at that time that he was being paid the checks from the Castle Club?

A. During a portion of the time, yes.

Q. How many times was your brother at the Castle Club during the time he was being paid for servicing the machines? **A.** I don't know.

Q. Was he ever there? **A.** Oh, yes.

Q. But you don't know how often?

A. No, I do not.

Q. Who received the checks made out to your brother Lewis from the Castle Club, Mr. Seijas?

A. Some were made out to him and some were made out to Army Seijas, trustee.

Q. And what was the purpose of making out the check for Army Seijas, trustee?

A. Numerous occasions my brother would not be available and I would go down there at least once a month for—as I was the attorney for the club—and I would pick up my attorney's fees and sometimes a check for him.

Q. The checks were made out to your brother Lewis and who got that money?

A. He got it or I got it. [511]

(Testimony of Army A. Seijas.)

Q. And if he received it, what would he do with it?

A. He would either keep it at the house or leave it in the safe.

Q. What safe? A. Down at the office.

Q. And did you have access to the entire amount he received from the Castle Club?

A. I had access to it, yes.

Q. What was the make up of the Castle Club as to ownership? Who owned the Castle Club?

A. Well, the Castle Club was a non-profit fraternal, sort of a fraternal or social club which owned the fixtures in the club and which was operated by a man by the name of Billy Capri.

Q. And you performed certain functions for this club? A. He did or I did.

Q. You did?

A. I was attorney, and I think sometime or other I was also secretary.

Q. You were an officer for some period of time, were you not? A. That is correct.

Q. And as such you kept the records of it?

A. I kept the minute book but not the ledgers, our journals or bookkeeping or anything else. [512]

Q. Yes, sir. For this you also received a fee, didn't you? A. Yes.

Q. And did you also receive and the United Amusement Company receive certain checks for rentals for slot machines down there?

A. No, sir.

Q. You did not? A. No, sir.

(Testimony of Army A. Seijas.)

Q. Do you recall that some of the checks were so entered on the books? A. Yes.

Q. And what was the reason that the checks made out to you and the United Amusement Company was charged as slot rentals by the Castle Club?

A. I don't know that that is the fact, Mr. Obenour.

Q. Pardon me, I thought you recalled it. Is that not the fact?

A. No, I think you will find out that that was for overhauling their machines.

Q. That was for overhauling machines?

A. Not for rentals because the machines were their own.

Q. What was the purpose, then, of the checks made out to the amusement company, United Amusement Company, for the work your brother did in servicing the machines? [513] What was the purpose of the checks being so made out?

Mr. Mead: There is no testimony, your Honor, or evidence up to this point of this fact.

The Court: I thought Mr. Seijas said that he recalled there were some such, but you better back up and cover it again.

Q. (By Mr. Obenour): Do you recall their being checks made on United Amusement Company?

A. I think there was one or two or maybe three. I don't recall but a very few that the checks for the overhauling of certain machines had been made out

(Testimony of Army A. Seijas.)

by them to the United Amusement Company rather than to my brother Lewis.

Q. And who got the money, then, from the checks of United Amusement Company?

A. The checks were endorsed, and my brother received the money from that service.

Q. For that service? A. Yes.

Q. And if you had received the money, how did it get back to you for your use?

A. Well, it was at the house or wherever it was, and all I had to do was take it if I wanted it.

Mr. Mead: We object to this line of questioning, your Honor, unless it's an attempt [514] on the part of the government to impeach its own witness.

The Court: I don't think the last question was subject to that criticism.

Mr. Mead: We object to further inquiry on these items of sources of income that Mr. Obenour is inquiring into.

The Court: Well, go ahead, put a question to the witness. The last question was proper.

Q. (By Mr. Obenour): During this time your brother Lewis was where?

A. My brother Lewis was either in Seattle or down in San Francisco.

Q. And during this time he was in the Merchant Marine?

A. I think for a period of 90 days he was in the Merchant Marine.

Q. Where is your brother Lewis now?

A. My brother is in the hospital now.

(Testimony of Army A. Seijas.)

Q. And both of your brothers are incapacitated in the same ailment, are they not, Mr. Seijas?

A. Yes.

Q. Incapacitated to the point where it is difficult for them to travel? A. Yes.

Q. How much did your brother Lewis receive from the Castle [515] Club?

A. He received about ten or eleven thousand dollars.

Q. And who reported this money your brother received from the Castle Club? A. He did.

Q. Did you take care of your brother Lewis' affairs also while he was away?

A. Just a moment, Mr. Obenour. I said ten or eleven thousand dollars. I think it might have been closer to ten or fifteen thousand dollars.

Q. Mr. Seijas, I will ask you if you can identify these documents as records of the Castle Club from which you served as an officer during a period of time?

A. Do you want me to come down there?

The Court: Take them to the stand.

Mr. Obenour: We are not offering them at this time. We are simply identifying them so that they will be available in the court room, if your Honor please.

The Court: Just quickly glance at them sufficiently to satisfy yourself that you can identify them or not.

The Witness: Some of these check registers I recognize the handwriting.

(Testimony of Army A. Seijas.)

Mr. Mead: If they are going to be [516] identified, they ought to be at least marked.

The Court: Yes, that is right, but first we will get the preliminary, whether he recognizes them, and we will attend to that.

The Witness: These I recognize (indicating). These I do not (indicating).

Q. (By Mr. Obenour): Which are recognized?

A. These (indicating).

Q. These are recognized and these you do not?

A. Those I can identify.

Q. To your knowledge, own knowledge, do you know those to be from the records of the Castle Club?

A. Mr. Obenour, I have never seen those.

Q. Have you not seen these documents marked as government's exhibits in your last trial?

A. Yes, that is right, but they were not my exhibits in that case.

Q. But did you not see them on that occasion?

A. Yes, I did. They were introduced by you in the trial.

The Court: If there is going to be any reference to any of these, we will have to have them marked.

Mr. Obenour: If your Honor please, under cases we could cite to your Honor would be that where there are voluminous records of the business, [517] as long as the government shows there to be in existence in the courtroom for the purpose of cross-examination as a sole purpose. We are not offering them.

(Testimony of Army A. Seijas.)

The Court: But the point of it is, that we have to have some identification of them, and they come within the control of the clerk when they are referred to so that anyone interested in them may have an opportunity to examine them. I think perhaps what you might do is to give them a master number, and then a "B" "C" and so forth on down so that they will be here, and if any reference is made to any one of them, then there will be a way of determining which one is referred to.

The Clerk: Yes, your Honor.

The Court: Go ahead.

The Clerk: Plaintiff's Exhibit 103 has been marked for identification.

Q. (By Mr. Obenour): What is Plaintiff's Exhibit 103, Mr. Seijas?

The Court: I think you can probably attend to that at the recess. We are pretty close to the noon recess. It will take some time to go into them all. Go ahead. [518]

The Witness: 103 is a receipt.

Q. (By Mr. Obenour): Whose receipt?

A. My receipt to a man by the name of Randall.

Q. For what? A. For 52 checks.

Q. What were those checks?

A. Those were checks from the Castle Club.

Q. To whom? A. To me or to my brother.

Q. And are those checks to which you have been referring included in the amount furnished in the explanation of Mr. Patten of some $14,000?

A. Generally, yes.

(Testimony of Army A. Seijas.)

Mr. Obenour: I offer Exhibit 103.

Mr. Mead: May I inquire, your Honor?

The Court: Yes.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, this is a sheet of paper which has a list of numbers on it, apparently check numbers? A. Yes, sir.

Q. And it has a date on it, 11 7/53. Is that the date? A. Yes.

Q. When did you execute that receipt? [519]

A. On the date that appears on this document.

Q. That date is what?

A. November 7, 1953.

Q. And Mr. Randall is who?

A. Mr. Randall at that time was the bookkeeper for Castle Club.

Q. And at that time do you mean the year '53?

A. November 7, 1953.

Q. Was that receipt obtained by you from him?

A. No, sir.

Q. How does it come into your possession, or has it come into your possession?

A. It was just presented to me by Mr. Obenour.

Q. You haven't seen it since the date that you executed it and delivered it?

A. I don't remember whether this was brought in at the other trial or not, but I executed this receipt, and I gave it to Mr. Randall and Mr. Randall gave me the checks for these checks that——

(Testimony of Army A. Seijas.)

Q. What was the purpose of obtaining those checks for which the receipt was given?

A. I went down to see Mr. Randall to find out definitely how many checks my brother had received, that is, Army Seijas, trustee, and how many checks I had received, and he gave me a list. I went through the check [520] register that we have here or through the checks. I went through all of the checks that he had and picked out the checks and asked him if I could have them for the purpose of my trial and gave him a receipt for the checks that he gave me.

Mr. Mead: I think that is sufficient.

The Court: They were canceled checks, of course?

The Witness: Yes.

The Court: No one has mentioned that yet, but I think that is the case.

The Witness: Yes, they were paid checks.

Mr. Mead: We object to this as not being binding upon the defendant and having no bearing upon the issue involved.

The Court: You will have to lay some further foundation about it, what happened to the originals and so forth.

Direct Examination (Continued)

Q. (By Mr. Obenour): Where were the checks that you received on this occasion, Mr. Seijas?

A. Where are they now?

Q. Yes, sir. [521]

(Testimony of Army A. Seijas.)

A. I don't know where they are now. I don't remember whether we put them in on the other trial or not.

Q. Did you ever return them to Mr. Randall?

A. Not to my recollection. My recollection offhand now is that we used them in the other trial, and I suppose they have been returned to either me or Mr. Sager.

Q. Do you know where they are?

A. No, I don't. I don't have any idea.

Mr. Obenour: We offer 103, your Honor.

The Court: Whether the exhibit itself is admissible might be doubtful, but, of course, Mr. Seijas may use it to refresh his recollection concerning the matter, if that is desired. I doubt whether the exhibit itself, as far as we now know, is admissible as such.

Mr. Obenour: Yes, sir.

Q. (By Mr. Obenour): This money, though, was reported by your brother Lewis Seijas?

A. It was reported on his income tax return.

Q. And made available to you?

A. Yes, sir.

Q. What was the source of the money that your father had which you included in your explanation to Mr. Patten?

A. Give me the question again, Mr. Reporter.

Q. What was the source of the money your father had which he made available to you as included in your explanation to Mr. Patten?

(Testimony of Army A. Seijas.)

A. My father had been placed on the payroll of the United Amusement Company.

Q. By whom?

A. By Mr. Forman and myself—by myself with Mr. Forman's consent.

Q. What was your father to do?

A. My father was to check—you recall in my testimony yesterday we talked about payouts, payouts was the way the accounts had of cheating on the operator, so to speak, by saying that they had paid out monies, which they hadn't paid out, and my father's job was to check on that and also check on people who were called pinball slickers. That is people who would go and they would beat the pinballs all the time by the use of some tricks and devices that they had contacted, and that was his job.

Q. Where was he to perform this work, Mr. Seijas? A. In Bremerton.

Q. Did he perform the work?

A. Yes, he did. He went over there whenever the occasion demanded.

Q. How was he paid? [523]

A. We put him on the payroll and paid $100 a week for that job, as I recall.

Q. He was paid what, excuse me?

The Court: One hundred a week.

Q. (By Mr. Obenour): By whom?

A. By the company.

Q. And the company was what?

A. United Amusement Company.

(Testimony of Army A. Seijas.)

Q. And at this time who constituted United Amusement Company?

A. Mr. Forman and I.

Q. Was that the city routes or county?

A. No, we charged that to the county. That was charged to the county, county route only.

Q. But he actually performed services in and out of Bremerton?

A. Yes, he performed services in the City and out of the City of Bremerton.

Q. And did Mr. Forman have knowledge of the payment made to your father?

A. Yes, he did.

Q. Were you subpoenaed to bring the checks that were paid to your father, Mr. Seijas?

A. I don't recall that I was, but at any rate, I don't have them. [524]

Q. Did you make a search to attempt to find those checks? A. Yes.

Q. And do you know where they are?

A. I do not.

Q. And do you know what happened to them?

A. No, I don't remember whether we introduced those at the other trial or not. At any rate, I don't know what has happened to them.

Q. You had them last? A. Pardon me?

Q. Did you have them last?

A. Well, I presume I had them last. I don't think you did.

Q. In fact, did we have them?

(Testimony of Army A. Seijas.)

A. I say I don't remember whether we had them in the trial as an exhibit the first time or not.

Q. But you have made a search for this trial, and you are unable to find them, is that correct?

A. That is correct.

Q. What was the amount paid to your father by the amusement company for this service?

A. My father secured, I venture to say, between ten and eleven thousand dollars during all of the time he was employed.

Q. Do you recall when that was?

A. He was employed, I believe, from sometime in early '42 [525] until the time that we sold the county route. That was United Amusement Company, and when that route was sold, his services were discontinued. That would have been sometime, I believe, in November, the 10th, 1945.

Q. And what did he do with the checks he received?

A. Either he cashed them, or somebody in the office cashed them for him, and he kept the money.

Q. And he kept the money. How did it become available to you for increasing your net worth?

A. Because he kept—either he kept the money out at the house or down at the safety deposit box.

Q. Was that at the same place your brothers kept the monies that they received and made available to you?

A. Some was, probably kept in safety deposit boxes, I don't remember.

Q. But who reported this money?

(Testimony of Army A. Seijas.)

A. My father reported the money as income for which he had worked.

Q. Did Mr. Forman know that you were getting this money that was going or being paid to your father?

A. I wasn't getting the money at that time. It was available to me.

Q. How many of the checks were endorsed either by you or by Mr. Forman?

A. I don't remember how many checks were endorsed by me. I [526] know that most of them were endorsed by my father, and I think maybe—I am just guessing now. I would venture to say maybe a dozen of them were cashed or endorsed by me, and I think four or five were cashed and endorsed by Mr. Forman.

Q. The monies were never included on your return for any of the years, were they, Mr. Seijas?

A. It was not my money, and it was not included by me.

Q. Did Mr. Forman receive copies of your tax returns in each of these years that your father was receiving this money and that your brother Lewis and brother Henry were receiving this money?

A. You are talking about me, my tax returns or my father's?

Q. Your returns.

A. Mine, he received copies of my return.

Q. And in each instance, none of these items were included on your returns?

(Testimony of Army A. Seijas.)

A. My brothers Henry, Lewis, and my father's income were not reported on my income tax.

Q. Did you also include a matter of the Palace profit, from the Palace? A. Yes, I did.

Q. And what was that transaction, Mr. Seijas?

The Court: Do you mean included in his explanation that he gave at this same conference? [527]

Mr. Obenour: Yes, sir, included in his explanation to Mr. Patten.

The Witness: In 1944 the Palace was up for sale. It had been up for sale previously, and it was another Heberling deal originally, but in 1944 I had a friend by the name of Harry Kiesler, and we were going to do—pardon me, I am getting ahead of my story. The Palace was up for sale, and the Palace was a good account, and Mr. Kiesler who worked for a salvage company in Seattle was also looking for some other type of employment, and I suggested to him that he take over this Palace deal on the same basis as Heberling. Mr. Heberling had brought in the Smoke Shop deal to us and the dock concessions deal to us, so that he could go in there and get something to do, and at the same time we would see that that location, which was one of our pinball locations, would remain in friendly hands, and so we tried to get him to buy in, and he did buy in on a partnership with the McGill brothers, McGill brothers who also operated pinball machines.

Q. (By Mr. Obenour): When you say "we", to whom are you referring?

A. Mr. Forman and I. They wanted to buy in

(Testimony of Army A. Seijas.)

also, and in [528] order to work out the manner out amicably, it was to be divided so that Mr. Kiesler would get 40 per cent, and McGill brothers, who also were putting up relations of theirs into the venture, would get 60 per cent, and then the pinball machines were to remain in status quo. That is, they were not to take ours out and put theirs in, but ours were to remain in there in the location. That was the way that we started to get Mr. Kiesler in there. Mr. Kiesler was Jewish and these people objected to him, and after a short period of time and before the thing really got off the ground, why, we dissolved that partnership and gave it all to the McGill brothers in exchange for which we made a profit on the deal, and my recollection offhand is that we paid Mr. Kieler—we gave him a thousand dollars for his trouble.

Q. (By Mr. Obenour): Who is "we"?

A. Mr. Forman and I, and we took the net gain after other expenses that we had and divided it equally.

Q. How much was that?

A. My recollection is that it was about between four thousand and forty-five hundred.

Q. Each, as to whom? [529]

A. Mr. Forman and I.

Q. Was that profit on this transaction reported by you on your tax return? A. Yes, it was.

Q. And how was it reported?

A. Let me see, the 1944 tax returns. I will refresh my recollection, but I am pretty sure it was.

(Testimony of Army A. Seijas.)

Q. Was this included in your explanation to Mr. Patten and Mr. Paine at that time?

A. I don't remember whether it was or was not. Yes, it was. It was reported on my 1944 income tax return.

Q. How?

A. As a Palace Billiard Amusement devices, Palace Billiards, forty-four hundred eighty-three dollars.

Q. And was the sale of the amusement devices or negotiations of the premises itself one in which you made a profit?

A. It says amusement devices on there.

Q. Yes, sir.

A. I said it says amusement devices on there, and I don't recall how——

Q. Was your profit made from the sale of the amusement devices or from the sale of the premises or the business itself, the rights to the business rather than the devices? [530]

A. Well, I have no recollection now why the word "amusement devices" is put on there, but we made the forty-four hundred.

Q. Do you have a copy of that Palace Billiards agreement?

A. I have some notes here about it.

Q. May I have them, please? A. Yes.

Mr. Obenour: I ask that these be marked.

Q. (By Mr. Obenour): On any of these transactions where Mr. Forman appears as an interest in there——

(Testimony of Army A. Seijas.)

The Court: The Palace deal you are talking about?

Mr. Obenour: Yes, sir.

The Witness: Did he appear in the picture? Yes, he did.

Mr. Mead: I object to that unless the documents are produced, your Honor.

Mr. Obenour: We are about to produce them.

The Court: That is what he is about to do.

The Clerk: Plaintiff's Exhibit No. 104 has been marked for identification.

Q. (By Mr. Obenour): Will you identify that, please? A. Yes.

Q. What are those?

A. The first is a receipt from Mr. McGill, John J. McGill [531] to me showing that I had paid him $20,000, and the second part of the exhibit is instructions to Marion Garland wherein I was to receive $30,000 when I was to deliver to Mr. Garland, an attorney, a bill of sale from Mr. Kiesler to Mr. McGill.

Q. (By Mr. Obenour): Now, what was actually being sold in this transaction, Mr. Seijas?

Mr. Mead: The instrument speaks for itself, your Honor.

The Court: I assume that he is referring to that.

Mr. Obenour: Yes, sir.

The Court: Well, at the time that this partnership was started, the place was closed. It had been closed down for renovation, and new equipment was put in or it was overhauled, and certain parts of

(Testimony of Army A. Seijas.)

new equipment, as many as they could get during war years, was put in. What you are asking me is what was sold. I don't know how to answer that question, whether an interest in the partnership was sold, whether goods, wares, merchandise was sold, or whether the right to participate in the business was sold, but, at any rate, whatever right he had, Mr. Kiesler, they were sold because he never really [532] got a chance to participate in a partnership.

Mr. Obenour: I offer 104.

Q. (By Mr. Obenour): How did Mr. Forman appear in this transaction, Mr. Seijas?

A. Mr. Forman did the negotiating with Mr. John McGill.

Q. Was he acting upon his own behalf in his contacts with them, or was he acting as an agent for someone, or what was his position?

A. No, Mr. Forman was going along, and he was trying to help put Mr. Kiesler in there.

Mr. Mead: This is objected to, your Honor. It is not that Mr. Forman was not a partner to this agreement and not signed by him.

The Court: No, but the document would, I presume, be offered as supporting the witness' testimony that there was such a transaction. For that limited purpose, it would be admissible I think.

Mr. Mead: There might have been a transaction, your Honor——

The Court: His oral testimony concerning it

(Testimony of Army A. Seijas.)

makes it relevant, it seems to me. The weight of it is, of course, for the jury to consider.

Mr. Mead: And, of course, it has no bearing [533] upon partnership matters involved in these proceedings, your Honor.

The Court: I think if is admissible. It is admitted. Exhibit 104.

(Whereupon, Plaintiff's Exhibit No. 104 for identification was received in evidence.)

Q. (By Mr. Obenour): Mr. Seijas, is Mr. Harry McGill now living?

A. My information is that he just recently passed away.

Q. John McGill?

A. John McGill died in September, seven or eight years ago.

Q. Mr. Kiesler?

A. Mr. Kiesler passed away in 1952.

Q. And the only persons remaining of the transaction are you and Mr. Forman?

A. Well, I don't know—yes, as far as we know.

Q. Did Mr. Harry McGill appear at the last trial? A. Yes, he did.

Q. Was there holdouts being conducted at the Palace on their machines which are recorded in Exhibit 76, 78 and 79?

Mr. Mead: That is objected to as being immaterial, your Honor, and not a matter involved in this case. [534]

The Court: Overruled.

The Witness: Yes.

(Testimony of Army A. Seijas.)

Q. (By Mr. Obenour): What was being held out from the Palace of the receipts?

A. Mr. Obenour, you faced the back of the room when you asked the question, and I didn't get it.

Q. What was being held out in the operation of the Palace? A. Money.

Q. And in what form? How was it obtained?

A. It was obtained from the machines.

Q. In the same manner you have described for other locations?

A. Well, it was just like another location.

The Court: Do you mean in every respect the money was turned in in the same manner you have described before?

The Witness: Yes, sir, your Honor. It was just another location as far as I know.

The Court: Well, I am particularly concerned with what, if anything, the defendant Forman had to do with it. That general question, I assume, covers that, but you had better cover that item.

Mr. Obenour: All right, sir.

Q. (By Mr. Obenour): When you say this was just another [535] location, what do you mean, Mr. Seijas?

A. Well, I can't find any offhand, but it was money taken—in that it was taken out of the machines by Mr. Meyers and brought over with other monies and given to Mr. Forman, and then Mr. Forman would give some of the money to me.

Q. And what is the entry in the books, "New deal, Palace"? What does that mean?

(Testimony of Army A. Seijas.)

A. I don't know what that means. I saw that as I glanced through here. I don't recall what that means.

The Court: We are right at the noon hour, and I think we better take our recess promptly today because I have another matter to attend, but we will be through by 1:30, I am sure.

(Whereupon, at 12 o'clock p.m. a recess was taken until 1:30 o'clock p.m. of the same day.)

After Recess

The Court: Proceed.

The Clerk: During the recess, Plaintiff's Exhibits 105-A through K, the books and records, were marked for identification.

The Court: All right.

Direct Examination—(Continued)

Q. (By Mr. Obenour): Mr. Seijas, how long did Mr. Forman continue to occupy the same office space with you? A. I think until 1953.

Q. And during that time did you have any arrangement with Mr. Forman about the payment of the office expense? A. Yes.

Q. What was the agreement as to the payment of the office expense? A. At what time?

Q. Well, from the beginning. I believe you stated that he was your guest in your office. How long did that continue?

A. That continued for about a year. Then he went to larger quarters and office expense was put out of the United Amusement Company.

(Testimony of Army A. Seijas.)

Q. What expenses were paid as to the office from the United [537] Amusement Company?

A. The rent, telephone and the stenographers.

Q. Was there any expense incurred in the conduct of the entire office that was not paid out of the monies of the amusement companies?

Mr. Mead: Objected to as immaterial, your Honor.

The Court: Overruled.

The Witness: I don't recall of any.

Q. (By Mr. Obenour): And in paying the office expenses from the United Amusement Company, how much of the expense would Mr. Forman have paid? **A.** Have paid?

Q. Yes, sir.

A. Do you mean individually?

Q. How much would he be paying on the expenses under the arrangement that they were paid?

A. Well, if the expenses were paid out of one of the pinball companies, naturally he would be standing one half of it.

Q. All right, sir. How long did that arrangement continue?

A. That arrangement continued until sometime in '47, maybe '48. '47, I think.

Q. '47? **A.** Yes. [538]

Q. And he continued, though, to occupy space with you, you believe, until '53? **A.** Yes, sir.

Q. Did you have other business interests with Mr. Forman other than those you have already discussed? **A.** At what time?

(Testimony of Army A. Seijas.)

Q. During the period of '42 through 1953?

A. Oh, yes.

Q. What was the partnership known as, Seijas and Forman? A. Seijas and Forman.

Mr. Mead: This is objected to, your Honor, unless it's confined to the partnerships of the subject matter of this indictment and the years in question.

The Court: Overruled.

The Witness: Seijas and Forman was a partnership that bought a piece of property in West Seattle.

Q. (By Mr. Obenour): Who constituted this partnership? A. Mr. Forman and I.

Q. And the purpose of the partnership was for what?

A. The purchase of a building and a operating building, in West Seattle.

Q. Do you recall when it was established?

Mr. Mead: May I have a continuing objection, [539] your Honor, to this line of questioning covering other partnerships in later times than are described in the indictment, which, of course, ends with the year 1945?

The Court: You may.

Q. (By Mr. Obenour): Do you recall when it was begun, Mr. Seijas?

A. Offhand, I would say '43.

Q. How long did it continue?

A. Through 1947 or '48.

Q. And handing you Exhibits 22, 23, 24, 25, 26, 27, being returns for A. A. Seijas and W. R. For-

(Testimony of Army A. Seijas.)

man for the years '45, '46, '47 and '48, two copies for '48, one for '49, can you identify those, please, sir?

Mr. Mead: May I have those exhibit numbers, please?

The Court: Exhibits 22 to 27, inclusive.

The Witness: No. 22 is the partnership return for the year, commencing in the year 1945, of a partnership that was organized May 5, 1943, between Mr. Forman and myself in which we each had an equal share for a masonry building located at 4540 California in Seattle.

Q. How was that building purchased?

A. We made a down payment and borrowed the rest of the money [540] from the Washington Mutual Savings Bank of Seattle.

Q. How much was paid down?

A. I don't remember.

Q. What was the share paid by you and Mr. Forman?

A. I don't remember at this time how much was paid down, and how much I paid and how much he paid.

Q. Do you recall any of the price involved at all? A. The price of the building?

Q. Yes, sir.

A. I think the price was $47,500.

Q. Did you have any recollection of how much was borrowed on that price?

A. No, it was down payment made and balance

(Testimony of Army A. Seijas.)

carried by the Washington Mutual, whatever it was, I don't recall.

Q. All right, sir. Can you identify the other exhibits, please?

A. Exhibit No. 23 is the partnership return information for the year 1946, Seijas and Forman, for the Masonry Building located at 4540 California Avenue.

Q. And 24?

A. No. 24 is the partnership information return for the year 1947 for the same building.

Q. 25?

A. 25 is the partnership return for the year 1948, same building.

Q. 26? [541]

A. 26 is the partnership return for the year 1948 for the same building.

Q. 27?

A. I want to go back to 26. 26 and 28 seem to be duplicates.

Q. 26 and 28—25?

A. 26 and 25 are duplicates, and 27 is the return for the year 1949.

Q. You say duplicates. There were two returns filed for the same partnership in 1948, were there not? A. Yes.

Mr. Obenour: I offer exhibits 22 to 27.

Mr. Mead: Objected to, your Honor, as not—that is, number 22 to 27 involve a partnership having to do with an ownership of a piece of real property and has no bearing upon the items involved in

(Testimony of Army A. Seijas.)

this indictment or the time involved here either. It's incompetent and immaterial.

The Court: Overruled. They are admitted.

(Plaintiff's Exhibits Nos. 22 through 27, inclusive, for identification were received in evidence.)

Q. (By Mr. Obenour): Subsequent to the first transaction concerning theatres you discussed yesterday, referring [542] to 1942—subsequent to that time did you have any interest with Mr. Forman in any theatres? A. I did.

Q. What were they?

Mr. Mead: This is objected to for the same reason, your Honor. It's a time later than that involved in the indictment and enterprises not covered in the indictment.

The Court: Overruled.

Mr. Obenour: In order to be specific as to time, I would say this is both during 1943 and subsequent?

The Court: In any case, the objection is overruled. My opinion of the evidence now warrants—I will make no further comment except that I feel it's admissible. Go ahead.

Q. (By Mr. Obenour): What were the theatres which you had an interest or did any work with Mr. Forman in addition to those you referred to earlier?

A. It was the Green Parrot, the Seattle Autoview Drive-in, the Tacoma Autoview Drive-in theatre, and the Coast Drive-in Theatres.

(Testimony of Army A. Seijas.)

Q. All right, sir. Referring—first, which one was first in manner of time, chronologically?

A. Of the ones I have mentioned? [543]

Q. Yes. A. The Green Parrot Theatre.

Q. And was there also a First Avenue Theatre at that same time?

A. Well, First Avenue Theatre and Green Parrot Theatre are two different theatres next door to each other on First Avenue in Seattle. I am treating them as one entity.

Q. However, there were actually two theatres next door to each other? A. That is correct.

Q. And who constituted that partnership, Mr. Seijas?

A. That partnership was made up of Mr. William Forman, Mr. Sam Forman, Mr. Al Forman and myself.

Q. Who were Sam and Al Forman?

A. Sam Forman was the father of William Forman and Al Forman. Al Forman is Mr. Forman's brother.

Q. When did this partnership commence?

A. The partnership commenced, as I recall, in the spring of 1944 or '45.

Q. Who instigated the beginning of this association between you and the Formans?

A. I think I did.

Q. Describe what happened?

Mr. Mead: May we have a continuing objection [544] to this line of questioning?

The Court: You may.

(Testimony of Army A. Seijas.)

The Witness: Do you mean you want it from the beginning?

Q. (By Mr. Obenour): At this particular transaction, yes, sir.

A. I had a client by the name of Mr. Lamb who was in the theatre business. He was selling motion picture products, and he had bought an interest in the Green Parrot Theatre to operate it from a young chap by the name of Mormon who was drafted to go into the service. He had a lease that provided that he could not assign the theatre to anybody without the landlord's consent. The landlord was a man by the name of Mr. Bedjisoff. Mr. Bedjisoff had been sued by me previously on another occasion or threatened to be sued, I don't remember, some years previously. Mr. Bedjisoff found out that Mr. Lamb was in possession of the theatre which he owned, the theatre and the property. He had no personal liking for Mr. Lamb, and he retained a firm of lawyers to dispossess Mr. Lamb.

I received the summons and complaint when Mr. Lamb brought it in, and I advised Mr. Lamb that the firm of attorneys who had sued him had sued him under the wrong statute, and I thought that he had a good defense [545] to that particular case, so we fought the case, and we won it in the lower court. Mr. Bedjisoff appealed the case to the supreme court. In the meantime Mr. Lamb was operating the theatre all the time, and the supreme court sustained the verdict of the lower court. Then I advised Mr. Lamb that the landlord would probably

(Testimony of Army A. Seijas.)

bring the proper action against him, and that he better make a deal with the landlord if he could, and sure enough, that is exactly what happened. The landlord got himself a new firm of attorneys and brought another action to dispossess the tenant, and this time they brought the right action, and I advised my client to salvage what he could.

Mr. Forman was friendly with Mr. Bedjisoff, and, I, of course was friendly with my client, so Mr. Forman suggested that he might go up and talk to Mr. Bedjisoff, and see if he couldn't take the theatre off my client's hands, which is what he did. My client sold to Mr. Forman who then had the right to go in there and operate the theatre, and he and I formed a partnership to go in there on a 50-50 basis to operate that theatre.

Q. Who formed the partnership?

A. We agreed to form it.

Q. Who is "we"?

A. Mr. Forman and I. [546]

Q. William Forman? A. Yes, sir.

Q. Now when you say theatre, are you not referring to both theatres or one or the other?

A. I think at this time I am referring to one only, Green Parrot.

Q. The Green Parrot? A. Yes.

Q. Did you form that partnership with William Forman?

A. No. By the time that it got down to actual formation, Mr. Forman and William Forman told me he would like to have a place for his father just

(Testimony of Army A. Scijas.)

like I had a place for my father earlier, or made some statement, I don't recall offhand, and that was agreeable to me, so the situation was to be divided on an equal third basis. Then Mr. Forman told me that Mr. Al Forman, who was his partner in Oregon, felt that he had been left out. After all, he was in the theatre business, and that again reduced my holdings from 37½ per cent to 25 per cent which was agreeable with me, so the ultimate result was that we formed a partnership, in which I was to receive 25 per cent and for which I paid $6250, and Mr. Forman, Mr. William Forman and the rest of the Formans picked up the rest of the partnership.

Q. How long did the partnership continue? [547]

A. Until 1950.

Q. And during that time, did the make-up of the partnership continue to be three Formans and yourself? A. To my knowledge, yes.

Q. How much was originally invested by you and the Formans in these two theatres?

A. It was to be a $25,000-dollar venture in which 25 per cent was to be paid by me amounting to $6,250.

Q. And did you invest $6,250 into the theatre?

A. I did.

Q. And how much did the others invest?

A. Well, I don't know. I would guess the balance of the difference between $6,250 and $25,000.

Q. Handing you Exhibits 28 and 29, can you identify those please, sir? A. Yes.

Q. What are they?

(Testimony of Army A. Seijas.)

A. 28 is a partnership income tax return for the Green Parrot and First Avenue Theatre for the year 1946.

Q. And 29?

A. Is the partnership return for the year 1947 of the Green Parrot and the First Avenue Theatre.

Q. Who prepared those returns, if you know?

A. The one marked Plaintiff's Exhibit No. 28 has the signature of the Endersby. [548]

Q. Do you know who that is?

A. Yes, I do.

Q. Who is that?

A. That is Thelma Endersby who was the bookkeeper or auditor for the theatres down in Portland.

Q. And who prepared 29?

A. 29 does not have any statement as to who prepared it.

Q. Whom is it signed by?

A. It is signed by Albert Forman.

Q. And the other one is signed by whom?

A. The other one is signed by Endersby and Forman.

Mr. Obenour: I offer 28 and 29.

The Court: We object to these two exhibits for the same reason that they cover partnership returns of enterprises for the years '46 and '47 and have no materiality to the four partnerships involved in this matter and to the years involved, that Mr. Seijas' income tax returns involved, which are the years 1942 through 1945.

(Testimony of Army A. Seijas.)

The Court: Objection on that ground is overruled. The exhibits are admitted.

(Plaintiff's Exhibits Nos. 28 and 29 for identification were received in evidence.)

Q. (By Mr. Obenour): Did the partnership of the Green [549] Parrot and First Avenue own any other theatre than these two? A. No, sir.

Mr. Obenour: If I might read from the returns for '46 and '47 the descriptive share for these partnerships?

The Court: Yes, the exhibits are admitted. You can refer to them.

Mr. Obenour: "William R. Forman, ordinary net income, $25,619.08; Albert Forman, $25,619.07; Army Seijas, $17,079.38. In 1947, $12,237.41 for William Forman, same amount for Albert Forman, and Army Seijas, $8,158.28.

Q. (By Mr. Obenour): After these years '46 and '47 and in the years '48, '49 and '50, did the Green Parrot and First Avenue theatres continue to show such a profit? A. No.

Q. What happened to the theatre business as to these two theatres in the years after '46 and '47?

A. Same thing that happened to these theatres happened to a great many others. They just couldn't make any money. The income for a conventional house theatre—that is a four walls and a roof type of theatre—started to decrease as the years went by.

Q. Did the partners then show a loss on their partnership [550] returns in their own returns from this partnership? A. I did.

(Testimony of Army A. Seijas.)

Q. Pardon? A. I did.

Q. And what was the basis of the information you put on your own return?

A. From Mr. Forman and partnership returns as given to me by him.

Q. What were the other theatres in which you had an interest with Mr. Forman?

A. The Seattle Autoview Theatre which is commonly called the Duwamish Theatre and the Tacoma theatre, which I appeared to be an owner of, I think, 25 per cent, but I was not an owner. I was just merely——

Mr. Mead (interrupting): This testimony is objected to on the same basis, your Honor, that it involves other enterprises not covered by the indictment and are later periods that are likewise not covered.

The Court: Yes, the objection is overruled. Any evidence of any enterprises between the defendant and the witness during the period '42 to '53 is admissible.

The Witness: ——which is a common practice among the law profession to keep incorporators [551] on in the coast drive in theatres.

Q. (By Mr. Obenour): First of all, what type of theatres were these that you have mentioned?

A. All of these theatres that I have now mentioned to the jury here with the drive-in type of theatres as distinguished from the First Avenue and Green Parrot, which was a conventional type of house.

(Testimony of Army A. Seijas.)

Q. Which was the first drive-in theatre in which you and Mr. Forman developed an interest?

A. In the Duwamish Drive-in Theatre.

Mr. Mead: May we have a continuing objection to this?

The Court: I think you made it very plain what your position on this is, and I tried to make mine plain, and I am sure you may have a continuing objection throughout the trial so that if you overlook making it at any time, it will be understood that you have taken that position and that I have overruled it.

Mr. Mead: Thank you.

Q. (By Mr. Obenour): Who first became aware of the Duwamish Drive-in possibilities as between you and Mr. Forman? A. Mr. Forman.

Q. What happened?

A. Mr. Forman had been advised that somebody was trying to [552] put in a drive-in theatre north of the Duwamish River bridge across Highway 99 south of Boeing plant in Seattle. Mr. Forman knew that I was very friendly with the owners of that property and suggested that we negotiate with that owner for the purpose of securing the property for the purpose of building a drive-in theatre.

Q. Who was the owner?

A. The owner was a man by the name of Ralph Desimone of Tacoma, but who did not appear as the owner. The owner who appeared as the owner was his brother by the name of Mondo Desimone.

Q. What happened, then, as to the Duwamish?

(Testimony of Army A. Seijas.)

A. We negotiated — rather, I negotiated with Mondo Desimone for a period of time to get a lease on this piece of property for the purpose of erecting a drive-in theatre provided that the board of planning engineers in King County would grant us a permit to rezone the property from farm land to business property or commercial property which would enable us to build a building or a tower for a drive-in theatre.

Q. Was the theatre built?

A. The theatre was built, yes.

Q. And was this developed on a partnership basis or what was the manner in which your interest was held? [553]

A. That venture was a corporation.

Q. Who incorporated it? A. I did.

Q. What was the name of the corporation?

A. The Seattle Autoview Theatres.

Q. And the corporation owned at that time how many theatres? A. One.

Q. And that was the Duwamish?

A. That is right.

Q. Who else was associated with you in the Seattle Autoview Theatres?

A. Mr. William Danz.

Q. Who was he?

A. Mr. William Danz was the same William Danz that I mentioned yesterday who was Mr. Forman's father-in-law, who is the owner or largest stockholder of the Sterling Theatres in Seattle.

(Testimony of Army A. Seijas.)

Q. Who else was associated in the Seattle Auto-view Theatres? A. Just the three of us.

Q. Mr. Danz, Mr. Forman and yourself?

A. That is right.

Q. Who contributed the investment for the construction of the Duwamish? [554]

A. First of all we bought stock in the company. Secondly, we made loans. The three stockholders made loans to the corporation, and the corporation borrowed money from outside sources.

Q. How much was invested by each of you?

A. At what time?

Q. At the outset?

A. We subscribed to $10,000 worth of stock. Mr. Forman bought $3,750. Mr. Danz bought $3,750, and I bought 25 hundred dollars worth.

Q. What loans were made by each of you to the corporation?

A. I don't recall the exact amounts. The amount varied at different times and different sums. My recollection is that I loaned the company anywheres from twenty-five to fifty thousand dollars.

Q. When was this corporation formed, incidentally?

A. I think the corporation was formed during the latter part of 1946 because we tried for nine months during 1946 to get the property rezoned, and we didn't want to spend any money forming a company until we had assurances that the rezoning was to go through, and our deal was to go through.

(Testimony of Army A. Seijas.)

Q. When did you make the loan to the Seattle Auto View?

A. Oh, I don't recall offhand, but——

Q. Do you have any records of the transaction?

A. I don't recall from what bank account I made it. I made it out of this one (indicating), maybe. I don't know. December 9, 1946, according to these records I gave Mondo Desimone a thousand dollars for an option on the property.

Q. By these records, you are referring to what?

A. I am referring to Exhibit 215 of the first trial.

Q. Explain it, please. What is that document or that book?

A. That book is the stub book of a check book that I had.

Q. Whose checks were they, Mr. Seijas?

A. My checks drawn on Pacific National account.

The Clerk: Plaintiff's Exhibit 106 has been marked for identification.

Mr. Obenour: I offer 106 for identification.

Mr. Mead: Exhibit 106, your Honor, is objected to on the same grounds as the former exhibit. It is incompetent and immaterial, and it is objected to on the ground that the exhibit is a maze of other matters that are extraneous.

The Court: Yes. That second phase of it I am concerned with. Is the only portion of that you are concerned with is the entry that the witness has just referred to?

(Testimony of Army A. Seijas.)

Mr. Obenour: No, sir. [556]

The Court: I will reserve the general admission of it for now. I have to know what other matters refer to it before I can admit it generally.

Q. (By Mr. Obenour): What entries were made in the book, Mr. Seijas?

A. Well, it shows the money that I gave the theatres.

Q. Those are what entries in that book? Can you describe the entries contained in 106?

The Court: Generally.

A. Well, they are just whenever I made out a check, why I would write out a check and put on the stub of the check whom it was made to and the date and the amount.

Q. (By Mr. Obenour): Was there check stubs of your checks for what period?

A. This commenced June 16, 1945, and terminated—excuse me—September 29, 1949.

Q. What account?

A. This is Pacific National Bank account of Seattle.

Q. And whose account?

A. My account individually.

Q. Your individual account? A. Yes.

Mr. Obenour: I offer Exhibit 106, your Honor.

The Court: You ought to call attention to the particular items that you expect to call attention to so that counsel may have an opportunity to examine those and make objections if he has any.

Do you want to wait until recess?

(Testimony of Army A. Seijas.)

Mr. Obenour: In that regard, I will reserve that. It will be more in line with other testimony to be developed later.

The Court: I am not supposed to admit the document until it is indicated what particular items you expect to call attention to, and that will give counsel an opportunity to make objection or particular objection if he wishes.

Go ahead.

Q. (By Mr. Obenour): You stated that it shows that you drew a check to Mr. Desimone in December of 1946 for option for the property?

A. That is right.

Q. And, now, in what period of time did you make these loans of twenty-five and fifty-thousand dollars to Seattle Autoview Theatre?

A. Well, the very next month we incorporated, and I paid the twenty-five hundred, and then sometime during the year 1947 I advanced money to the Seattle Autoview [558] Theatre to help pay the construction of the theatre. The theatre was opened in 1948.

Q. Who operated the theatre?

A. Mr. Forman operated the theatre.

Q. What did you and Mr. Danz do in this venture? A. Nothing.

Q. Did you receive a return of your loan?

A. Yes.

Q. When?

A. I can't tell you. I don't remember but sometime in '47, '48, '49.

(Testimony of Army A. Seijas.)

Q. How many loans did you make to the Seattle Autoview?

A. I don't know, but if I had my books or ledger or something like that it would reflect it or the books of the Seattle Autoview Theatre would reflect it, but I don't recall offhand.

Q. Did you about this same time make loans to anyone else? A. To anyone else?

Q. In line with drive-in theatres other than Mr. Forman.

Mr. Mead: That is objected to as entirely immaterial, your Honor.

The Court: Well, the first question for yes or no may be answered. Just answer yes or no.

The Witness: Did I make other loans to other people? [559]

The Court: On drive-in theatres other than Mr. Forman.

The Witness: The answer is yes.

Q. (By Mr. Obenour): To whom?

Mr. Mead: That is objected to as being immaterial itself, your Honor.

The Court: What materiality will that have?

Mr. Obenour: I believe, your Honor, it would be tied in with Mr. Forman, both in Seattle Autoview and also in the manner in which he came to make——

The Court: Do you expect to show some evidence?

Mr. Obenour: Yes.

(Testimony of Army A. Seijas.)

The Court: On that representation I will overrule the objection. Go ahead.

The Witness: Mr. Forman had become a partner or had an interest in the Aurora Drive-In Theatre, which is located north of Seattle on Highway 99. I am not sure whether he had received an interest at that time or not, but, at any rate, he did, whether it was at that time or earlier or later, I can't offhand recall. At any rate, I had no interest in the Aurora Drive-in Theatre, and they [560] needed money.

Q. Who is "they?"

A. The Aurora Drive-in Theatre.

Q. Who were the persons?

A. That was a partnership composed of Dwight Spracher and E. W. Johnson of Spokane, and Mr. Forman. As I say, I don't recall just exactly when Mr. Forman got into a partnership. They needed money.

Q. "They" now are who?

A. It is the Aurora theatre.

Q. Are you referring to Spracher and——

A. Spracher and Johnson.

Q. All right, sir.

A. At any rate, Mr. Spracher acted as the main borrower or the borrower of money, if you want to put it that way, and I loaned him in the beginning of 1948——

Mr. Mead: We object to all this, your Honor, as to what he might have loaned to Mr. Spracher.

(Testimony of Army A. Seijas.)

Mr. Obenour: How did Mr. Spracher happen to come to you for the loan, Mr. Seijas?

Mr. Mead: Well, it is objected to as immaterial, your Honor. We would like a ruling on the first objection.

The Court: The counsel has represented [561] that Mr. Forman is going to be shown to have a part in this, and on that theory, I am allowing it in.

Mr. Mead: I have a continuing objection, I assume?

The Court: That is right, go ahead.

The Witness: Well, your Honor, am I answering the first or second questions?

The Court: The last question was who approached you about the making of a loan?

The Witness: Mr. Forman brought Mr. Spracher to me.

Q. (By Mr. Obenour): For what purpose?

A. To loan him the money, loan him $5,000.

Q. And do you recall when this was?

A. It was in 1946.

Q. And how much did you finally loan Mr. Spracher altogether?

A. I loaned him $25,000 altogether. I loaned him the five and another twenty which made it twenty-five.

Q. How did it happen that Mr. Forman would believe that you would be able to loan Mr. Spracher $25,000?

Mr. Mead: That calls for a conclusion, your Honor.

(Testimony of Army A. Seijas.)

The Court: Unless Forman said anything [562] about it, but this witness' idea would be a matter of conclusion.

Q. (By Mr. Obenour): Did Mr. Forman say anything concerning how it was that he called up or rather brought Mr. Sprächer to you for the loan?

A. If he did, I don't recall it at this time.

Q. And over how long a period was this loan for $25,000 to be?

A. My recollection is that it was a demand loan. That is, when I wanted the money, I was to get it back. That is my recollection of it.

Q. And was it repaid? A. Yes, it was.

Q. When?

A. I don't remember when it was repaid. It was repaid either that year or the beginning of the next year, 1949.

Mr. Mead: We object to this matter, your Honor, on the further ground that if their documents state it was a demand loan, which I assume was a note, and if there are any documents with regard to it, they would be the best evidence.

The Court: Well, I think not in that instance. There is no indication to that effect. Go ahead.

Q. (By Mr. Obenour): Did Mr. Forman have anything to do with [563] the loan being repaid?

A. Yes.

Q. What did he do?

A. At the end of the year Mr. Forman needed some money himself, and he prevailed upon Mr. Sprächer or Mr. Johnson to repay that money.

(Testimony of Army A. Seijas.)

Q. And what did you do then with the money repaid?

A. I turned around and loaned it to Mr. Forman or to the drive-in theatres. I don't remember which.

Q. Which drive-in?

A. The Duwamish, I think. I am not sure.

Q. But it was to Mr. Forman? A. Yes.

Q. What other interests had Mr. Forman developed in the drive-in at this time?

A. Mr. Forman had developed an interest in the Tacoma Drive-in theatres.

Q. Did you have any interest in that?

A. No, I did not.

Q. Were there any other drive-ins in which you did have an interest with Mr. Forman?

A. Not at this time.

Q. When was the next drive-in theatre enterprise in which you had an interest with Mr. Forman? A. In November of 1948. [564]

Q. What happened on that occasion?

A. Either during the beginning of the month or in October of 1949, Mr. Forman informed me that he had to borrow some money to protect himself from foreclosure in the some theatres, drive-in theatres he was interested in in Los Angeles, California.

Q. And where did this take place?

A. Where did it take place?

Q. This conversation.

A. It took place in Seattle in our office.

(Testimony of Army A. Serjas.)

Q. In your office? A. Yes.

Q. And just what did Mr. Forman tell you?

A. Mr. Forman, as I recall, had gone to Los Angeles looking for locations for drive-in theatres in conjunction with a chap by the name of Gus Desimone who was a theatre owner from Kansas. Between the two of them, they formed a joint venture, and they started to build a theatre in Los Angeles. They started running short of funds, and neither one—strike that running short of funds—and they were looking to borrow money with which to complete the theatre project that they were on at that time.

Q. Did Mr. Forman tell you of his financial position, his financial condition, at this November, '48 conversation [565] when he was seeking money for the California drive-in? A. Yes, he did.

Q. What did he say?

A. He said that he needed money, that he and Mr. Desimone and two other fellows that had been in the interim associated with him and Mr. Desimone, could not raise enough money, and they were afraid they would be foreclosed out of the building of that theatre at that time.

Q. What did Mr. Forman want you to do?

A. Mr. Forman wanted me to loan him the money to help him out of his financial difficulty.

Q. How much did he want?

A. My recollection is that he wanted $100,000.

Q. Did you know any of the others—rather any

(Testimony of Army A. Seijas.)

of the others who constituted this association in California? A. I did not.

Q. Did you make this loan to this California drive-in business? A. Ultimately, yes.

Q. And when?

A. I talked to Mr. Forman for two or three weeks, maybe a month about this loan, and ultimately it was agreed that I was to loan him $100,000 divided into two payments, one of 50 and the other 50 just as soon as it was needed. [566]

Q. How was the loan handled as to documentation?

A. I executed—I prepared some promissory notes and a pledge of stock. There was no mortgage. It was an unsecured loan, just a straight loan, and I prepared a note and a pledge of stock in a company that we were—had been formed or was being formed in Los Angeles, California, so that the note would be signed by Mr. Forman and his three Los Angeles associates to go with an assignment of the stock that they had in this newly-formed corporation.

Q. And did you make the loan at a later time?

A. Then the latter part of November, 1948, they received their first $50,000, and my recollection is that in April of 1949, they received the balance of the other $50,000.

Q. To whom were you making the loan, Mr. Seijas?

A. The notes showed that I was making the loans to William R. Forman, Gus Desimone,

(Testimony of Army A. Seijas.)

Charles A. Caballero and Jack Tingle. Actually, I was making a loan to Mr. Forman.

Q. Did you know any of the others at all?

A. I did not except just prior thereto.

Q. Did you do any legal work for this firm?

A. Yes, I did.

Q. What did you do?

A. Well, as I recall, we, in March of 1949, I formed a [567] Washington corporation for drive-in theatres in California, Los Angeles, and I amended that because it could not qualify under the title to practice or do business in the State of California. Then we changed that and started to do business in the State of California. At that time it was very difficult to form a corporation in the State of California and go right out and start doing business because of the lapse of time between the filing of papers and getting clearance from the commissioner of the corporations in California, so we formed it here in Seattle, and then we had some problems with some other people who were competitors, a man by the name of Frank Fishman, with whom we formed another group or venture, and then we had zoning problems in some of these new ventures that we had in the setting up of new drive-in theatres. We had zoning problems, and I recall, I think I—we had a lawsuit involved. Then there were other legal matters in connection with a loan from the Reconstruction Finance Corporation.

Q. What did you do with the loan from RFC?

A. The corporation, Coast Drive-in Theatres and

(Testimony of Army A. Seijas.)

Pacific Drive-in Theatres made an application to the RFC to borrow money with which to pay off obligations of these theatres. After the crises in the latter part of 1948, [568] they were faced with competition and overexpansion which necessitated borrowing more money, and the only people who they could borrow money from was the RFC.

Q. And what did you do in that regard?

A. I called on the RFC.

Q. Where?

A. Washington, D. C., and made an application for a loan and processed that for quite a period of time, and secure monies from the RFC with which to complete or at least help complete the building program of the Forman group in Los Angeles.

Q. How much did you obtain from the RFC?

A. Well, we had a commitment for—I don't remember offhand, I think it was $520,000. Actually, we borrowed $220,000, I think, but I had to subordinate the repayment of my loans until after the RFC were repaid their loans. Instead of my notes falling due when they were supposed to, I waived my rights of collection and also the right to the stock that had been pledged with the Pacific National Bank until the RFC got their money, before they started to repay me my money.

Q. And was the RFC loan repaid?

A. Yes, it was.

Q. And was your loan repaid?

A. Yes, it was. [569]

Q. And which was repaid first?

(Testimony of Army A. Seijas.)

A. The RFC money was repaid first. That was the agreement.

Q. When were you repaid?

A. I think I was repaid in 1952.

Q. Where did the money come from that you loaned Mr. Forman and his associates in 1948?

Mr. Mead: That is objected to as immaterial, your Honor, as to where this came from.

The Court: Overruled.

The Witness: As I recall, when I had agreed to give the money to Mr. Forman, I had to borrow $13,500 from this friend of mine by the name of Kiesler, whom I have mentioned to you earlier this morning, and the rest of the money came from my safety deposit boxes.

Q. (By Mr. Obenour): The rest of the $100,000?

A. I don't remember whether it was the rest of the $100,000 or the rest of the $50,000 or whatever it was. I just don't recall offhand.

Q. But there was a total loan of $100,000 made by you? A. Yes.

Q. At least, part of which was from your safety deposit box?

A. Part was from there. Part was from Mr. Kiesler's money. [570]

Q. The $13,000? A. Yes.

Q. Was any of this money——

A. (Interrupting) $13,500.

Q. Was any of this money that you loaned Mr. Forman and his associates money which you had acquired and put in your safety deposit boxes from

(Testimony of Army A. Seijas.)

the pinball holdout which you had received from Meyers and Forman in 1942 to 1945?

Mr. Mead: I assume we have a running objection to this at a later time, your Honor.

The Court: You do. Overruled.

The Witness: Yes.

Q. (By Mr. Obenour): Did you also buy any interest in any of the Forman drive-ins in California?

A. Yes.

Q. What did you buy in the Forman drive-ins in California?

A. My recollection is that I bought—well, I bought, I think, $2,000 worth of stock in one of the companies, That may sound like a stupid answer, but what happened was this. Everytime a theatre was started, we would form a new corporation, and we would not—what we would do was put in a small amount of money, and loan the rest of the money to the corporation instead of putting it all in the form of stock. [571]

Mr. Mead: Not only the form of the question but the form of the answer is argumentative.

The Court: It is indirectly responsive.

Mr. Mead: It is not responsive——.

Q. (By Mr. Obenour): Were these the same persons in the corporation in which you bought stock as you had loaned the money to? A. Yes.

Q. Do you still have this stock? A. No.

Q. When did you sell it?

A. I don't remember the date, but I sold all of

(Testimony of Army A. Seijas.)

my interest back to Mr. Forman at book value of the stock.

The Court: I think we are pretty close to the recess period.

Mr. Obenour: I wanted to make sure I hadn't overlooked anything.

The Court: Have you concluded this subject?

Mr. Obenour: Yes, sir.

The Court: We are going to take our afternoon recess now, ladies and gentlemen.

(Whereupon, the afternoon recess was taken.)

The Clerk: Plaintiff's Exhibit 107 has been marked for identification. [572]

Q. (By Mr. Obenour): Handing you Exhibit 107, can you identify that, please? A. Yes.

Q. What are those two papers?

A. One is a note for $25,000, and the other is a chattel mortgage.

The Court: Go ahead.

The Witness: I am trying to see what this is.

The Court: Excuse.

The Witness: And the other, a chattel mortgage of Seattle Autoview Theatres.

Q. (By Mr. Obenour): And that is a note on a loan from whom to whom?

A. The note is a 30-day loan from Army Seijas to the Seattle Autoview Theatres Corporation for $25,000.

Q. Dated when?

A. It is dated January 1, 1949.

(Testimony of Army A. Seijas.)

Q. And the chattel mortgage represents what transaction?

A. The chattel mortgage is dated the 16th of April, 1948, from Seattle Autoview Theatres to Army Seijas, of the lease, fixtures, merchandise and equipment, to the Duwamnish Theatre in support of a security for two notes dated October 1, 1948, which were paid on August 2, 1949. [573]

Q. For how much?

A. The two notes were for a total of $25,000.

Q. Do those two documents represent the two loans to the Seattle Autoview Theatre each in the amount of $25,000 to which you were just referring earlier?

A. Well, I didn't refer to any specific loans or amounts, Mr. Obenour. I did refer to some loans. I think I referred to three loans, one of April 9, 1948, for $15,000, one of April 16, 1948, for $10,000, and one January 1, 1949, for $25,000 making a total of $50,000.

Q. And who signed those notes and chattel mortgage for the Autoview Theatre?

A. The note dated January 1, 1949, was signed "Seattle Autoview Theatres Corporation by William Forman, Vice-president. Attest: Army Seijas, Secretary." The chattel mortgage is signed "Seattle Autoview Theatres, Incorporated, by William R. Forman, V. P., and Army Seijas, Secretary."

Mr. Obenour: Offer Exhibit 107.

Mr. Mead: May I inquire about this, your Honor?

The Court: You may.

(Testimony of Army A. Seijas.)

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, I think you said that the mortgage does not seem to tie in to this $25,000-note or does it?

A. I don't think it does, Mr. Mead.

Q. The $25,000-note which you identify as dated January 1, 1949, and the mortgage is dated the 16th of April, 1948, and appears to be given as security for two notes, one dated April 16, 1948, the first being in the amount of $15,000, the second in the amount of $10,000 aggregating in all $25,000. Now, is it your recollection that this was a loan of a total loan, then, of the aggregate of these three notes?

A. May I see it again, please? As of January 1, 1949, my testimony would be that there was outstanding and due me two notes aggregating $25,000, and on that day another note was issued for another $25,000 making a total amount of money advanced by me to the Duwamish Theatres of $50,000 as of January 1, 1949. The note dated January 1 indicates that it was paid on April 22, 1949, and in whose handwriting that is I can't tell. The chattel mortgage indicates that it was paid April 2, 1949, and in whose handwriting that note is, that annotation is, I don't know.

Q. Did these appear to be one note, the original note, Mr. Seijas?

A. The one that I am—the one that, that denominated note, [575] appears to be an original note.

Q. Do you know where these documents came

(Testimony of Army A. Seijas.)

from, whether they came from your files or some other files?

A. They did not come from my files, Mr. Mead. I would take it that they came from the files of the Seattle Autoview Theatres because when you pay off a note, why, the note goes back to the borrower.

Q. It would be your opinion that at the time the second note was given there was not an aggregate of $50,000 but due you $25,000, is that correct, at that time?

A. At the time on January 1 there is—as of December 31, 1948, my recollection is that where there would be—no, I am wrong again. I see across the face of the chattel mortgage, it says, "Paid in full, 12/27 '51," and if has my signature across that.

It seems to be different than the annotations made on the side of the chattel mortgage, and in whose handwriting I said I cannot identify it.

Q. Then you would wish to change the facts as to the money being paid off on the first two loans?

A. I can't change the facts. I would have to change my testimony that when this note was paid off, that is, the note dated January 1 which indicates here was paid April 25, 1949, in my handwriting.

Q. Is that the $25,000? [576]

A. That is the 25-lump sum note, and my testimony would be that the two notes aggregated $25,000 was paid off December 27, 1951, as shown by the instrument known as chattel mortgage.

Q. So, then, when was the $25,000 paid off according to that notation there?

(Testimony of Army A. Seijas.)

A. The lump sum note?

Q. Yes, sir. A. April 23, 1949.

Q. Does the document, the chattel mortgage, show evidence of being recorded?

A. It does not.

Q. And that is the original document?

A. Yes, sir. It appears to be an original.

Mr. Mead: Thank you.

We object to these documents as to the materiality, your Honor.

The Court: On the general objection?

Mr. Mead: On the general objection.

The Court: The general objection is overruled, and they are admitted.

(Whereupon, Plaintiff's Exhibit No. 107 for identification was received in evidence.) [577]

Direct Examination—(Continued)

Q. (By Mr. Obenour): Mr. Seijas, in line with the question that counsel asked, after the $25,000 lump-sum note was executed on the loan of $25,000, did that make a total, then, outstanding of $50,000 due you from the Seattle Autoview or $25,000?

A. As of January 1, 1949, it would be a total due me, according to these two documents, of $50,000.

Q. You mentioned Mr. Sprague and Mr. Johnson. A. Yes, I did.

Q. And that was the Aurora Drive-in you loaned the money on? A. Yes, sir.

Q. And did Mr. Johnson also have another theatre at that time? A. Yes, he did.

(Testimony of Army A. Seijas.)

Q. What was that?

A. My recollection is he had a theatre known as Midway Theatre and an interest in a theatre in Spokane.

Q. And where was the Midway Theatre located?

A. The Midway Theatre is located on United States Highway 99 between Seattle and Tacoma at a point approximately 15 miles south of Seattle, midway between Seattle and Tacoma.

Q. Did you and Mr. Forman subsequently acquire the Midway Theatre? [578]

A. Subsequently Mr. Forman and I and a man by the name of Henry Schafer formed a corporation which took over the Midway Drive-in Theatre.

Q. When was that?

A. I don't recollect offhand. My best guess is that it would have been 1951 or '52.

Q. Prior to your acquiring the drive-in, Midway Drive-in, was there any coordination between the operations of the Midway and the Duwamish?

A. I don't understand your question, coordination?

Q. Prior to your acquiring, yourself and Mr. Forman and the other name I have forgotten——

A. Schafer.

Q. Who owned the Midway?

A. Mr. Johnson and Mr. Spracher, and I think, a man by the name of Condon may have at that time.

Q. Was there any coordination of operation between the Midway and Duwamish prior to your acquiring an interest?

(Testimony of Army A. Seijas.)

A. If I understand your question correctly, the Midway Theatre was operated by Spracher and Condon, I think, or Clemens, and the Duwamish Theatre was operated by Mr. Forman. Each operator had their own theatres.

Q. Was there any sort of a buying pool as to film between the two operations?

A. Not to my knowledge. When you speak of buying pool, [579] do you mean a central purchasing agency to buy film for both theatres or group of theatres?

Q. Yes, sir.

A. No, not to my knowledge.

Q. And after you acquired, you and Mr. Forman and the other gentleman, acquired the interest in Midway, what interest was—what were your respective interests in that theatre?

A. My recollection is that a corporation was formed for $3,000 to take over the Midway Theatre. I bought 25 per cent of the stock, Mr. Schafer 25 per cent of the stock, and Mr. Forman owned 50 per cent of the stock. The theatre was not a going concern in the sense of being a moneymaker, and we did not attach a great deal of value to it.

Q. What was the price paid for the Midway?

A. I don't recall that we paid anything for it, maybe $3,000, I don't know.

Q. How did you acquire the theatre then if you paid nothing or $3,000 for it from Johnson and the other gentleman you named?

A. Well, that was handled by Mr. Forman, and

(Testimony of Army A. Seijas.)

I think we assumed the liabilities. I think the corporation assumed the liabilities of the theatre.

Q. And after you assumed the liabilities of [580] the Midway, did the corporation operating the Midway Theatre recover the operation of that theatre?

A. Well, my recollection is that Spracher and Johnson were not doing a very good job at the Midway Theatre, and Mr. Forman took it over. The theatre started making money. Mr. Forman is a good motion-picture operator, motion picture theatre operator.

Q. And did the success of the Midway Theatre in any way affect the success of the operation of the Duwamish?

A. Well, we—our receipts for the first year of the Duwamish, as I recall, and I haven't seen the books for a long time—I don't know, my recollection is that the first year the Duwamish was open we made money, and the graph went down; when Mr. Forman took the Midway Theatre, the graph went up, if I make myself clear to you.

Q. Well, I don't understand, Mr. Seijas. You say the graph?

The Court: What happened to the Duwamish after that time?

The Witness: The Duwamish made money. It did not make as much as we had before, but we made a lot more money in the Midway then than with the operator previous to Mr. Forman.

Q. (By Mr. Obenour): Is this correct, [581] that when Mr. Forman took over the Midway, the

(Testimony of Army A. Seijas.)

Midway went up, and the Duwamish went down?

A. Yes. The Midway made money when Mr. Forman took over. The Duwamish did not make as much money as it had previously.

Q. Was the decline in the receipts of the Duwamish anyway affected by the newness or caliber of the motion pictures shown at the Duwamish as compared to the Midway?

Mr. Mead: That is objected to, your Honor, as speculative in addition to being immaterial.

The Court: I think it is. It calls for an opinion.

Q. (By Mr. Obenour): How long did you continue to have an interest in any of the Forman Theatres, Mr. Seigas?

A. When I sold out to Mr. Forman, I sold out all the stockholdings that I had in theatres.

Q. When was that?

A. I don't recall when that was, '52 or '53.

Mr. Mead: I beg your pardon, I didn't hear that answer.

The Court: '52 or '53, I think.

The Witness: That is what I said.

Mr. Mead: Thank you, your Honor.

Q. (By Mr. Obenour): This may have been covered, I am not certain, but the operation of the pinball routes by Mr. [582] Forman and Mr. Heberling, your county route, was operated separate from Mr. Heberling's, is that correct?

A. That is correct.

Q. And Mr. Heberling, the two Heberling brothers, had their own county route?

A. That is correct.

(Testimony of Army A. Seijas.)

Q. The Heberling brothers had an interest in what routes?

A. Well, let's start at the beginning. We will start in March of 1942. At that time they owned a half interest in the "A" route. They owned a 16 2/3 interest in the "B" route, and I think they owned a 25 per cent interest in the "C" route.

Q. All right, sir, and from that time on what were the chronological order of changes in the interest of the Heberlings in the routes you mentioned?

Mr. Mead: I think this matter has been covered entirely yesterday, your Honor.

The Court: Well, it's quite possible that it was, but with the great detail that we have heard, I can't say. I can't recall distinctly.

Mr. Obenour: It would be preliminary in any event.

The Court: Can it be done quickly? To summarize, we will allow that. Go ahead.

The Witness: From time to time portions of [583] the "B" and "C" routes were sold to the Heberling brothers.

Q. (By Mr. Obenour): All right, sir, and did they eventually then have an equal interest with you and Mr. Forman? In other words, you and Forman had a half, and Heberlings had a half in all the routes? A. In all of the city routes.

Q. All city routes? A. Yes.

Q. About what time was that if you recall?

A. That was, I would venture to say, about July

(Testimony of Army A. Seijas.)

1, 1944. Let me see the supplementary agreement. Maybe I can fix the time from that.

The Court: No. 86.

The Witness: It would be just about that time I would say, about July 1, 1944.

Q. (By Mr. Obenour): July 1, 1944?

A. Yes.

Q. Did you sell any of your route to the Heberlings?

A. Well, we had to sell portions of the "B" and "C".

Q. Other than that, I mean the route in its entirety? A. In 1945, yes.

Q. And what routes did you sell?

A. We sold the county route on November 10, 1945.

Q. You sold the county route? [584]

A. Yes, sir.

Q. And who did you sell the county route to?

A. We sold the county route to a friend of Mr. Forman's and mine, by the name of Harry Schneiderman.

Q. How did that transaction come about?

A. Mr. Schneiderman was a friend of Mr. Forman's. They both came from Portland; Mr. Schneiderman was also an acquaintance of mine. He had a gasoline station down by the Smith Tower. He wasn't selling any gas during the stamp days, and he wanted to get into the pinball business, and he knew the Heberling brothers. They had faith and confidence in him, and they took him in just like

(Testimony of Army A. Seijas.)

Wendall Arnold and the dock concessions, another one of those type of transactions where he bought in or bought the county route from us.

Q. Who is he now?

A. Mr. Schneiderman. He then worked out his own deal with the Heberling brothers of which I am not acquainted.

Q. How much did you sell the county route for?

A. I don't recall accurately, but my recollection is that it was $44,000.

Q. And that was sold when?

A. November 10, 1945.

Q. And who received the $44,000?

A. We did. [585]

Q. "We" being whom?

A. Mr. Forman and I.

Q. And who handled the transactions as between you and Mr. Forman and Mr. Schneiderman?

A. Mr. Forman made the deal with Mr. Schneiderman, and I probably prepared the bill of sale.

Q. Who received the money from Mr. Schneiderman? A. Do you mean physically?

Q. Yes, sir.

A. Mr. Forman received the money or the check. I don't know what it was.

Q. How was the money divided?

A. Well, I don't recall. I suppose it was banked and divided equally.

Q. Between whom?

A. Mr. Forman and I.

(Testimony of Army A. Seijas.)

Q. And as of that date, you no longer had routes other than in the City of Bremerton?

A. That is right, and as of that date, that was the date that my father stopped working for us.

Q. And did the Heberlings subsequently sell their interest in this city route to you?

A. No. Then the following month—they have got the entire county now—that is, they had—Schneiderman got the entire county. Heberlings, Seijas and Forman [586] had the entire city, not county, McGill's and Royal Amusement Company. Mr. Heberling called a meeting of all parties concerned the first part of December, and we wrote up quite a lengthy document, as I recall it, and their purpose was to get out of the city.

Mr. Mead: Object to the reference to the document and what it contained, the document being the best evidence.

Q. (By Mr. Obenour): Do you have a copy of the document?

A. I don't know if I do or do not.

Q. Incidentally, do you also have a copy of the Forman sales transaction?

A. I just found that—I don't think so. I don't find it here. Wait just a moment. No, I don't find the December—I don't find the December matter.

Q. Do you have any record of a sale of Heberling to——

A. Yes, I do.

Q. Heberling sale to you and Mr. Forman?

A. Yes, I do.

(Testimony of Army A. Seijas.)

Q. And also of the sale to Mr.—by you to Mr. Schneiderman?

A. I find the agreement of sale between Mr. William R. Forman and Harry Schneiderman.

Q. May I have that document, please?

A. Yes. [587]

Mr. Obenour: I ask that it be marked.

The Clerk: Plaintiff's Exhibit 108 has been marked for identification.

Mr. Obenour: I offer 108.

Q. (By Mr. Obenour): May I have the document reporting the transaction between you and the Heberlings?

A. Yes, sir. What is that number there?

Q. 12.

Mr. Mead: May I inquire, your Honor?

The Court: You may.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, this Exhibit 108, I think you identified it as a copy of an agreement covering the sale of the United Amusement Company to Schneiderman. That would be the Forman interest, would it?

A. I don't understand.

Q. Would you hand it to the witness, please? There is a bill of sale attached to it. I would like to have you look at it. This is the county route that you described? A. Yes.

Q. And this is the agreement covering the sale of the county route to Schneiderman? [588]

(Testimony of Army A. Seijas.)

A. I am glancing at it to try to answer your question.

Q. Fine.

A. The first two pages of it denote an agreement signed the 10th day of November, 1945, between William Forman doing business as United Amusement Company and Harry Schneiderman, and is an agreement that Mr. Forman will not compete in the county against Mr. Schneiderman, which evidently had been overlooked in the bill of sale that Mr. Forman made to Mr. Schneiderman.

Q. And the date of the bill of sale, sir, was what?

A. The bill of sale is a duplicate original of the one that was given to Mr. Schneiderman. It is undated.

Q. But is there a date typed in as to month and year? A. There is not.

Q. And in any event did the delivery of the document which you identified as an agreement not to complete followed by some period of time by the delivery of the bill of sale?

A. I don't think so. I think it was contemporaneous with the bill of sale.

Q. I think you stated if was something that was overlooked?

A. Yes, in the preparation of the bill of sale.

Q. What is the next set of documents in that exhibit?

A. Well, the first document is this one, 108, is a signed agreement, duplicate original, signed by Mr.

(Testimony of Army A. Seijas.)

Schneiderman, [589] the second is a copy, a carbon copy of the bill of sale. The third is a third original carbon copy of the William R. Forman - Harry Schneiderman agreement not to compete which is unsigned by both parties.

Q. Now, do all these papers covered by this exhibit come out of your files? A. Yes, they did.

Q. And you have found them at what time, Mr. Seijas?

A. I don't remember whether I had this in the first trial or not, but at any rate, it was secured by me Friday.

Q. From your home?

A. From my home.

Q. And you found them in the United Amusement Company files?

A. Well, I don't know where I found it, but I found it in one of the filing drawers.

Mr. Mead: We have no objection to the exhibit, your Honor.

The Court: It is admitted.

(Whereupon, Plaintiff's Exhibit No. 108 for identification was received in evidence.)

Mr. Obenour: I offer 109, your Honor.

The Court: 109?

The Clerk: Exhibit 109 has just been marked for identification, your Honor. [590]

The Court: All right.

The Witness: Your Honor, may I correct my answer to Mr. Mead's last question?

The Court: Yes. Mr. Mead, Mr. Seijas indicates

(Testimony of Army A. Seijas.)

that he has a correction he wants to make as to the last answer.

Mr. Mead: Thank you, your Honor.

The Witness: You asked me if I got that from my files at home. As I said, I don't remember whether we had this at the previous trial or not. My recollection is that we did not. We had it, but it was not introduced, and I think I got it Friday from home.

Mr. Mead: That is about what I understood him to say before.

The Witness: I didn't want to mislead you.

Mr. Mead: Your Honor, this exhibit is a sheaf of papers, apparently which are a number of different documents.

The Court: Would you like to take time to look at it?

Mr. Mead: I would like first to have the witness identify them and put a "B" and "C" on them so we know what each one is. That hasn't been done.

The Court: I am not clear what this document is, either.

Mr. Obenour: I am sorry. I thought that it was identified.

The Court: No, I don't think it was.

If there are separate documents in there—do you have a pencil—put an "A", "B" and "C"——

The Witness: Do you want me to mark them?

The Court: Put "A, B and C" on 109, so we will know which one you are speaking of in each instance.

(Testimony of Army A. Seijas.)

The Witness: I am marking the first document here that is denoted as bill of sale. This is a bill of sale from Heberling brothers to Army Seijas for $35,000 of all of their interest in certain county operated amusement devices in Exhibit A, and then attached to Exhibit A which lists by Washington State Tax certificate number certain machines.

Mr. Mead: Does it list the locations of the machine?

The Witness: With a list of where the machines are located. List B is a bill of sale from the Heberling brothers to Army Seijas for a thousand dollars acknowledging the document [592] denoted and further promising that they would not compete with Army Seijas in the City of Bremerton in these locations that are enumerated on the document marked Exhibit A, and attached thereto, and C is a document dated March 31, 1945, and denominated as acknowledgment of partnership interest, and it is signed by Mr. Forman and myself.

Mr. Mead: With that explanation, we have no objection.

The Court: Exhibit 109 is admitted.

(Whereupon, Plaintiff's Exhibit No. 109 for identification was received in evidence.)

Q. (By Mr. Obenour): All right, sir. Now, with the sale—referring to Exhibit 108—of the county route to Heberlings as shown in Exhibit 108, you sold your interest in the county to Heberlings for how much again, did you say?

A. Mr. Obenour, on November 10, 1945, we sold

(Testimony of Army A. Seijas.)

our county route to Schneiderman. At that time we did not know that Heberlings was in the picture, but that route—and subsequenty it developed they were in the picture, and we didn't know about it, and on that day we sold the county route as shown in Exhibit 108 to Harry Schneiderman for $44,000.

Q. Did you have any knowledge, Mr. Seijas, of Mr. Forman introducing Mr. Schneiderman to the Heberlings for the first time?

A. I don't recall any such thing.

Q. Did you have any knowledge of the manner in which Schneiderman was made aware or acquainted with the Heberlings?

A. I have no recollection of anything like that. It may have happened, but I can't help you.

Q. And Exhibit 109 is the record of sale of the city routes, rather, the Heberling interests in the city routes to you? A. Yes.

Q. Why, sir, is the bill of sale in each instance made from the Heberlings to you rather than to you and Mr. Forman as partners?

A. That can be explained very easily, Mr. Obenour. You will recall that all of the pinball business in Bremerton, as far as Mr. Forman and I were concerned, were all in Mr. Forman's name insofar as Heberlings were concerned.

Q. Yes, sir.

A. The licenses were in other people's name, but insofar as Heberlings were concerned, Mr. Forman was the man. We were looking forward to selling out our interest in the City of Bremerton,

(Testimony of Army A. Seijas.)

Mr. Forman and I. We had [594] already disposed of the county route to Mr. Schneiderman. Mr. Heberling called a meeting in December and told us that he wanted to get out of the pinball business, although at that time we didn't know that he was a secret partner, or at least I didn't know that he was a secret partner of Mr. Schneiderman. In the meantime, the city was all cut up. That is, there was interests of half in this route and half in that route, and another half in another route between Mr. Forman and Mr. Heberling. Obviously, if those routes were to be sold, you had to sell the entire route. You couldn't sell a route to go with somebody else's as a partner because the new buyer might not want the old partner, so consequently Mr. Forman and I represented to the Heberling brothers that it was to be my deal, although Mr. Forman and I had an understanding that Mr. Forman had half of my interest, whatever I bought, so in December of '44, I accepted this option to buy this route or their interest in these routes in the city.

That would give the Heberling brothers, or that would give Forman and Seijas, complete ownership in these three routes in the city, which would then put us in a position where we could sell the routes in the city. You will notice that we— [595] Heberling—Schneiderman bought in in November, and here I bought in in March of 1945, so Mr. Forman and I as of March 30, 1945, owned all of the city and an unencumbered route in the county which

(Testimony of Army A. Seijas.)

we sold in November of that year to Mr. Schneiderman, and then tried to sell the city later in that year of 1945. Do you understand my position now?

Q. Yes, sir. How much did you pay the Heberlings? A. We paid Heberlings $36,000.

Q. And while it was represented to be your deal, what money was used to pay the Heberlings for their half?

A. I don't recall whether we used our funds from the pinball business or out of our pockets or out of our bank accounts or what we did. At any rate, we gave them $36,000. Mr. Forman contributed $18,000, and I contributed $18,000.

Q. How long, then, did you and Mr. Forman operate the routes in the City of Bremerton?

A. We then operated the routes in the city as United Amusement Company of Bremerton until September 1, 1946.

Q. And during this time had Mr. Forman continued to pay half of the office expense?

A. Up until 1946?

Q. Yes, sir. A. That is my recollection.

Q. And do you have work papers pertaining to your 1946 tax returns, Mr. Seijas?

A. Yes, I do.

Q. May I have them, please? A. Yes, sir.

Mr. Obenour: I ask that these be marked.

The Clerk: Plaintiff's Exhibit 110 has been marked for identification.

Q. (By Mr. Obenour): I believe you stated that

(Testimony of Army A. Seijas.)

until September, 1946—what happened in September, 1946?

A. On September 1, 1946, Mr. Henry Morin took over an interest equal to 49 per cent of the three pinball routes, "A, B" and "C" that we now owned in its entirety.

Q. Who was Mr. Henry Morin?

A. Mr. Morin was a brother-in-law by a man by the name of Matt McCusker who is a friend of my brother's who I had also set up in business in Bremerton.

Q. How did Mr. Morin become acquainted with you and Mr. Forman?

A. Mr. McCusker knew that we had been trying to sell the pinball routes for some period of time. We had tried to sell them to Desimone from Tacoma, and we were unsuccessful. He knew we were anxious to sell. Mr. Morin's brother-in-law was anxious to get out of the [597] business he was in and get into another business where he did not have to work so hard and where he could be placed on a weekly salary, and he was brought into my office by Mr. McCusker.

Q. What happened when Mr. Morin was brought into your office, Mr. Seijas?

A. The matter was totally unannounced to me, and Mr. McCusker and Mr. Morin came in and were introduced, and he said that he understood we wanted to sell the pinball business in Bremerton. McCusker, of course, knew me quite well and what I knew about it, so I told him that we wanted—to

(Testimony of Army A. Seijas.)

see Mr. Forman, and I would see if Mr. Forman were in. Mr. Forman was in, and I told Mr. Forman, I said, "We have a man out here that wants to buy the pinball business. Who is going to talk to him, you or I?" We thought it best that Mr. Forman talk to him so then I brought Mr. McCusker and Mr. *Forman* down to Mr. Forman, and I introduced them, and Mr. Forman took over at that point.

Q. Had you determined how much money Mr. Morin had available to invest in the pinball business?

A. I found that out before I talked to Mr. Forman.

Q. And what did Mr. Morin have available to invest? A. He had $30,000 to invest.

Q. And prior to introducing Mr. Morin to Forman, did you [598] have a conversation with Mr. Forman as to what you would sell for $30,000?

A. Not at that particular time. We had wanted to *see* the entire route, so I told Mr. Forman that the man had $30,000 and asked him whether he wanted to talk to him or not, and we decided that we would talk to the man for the $30,000 and feel his way along.

Q. What was represented to Mr. Morin that he could acquire for $30,000?

A. Well, I wasn't present during that conversation.

Q. Did Mr. Forman tell you what he had told Mr. Morin?

(Testimony of Army A. Seijas.)

A. I was going to say, later they both were going to think it over as to whether or not one wanted to sell the half interest for $30,000, and the other was going to think it over as to whether he was going to buy the half interest for $30,000.

Q. Did Mr. Morin decide he wanted to buy a half interest?

A. We hadn't made up our mind between ourselves or how it was going to be handled, and Mr. Morin hadn't made up his mind, but it seemed like the next day or day after he came in and had his money and wanted to buy.

Q. And what did you and Mr. Forman do?

A. Then we couldn't determine between ourselves which half was going to be sold.

Q. So what did you decide to do? [599]

A. We decided—just let me think a moment. I might say that this chap was talking about buying as if he were buying stock in a company rather than an interest in a partnership, and he was talking about 50 per cent, talking in percentage figures, so we decided then to sell him 49 per cent. Mr. Forman was to give me one per cent which would give me fifty-one per cent interest in a partnership, and Mr. Morin forty-nine per cent interest in a partnership, but as between Mr. Forman and I, we hadn't determined what was going to happen to the money.

Q. What did happen to the money?

A. I prepared a bill of sale to Mr. Morin to go with a bill of sale and transfer to me of one per cent

(Testimony of Army A. Seijas.)

by Mr. Forman, and upon delivery to him of the document, he delivered to me, I think it was, a check for $30,000.

Q. What did you tell Mr. Morin was going to be the make up of the partnership in which he was buying an interest?

A. He was to take over Mr. Forman's job of operating the partnership, and he was to be the head man in the operation in Bremerton and was to work in conjunction with Mr. Meyers.

Q. Who was to be the other partner?

A. I was to be the other partner.

Q. And what was to be your share? [600]

A. My share was to be 51 per cent.

Q. And what was to be Mr. Forman's interest in the partnership thereafter?

A. Mr. Forman had no further interest. It was just a partnership between Mr. Morin and myself.

Q. Is that what was the actual factor, or is that what Mr. Morin was told?

A. That is what Mr. Morin was told. Mr. Forman and I had not decided between ourselves what was being sold.

Q. Do you have a copy of the transfer of Mr. Forman's interest in the partnership to Mr. Morin?

A. Yes, I do.

Q. May I have it, please? A. Yes.

Mr. Obenour: I ask that it be marked.

The Clerk: Plaintiff's Exhibit 111 is marked for identification.

(Testimony of Army A. Seijas.)

Q. (By Mr. Obenour): The signatures are signatures of whom?

A. Well, I saw Mr. Morin's signature on there. I don't know if there are any other on there or not. I can tell when you show it to me again.

Q. All right, sir.

Mr. Obenour: Offer Exhibit 111.

Mr. Mead: May I inquire of the witness, [601] your Honor?

The Court: Yes, you may.

Examination on Voir Dire

Q. (By Mr. Mead): This exhibit, Mr. Seijas, and I refer to Exhibit 111 has an envelope attached to it which says "Morin-Forman" on the envelope. Were these papers in this envelope?

A. I think they were, yes.

Q. And did you locate them in your files?

A. I think we had that left over from the first trial. I am not sure.

Q. Were these introduced as evidence in the last trial, do you know? A. I don't recall.

Q. In any event, they have been in your possession continuously? A. I have had those.

Q. Now, the first document is an assignment of interest of Forman to Morin and also acknowledging that one per cent of this business is assigned to you, is that right, a bill of sale, in other words? The second document, a yellow sheet, appears to be a copy of the first signed by Mr. Forman but not signed by Mr. Morin, is that correct? [602]

A. Well, I can't see. Do you have it in your

(Testimony of Army A. Seijas.)

hand? Whatever it is I am sure you are reading it correctly.

Q. The first document is an assignment of interest signed by Forman and Morin? A. Yes.

Q. It is an assignment of 49 per cent of the city routes to Mr. Morin and one per cent of the city routes to yourself?

A. That is correct. That is what it says.

Q. The date is August 8, 1946? A. Yes, sir.

Q. Was it signed on or about that date?

A. It was signed on that date.

Q. The second document, a yellow sheet, is a duplicate of the first but is signed only by William Forman? A. Yes, that is right.

Q. And the third document is a white sheet of paper headed, "Acceptance of Agreement," and what is that document?

A. Mr. Morin accepts the articles of partnership entered into between William Forman and Army Seijas and agrees to substitute himself in place of William R. Forman with the same terms and conditions.

Q. And by this acceptance of agreement, Army Seijas accepts Morin as a partner instead of Forman? A. That is right. [603]

Q. It was a duplicate of this original likewise signed by yourself at the same time, Mr. Seijas?

A. I don't recall. I presume it was.

Q. And that was delivered to Mr. Morin, I assume? A. Yes, that is correct.

Q. The other two remaining documents are

(Testimony of Army A. Seijas.)

merely unsigned copies of the third which is headed "Acceptance of Agreement," is that correct?

A. That is correct.

Q. And were these, all of these documents, prepared in your office and by yourself and executed on August 8, 1946?

A. Yes, and placed in this envelope.

Mr. Mead: We have no objection to these exhibits, your Honor.

The Court: Exhibit No. 111 is admitted.

(Whereupon, Plaintiff's Exhibit No. 111 for identification was received in evidence.)

Direct Examination—(Continued)

Q. (By Mr. Obenour)? And you say those documents or the other originals of those documents of 111 were delivered to Mr. Morin when he paid his money? A. Yes. [604]

Q. And how much did he pay?

A. He paid $30,000.

Q. And who received it?

A. I received it, and I recollect now that it was banked in my trustee—my Seattle First National trustee bank account.

Q. Do you have a record of the bank statement of that account for the period in which that check was deposited?

A. I don't think so. I think—I don't think that I have any record showing where that was deposited. I just told you that was my recollection.

Q. You do not have a copy of your bank state-

(Testimony of Army A. Seijas.)

ment for August of 1946 for the trustee account?

A. Oh, yes, I have that here. That was Exhibit 214 in the other case.

Q. May I have it, please?

A. Yes, sir. Excuse me, I was looking for a duplicate book, you know.

Q. Attached to it are certain other checks—attached to the statement for August of 1946, and this is your trustee account at the Seattle First?

A. Yes, that is what it is.

Q. There are several checks. What is this first one, "Army Seijas to Army Seijas signed Army Seijas, trustee"?

A. That is a check made payable to me for $13,221.33. [605]

Q. Does that have anything to do with the transaction between you and Forman and Morin?

A. Yes, it does.

Q. And what does it have to do with it?

The Court: I suggest you go back around. Some of the jurors are blocked out.

Mr. Mead: May we examine the exhibit, your Honor, before he testifies with respect to that?

The Court: Yes, counsel hasn't seen that.

Mr. Obenour: I am simply identifying these. Some of them appear not to be in. We will remove——

Mr. Mead: The question is, what does it have to do with it? It itself is not one of identification.

The Court: We are not too far from the recess time. Do you think that is another matter you could

(Testimony of Army A. Seijas.)

do more readily at that time if you are going down through that whole stack of checks?

Mr. Obenour: There are only four or five here.

The Court: Go ahead, identify them.

The Witness: The first check is a check [806] made out to me for $13,221.13, and the next one is a check made out to Mr. Forman for $15,000, and the next one is a check to Carl Brill, $81.09.

Q. (By Mr. Obenour): Does that have anything to do with this transaction, the Brill check?

A. No, sir.

The Court: Just the ones that have to do with this——

Q. (By Mr. Obenour): Remove all the checks that do not have anything to do with this transaction?

The Court: Do you want a staple remover?

The Witness: There is only——.

The Court: Extract any checks that do not have to do with the transaction we are referring to.

Mr. Obenour: May I have the bank statements and these two checks, please?

The Court: Pin them back together and give them an exhibit number.

The Clerk: Plaintiff's Exhibit 112 has been marked for identification.

The Court: Now, let counsel see them now before we go any further.

Mr. Mead: We have no objection to Exhibit 112.

The Court: Very well, Exhibit 112 is admitted.

(Testimony of Army A. Seijas.)

(Whereupon, Plaintiff's Exhibit No. 112 for identification was received in evidence.)

The Court: Go ahead.

Q. (By Mr. Obenour): The $30,000 check that was received by you from Mr. Morin, what did you do with it, Mr. Seijas?

A. It was deposited in the bank of Seattle First National Bank, my trustee account.

Q. Is that reflected on your copy of your statement for August—rather, July, 1946, to Army Seijas, trustee account as shown in Exhibit 112?

A. Yes.

Q. What did you do, then, in drawing upon the $30,000 or distributing the proceeds of the check from Mr. Morin?

A. I didn't do anything about it.

Q. Did you distribute the $30,000 in any way?

A. Yes.

Q. How?

A. By writing two checks, one for $13,221 to myself and one for $15,000 to Mr. Forman.

Q. Why were those checks written?

A. I think the best answer would be because we wanted the money. [608]

Q. And what was your agreement between Mr. Forman and yourself concerning the disposition of the money Mr. Morin was paying for an interest in the pinball business?

Mr. Mead: That is objected to, your Honor, as to what his understanding was, and it is an attempt to vary the terms of a written agreement.

(Testimony of Army A. Seijas.)

The Court: The question was what the understanding between him and Forman was, not the understanding of what the agreement—I suppose the word "agreement" would be better.

Rephrase the question, and then I will give you an opportunity to object.

Rephrase it, please.

Q. (By Mr. Obenour): What was the agreement between you and Mr. Forman?

Mr. Mead: That is calling for a conclusion, your Honor, and there is the written agreement in evidence, and if he is going to testify as to what some other agreement would be, it would be an oral agreement and an attempt to vary a written instrument, and we object to it. The best evidence would be the written agreement.

The Court: No, if there was further agreement between he and Forman about it, he is permitted to testify to it. [609]

The objection is overruled. Answer it.

The Witness: On August 8 we had no agreement. On August 9 we had an agreement.

Q. (By Mr. Obenour): What was the agreement?

Mr. Mead: I have an objection to this, your Honor?

The Court: Yes, of course.

The Witness: On August 9 Mr. Forman and I resolved our problem as to whether he should take all the money or I should take all the money. We agreed to divide the money equally between us,

(Testimony of Army A. Seijas.)

and I was then to be the operator, and he was to be a silent partner in my 51 per cent of the pinball route that we had previously sold to Mr. Morin.

Q. (By Mr. Obenour): What was your agreement between you and Mr. Forman as to what information concerning this agreement was to be given to Mr. Morin?

A. I don't understand what you mean, do you mean agreement?

The Court: The question is what did you and Mr. Forman agree to, if anything, concerning the revealing of the relationship between you and Forman?

The Witness: I understand it now. We agreed not to reveal Mr. Forman's interest in the [610] Morin-Seijas partnership.

Q. (By Mr. Obenour): To anyone?

A. To anyone.

Q. After September 1, 1946, in what names were the Bremerton city routes operated?

A. My recollection is that they were operated in the same fashion except we had to get a new certificate number from the state under the name of Morin and Seijas and transfer of different licenses. I don't recall whether the master license, but other licenses from Forman, or whoever it was, to Morin and Seijas and terminate the old partnership.

Q. Now, did Mr. Meyers continue to be the collector for the routes?

(Testimony of Army A. Scijas.)

A. Mr. Meyers continued to be the collection and Mr. Morin worked with him.

Q. And where did Mr. Meyers bring the receipts and the reports of the monies received after the new partnership was established?

A. Mr. Meyers and Mr. Morin would come into my office then after the first of September, 1946.

Q. And did Mr. Renstrom continue to be the bookkeeper? A. Yes, he did.

Q. And was everything else unchanged in the operation except that Morin replaced Forman?

A. Morin replaced Forman.

Q. And in each of the years '46, '47, '48 and '49, did Mr. Renstrom make out partnership returns for United Amusement Company of Bremerton?

A. He did.

Q. Showing you Exhibits 18 through 21, can you identify those, please, sir?

A. Plaintiff's Exhibit 18 is the partnership return for 1946 between United Amusement Company of Bremerton——

Q. Prepared by whom?

A. Pardon me—from September 1, 1946, through December 31, 1946, prepared by Mr. Renstrom.

Q. Signed by whom?

A. Signed by myself.

Q. And it shows the partners to be whom?

A. The partners are shown to be A. A. Scijas and H. T. Morin.

Q. Does it show in any way that Mr. Forman has an interest? A. It does not.

(Testimony of Army A. Seijas.)

Q. And similarly would you identify the returns for the partnership for '47, '48 and '49?

A. 1947 is shown on Plaintiff's Exhibit 19, and '48, the same thing except that the name has been changed from United Amusement Company of Bremerton to United Amusement Company, and [612] '49 is shown in Plaintiff's Exhibit 21 which shows Army Seijas and H. T. Morin as being partners.

Q. During this period, did Mr. Forman continue to have a half interest in your 51 per cent of this partnership? A. Yes, he did.

Mr. Oberneur: Offer Exhibits 18, 19—18 is already in—19, 20 and 21.

Mr. Mead: We object to 19, 20 and 21, your Honor, as partnership returns covering a written partnership agreement between Seijas and Morin for subsequent years which have no bearing on this controversy and is an attempt—and the testimony of the witness being an attempt to alter the plain terms of a written agreement already in evidence, and it would be incompetent, your Honor.

The Court: Overruled. The exhibits are admitted.

(Whereupon, Plaintiff's Exhibits 19, 20 and 21 for identification were received in evidence.)

The Court: Incidentally, with respect to 112, Mr. Seijas, these two checks I don't think that was completely tied up, what happened to these checks and what the purpose of giving them was and so forth. I think Mr. Seijas got started and we got

(Testimony of Army A. Seijas.)

[613] deflected on something else. I am not sure that was covered. I ask this in connection with the exhibits just admitted.

Q. (By Mr. Obenour): The checks contained in Exhibit 112, Mr. Seijas, are to Mr. Forman for $15,000 and to yourself for 13,000-odd dollars?

A. $221.

Q. Why was your check not $15,000?

A. My recollection is that there were certain bills that I had to pay or should be paid. Whether they were my bills or not, I don't recall offhand. Mr. Forman wanted me to treat it—to keep $15,000 and treat it then as a loan and that I would pay him back, and I was lukewarm to that proposition. Subsequently, I changed my mind and said no, that I didn't want to treat it as a loan, so then we formed a partnership, and we divided the money equally except that out of my $15,000, 17 hundred went to pay something else. What it is, I don't recall at this time, and that is why it is taken out of this trustee account. This trustee account was for the purpose of holding money that did not belong to me, but which many law offices have where they keep money that belongs to other people.

Mr. Mead: I object to the latter part of his testimony. It's not at all responsive. [614]

The Court: Well, I think reasonably called for by the inquiry.

The check of $15,000 that you have there to Mr. Forman, was that delivered?

(Testimony of Army A. Seijas.)

The Witness: Yes, it was delivered and cashed the next day.

Q. (By Mr. Obenour): Who is the endorsement appearing on those checks?

A. Mr. William R. Forman appears on the $15,000 check and my endorsement appears on the $13,221 check.

Q. Is that Mr. Forman's signature as endorser on there? A. Yes.

Q. Now, the information returns for the partnership did not reflect the name of Mr. Forman, is that correct? A. That is correct.

Q. For the years '46, '47, '48 and '49?

A. That is right.

Q. How was the sale of the interest in the business for $30,000 to Morin reported for tax purposes?

A. I didn't get all of your question. You walked away from me.

Q. How was the sale to Morin for $30,000 reported for tax purposes?

A. It was reported as a sale of capital asset.

Q. By whom? [615] A. By Mr. Forman.

Q. Who reported the sale of the $30,000 interest to Morin on the tax return?

A. Mr. Forman reported it. I did not.

Q. You did not? A. No.

Q. How much did Mr. Forman report on his return?

A. I have no personal knowledge of that except

(Testimony of Army A. Seijas.)

that I understand from him that it was $30,000. I never saw the return.

Mr. Obenour: I will offer Exhibits 32 and 33, your Honor, the tax returns for Dorothy Forman and William R. Forman for the year 1946.

I will also at this time offer the rest of the Forman tax returns, 30, 31 and 32.

The Court: Let's take these Exhibits 32 and 33, the '46 returns for Dorothy and William R. Forman. They are now admissible.

Do you want to renew any further objection beyond the general one?

Mr. Mead: No, we have no objection to them.

The Court: Very well, Exhibit 32 and 33 are admitted.

(Plaintiff's Exhibits Nos. 32 and 33 for identification were received in evidence.) [616]

Mr. Bischoff: We reserve the objection originally made.

The Court: Yes, the original objection is still reserved to you.

I think we better suspend. Another day has come to a conclusion at least as far as our trial is concerned.

We will be back at 9:30 in the morning. Keep in mind what I told you about temptation lurking in your path. Resist it vigorously.

(Whereupon, at 4:25 o'clock p.m., the court was recessed until 9:30 o'clock a.m., of the following day, August 3, 1956.) [617]

(Whereupon, on the 3rd day of August, 1956, at the hour of 9:30 o'clock a.m., the following further proceedings were had:)

The Court: Good morning, gentlemen, are you ready to proceed?

Mr. Bischoff: Your Honor, I filed this morning some tentative instructions, and we will ask leave to submit additional instructions the first part of the week.

The Court: That will be granted.

Mr. Obenour: Your Honor, we would offer again Exhibits 72 and 73.

Mr. Mead: We have no objection.

The Court: Very well, they are admitted.

(Thereupon, Plaintiff's Exhibits Nos. 72 and 73 for identification were admitted into evidence.)

Mr. Obenour: We offer Exhibits 30 and 31, tax returns for Dorothy and William Forman for the year 1945.

Mr. Mead: They are objected to, your Honor, as not being in issue. The sole issue in this case are the tax returns and the tax liability of Army Seijas for the years 1942 to 1945.

The Court: There is no issue in the case, of course, primarily or directly as to the tax returns [618] of the Formans, but these exhibits, it seems to me, may have some bearing on the issues we are here to try, and, accordingly, the exhibits are admitted.

(Thereupon, Plaintiff's Exhibits Nos. 30 and

31 for identification were admitted into evidence.)

Mr. Obenour: We offer Exhibits 34 and 35, the tax returns for William and Dorothy Forman for the year 1947.

Mr. Mead: We have the same objection, your Honor, as to materiality, being tax returns which are not in issue, and the tax liability of Mr. Seijas being the only issue and being for subsequent years.

The Court: Same ruling. They are admitted.

(Thereupon, Plaintiff's Exhibits Nos. 34 and 35 for identification were admitted into evidence.)

Mr. Obenour: Offer Exhibit 36, the tax return for William and Dorothy Forman for 1948.

Mr. Mead: Same objection, your Honor, as to the previous exhibit.

The Court: The same ruling. It is admitted.

(Thereupon, Plaintiff's Exhibit No. 36 for identification was admitted into evidence.)

Mr. Obenour: I offer Exhibit 37, the tax return [619] for William Forman and Dorothy Forman for the year 1949.

Mr. Mead: Same objection, your Honor.

The Court: Same ruling. Admitted.

(Thereupon, Plaintiff's Exhibit No. 37 for identification was admitted into evidence.)

ARMY A. SEIJAS

called as a witness on behalf of the Plaintiff, having been previously sworn, resumed the stand, and testified further as follows:

(Testimony of Army A. Scijas.)

Direct Examination—(Continued)

Q. (By Mr. Obenour): Mr. Scijas, after Mr. Morin entered the picture in September of 1946, was there any change in the actual operation of the business itself, that is, the mechanics of the business? A. Generally, no.

Q. After 1946 did the Amusement Company—rather, did you and your bookkeeper incorporate the various amusement company records into a single amusement company?

A. I think that was done, but I don't remember when that was done.

Q. And thereafter, were all of the routes included in a single joint—or, single information return of partnership return? [620]

A. I think that is correct.

Mr. Obenour: May I have Exhibits 18, 19, 20, and 21?

Mr. Mead: I couldn't hear you.

Mr. Obenour: 18, 19, 20, and 21.

Mr. Obenour: I would ask to read from Exhibits 18, 19, 20, and 21.

Mr. Mead: Have these been admitted?

The Court: Yes. They were admitted yesterday.

Mr. Obenour: ——from the income reported, that is the gross and net income reported each for the years 1946, '47, '48, and '49, and distributive shares as shown by the partners.

The Court: You may.

Mr. Obenour: United Amusement Company, Exhibit 18, partnership return for 1946, the period of

(Testimony of Army A. Seijas.)

September 1, 1946, to December 31, 1946, showing amusement device operators, 1812 Smith Tower, gross income, $39,324.70, and a list of expenses and deductions, totalling $45,059.43, and a net loss of $5,734.75, distributed to the partners, loss, $2924.71 to Mr. Seijas; Mr. Morin $2,810.02. For 1947, Exhibit 19, the return of the United Amusement Company of Bremerton which was crossed out to read [621] "United Amusement Company, 1812 Smith Tower, gross receipts, $120,268.55. A list of deductions and expenses totalling $130,838, and a net loss of $10,569.45 for 1947, distributed, A. A. Seijas, $5,390.42, Mr. Morin $5,179.03. For 1948, Exhibit 20, the partnership return, United Amusement Company shows deductions of $1236.09, and the actual detail is in a schedule attached showing gross receipts $104,909.90, Total expenses, $102,000 and a net profit $1236, and profit on sales, long term, $222, total $1458, net profit of $1236.09, and that was distributed for a profit of Mr. Seijas of $630.14, and Mr. Morin $605.68. For 1949, partnership return for United Amusement Company, Exhibit 21, and it shows an operating loss of $1761.11 and donations added back, $13, and shows a net short term gain or loss of $2,123.07, a loss of $1731.11, and to the partners distributive share, it shows a loss to Mr. Seijas of $899.85, and $6.63 added back for donations; Mr. Morin, $864.50 and $6.37 added back, total loss of $1751.41.

Q. (By Mr. Obenour): Mr. Seijas, is that your signature on the returns for '46, '47, and '49?

(Testimony of Army A. Seijas.)

A. That is my signature on three of them, and [622] Mr. Morin's signature on the other.

Q. Did you either furnish Mr. Forman with a copy of this partnership return or *or* apprise him of the partnership returns filed during that period?

Mr. Mead: That is objected to, your Honor, as being incompetent, irrelevant, and immaterial, and has reference to a later time. The only issue in this case is whether or not the defendant conspired with this—with Mr. Seijas to evade Mr. Seijas' income tax returns for the years 1942 to 1945, taxes due for those years, and the other points with respect to the four partnerships, three of the city routes in Bremerton and the county route, and that this is a time way past and a partnership between other individuals that can have no bearing upon the issues involved in this case.

The Court: I think I should comment or call your attention to the fact that the charge here is not limited as you indicate, but is stated to be conspiracy for the purpose of violating Federal law in four different respects and not merely in the respect to evading Seijas' income tax.

Mr. Mead: That is true, your Honor, in four [623] different respects with regard to his returns for these particular years and these particular partnerships.

The Court: The objection is overruled. Answer it, please.

The Witness: Your Honor, I am sorry. I have forgotten the question.

(Testimony of Army A. Seijas.)

Mr. Obenour: I will restate it.

Q. (By Mr. Obenour): Did you furnish Mr. Forman with copies of these partnership returns which you have before you, Exhibits 18, 19, 20, and 21, or in any *other apprise* him of the contents?

Mr. Mead: That is an objectionable question, your Honor.

The Court: You better break it down into several matters.

Q. (By Mr. Obenour): Did you give Mr. Forman a copy of the returns, 18, 19, 20, and 21?

A. I don't remember whether or not I gave him copies of these exhibits before me.

Q. Did you in any way apprise Mr. Forman of the income reported on these same exhibits?

A. We discussed it.

Q. And what discussion did you and Mr. Forman have, Mr. Seijas? [624]

A. I don't remember what it was except that we discussed it in the question of the losses.

Q. What discussion did you have with Mr. Forman concerning the losses as shown on these returns and the other venture, the Green Parrot Theater and First Avenue Theater?

Mr. Mead: I assume we have a running objection, your Honor.

The Court: Yes, you do.

Mr. Mead: Thank you.

The Witness: The losses of the first part of the operation I would say about '46, '47, are not real losses but only paper losses. It was not a little bit

(Testimony of Army A. Seijas.)

later that the—that real losses occurred. During the beginning of this time we had quite an argument as to the depreciation, the re-depreciation of these machines by this new partnership in which Mr. Morin was now injected.

Mr. Mead: May I request, your Honor, designate who he means by "we" when he says "we"?

The Court: Who comprised the "we"?

The Witness: Mr. Morin and I ostensibly had a new partnership and the question of depreciation schedules was to be taken on the machines was [625] a prime concern to us. We depreciated them——

The Court: The question is, did you discuss this with Mr. Forman?

The Witness: Mr. Forman and I discussed the question of depreciation.

The Court: Go ahead.

Q. (By Mr. Obenour): What, then, was the discussion you had with Mr. Forman concerning the operational losses reported by you on the Amusement companies as compared to what was reported on the Green Parrot and First Avenue Theaters?

A. The Green Parrot and First Avenue Theaters, as I recall, showed a loss in '39, and I would have to contribute my share of the losses to the Green Parrot Theater, in the meantime the United Amusement Company was showing a real money loss at that same time, so for a period of a year or two, Mr. Forman and I—he would pay some of the losses of the theater and I would pay some of

(Testimony of Army A. Seijas.)

the losses on the pinball machines, and we were going to balance up and straighten out our losses when we made a settlement.

Q. How were these losses reported on your respective returns?

A. Which losses do you have reference to, the theaters or the pinballs? [626].

Q. Both.

A. I don't recall offhand what was done about the losses in the theater. I suppose I reported them. The records would show. I don't recall offhand, but I took the losses in the pinball business.

Q. Did you have any discussion with Mr. Forman about your being able to take the full losses on the pinball routes and you paid the money loss yourself while Mr. Forman in balancing equities between the two businesses was unable to take the full loss of the theater?

Mr. Mead: That is objected to, your Honor, as being a leading question, in addition to the other objection.

The Court: Yes, it is in form leading. A question of what discussion there was would be sufficient.

Q. (By Mr. Obenauer): What discussion did you have with Mr. Forman concerning the losses reflected between the two places by each of you?

Mr. Mead: May we have a time fixed, your Honor?

The Court: Yes, you may.

(Testimony of Army A. Seijas.)

Mr. Obenour: 1948 and '49, if I understand correctly.

Mr. Mead: The time of the conversation?

The Court: Yes, that is what he wanted. [627] Fix the time of the discussion as best you can, Mr. Seijas, will you please?

The Witness: My recollection is that it was in March of 1947.

Q. (By Mr. Obenour): All right, sir. And what was that discussion?

A. I have before me Plaintiff's Exhibit 18 which was signed by me on March the 7th, 1947, in which I took a loss—which the partnership return shows that I was eligible to take a loss for income tax purposes of $2900. Mr. Forman's name does not appear on the return, but I took the loss, as I recall, in my income tax return and Mr. Forman and I discussed that. That was in March of 1947.

Q. Referring to Exhibit 28, the Green Parrot Theater and First Avenue Theater, was there any loss that Mr. Forman was able, then, to show from his operation of the theater or from his interest in the pinball routes?

Mr. Mead: I assume that we have a running objection to all of these subsequent events, your Honor.

The Court: Yes, you do.

Mr. Mead: Could we have the date of the conversation or discussion that has been referred to? Could that be fixed too? [628]

(Testimony of Army A. Seijas.)

The Court: Are you now referring to a discussion at the same time?

Mr. Obenour: Yes, your Honor.

The Court: That is in March of 1947?

Mr. Obenour: Yes, sir.

The Court: Go ahead.

The Witness: Well, Mr. Obenour, the partnership return for the Green Parrot for the year 1946 has nothing to do with our explanation and talk with regard to Plaintiff's Exhibit 18 which is the 1946 return for the last four months of that year of the United Amusement Company.

Q. (By Mr. Obenour): All right, sir.

A. This shows a profit and this shows a loss.

Q. What discussion was there, then, with Mr. Forman concerning who would receive the benefit tax-wise on their return for this operational loss?

Mr. Mead: Could we have the time fixed, your Honor?

Mr. Obenour: I am still talking about the same conversation.

The Court: March 1947.

Mr. Mead: Thank you, your Honor.

The Witness: Well, I took the loss, as I recall.

Q. (By Mr. Obenour): What conversation did you have at this time with Forman concerning who would be taking this loss?

A. Well, I don't get your question very clearly, but if I understand it correctly, we talked about it and my name appeared on the return, and consequently I was to take it.

(Testimony of Army A. Seijas.)

Q. All right, sir. Now, at a subsequent time did you have other conversations concerning the tax consequences of operational losses with Mr. Forman? A. Yes.

Q. When was that?

A. That would be in '48 or '49.

Q. And particularly what time in '48 or '49?

A. Well, I can't say, but my best guess it would be around income tax time.

The Court: Do you mean the filing of the return time?

The Witness: That is right, your Honor. That would be about the time we are talking about taxes.

Q. (By Mr. Obenour): Referring to Exhibit 10, your tax return for 1949, and to your schedule attached thereto, as to the sources of your income, what did you show for your partnerships for the [630] theaters, the Green Parrot and First Avenue for the United Amusement Company?

A. United Amusement Company showed a loss of $1982, and the Green Parrot Theater shows a loss of $1963, and——

Q. At the time that this return was prepared, did you have a conversation with Mr. Forman concerning the balancing of your equities between your contributions of actual losses in these businesses and your tax credits that you were able to receive?

A. I don't recall any specific conversation. I remember we talked about in trying to work out some kind of a contribution program between ourselves.

(Testimony of Army A. Seijas.)

Q. In what way?

A. Well, trying to balance off the losses sustained by the theaters as also his share of the losses sustained by the pinball business.

Q. While the pinball routes showed losses in each of the years '46 through '49 with the exception of the $1200 of 1948, did you in fact receive any money from the pinball companies during this period? A. Yes, we did.

Q. How would you receive the money?

A. At intervals whenever there was an accumulation of money in the bank account Mr. Morin and I would sit down and write out checks to each other for whatever amount we agreed to withdraw. We [634] would write out a check for an amount equal to 51 per cent which I received and he would get a check equal to 49 per cent of the amount we agreed to divide.

Q. Do you have the records for the 1946-47 operations or '48 operations of the amusement company? A. I have the ledgers.

Q. May I have them, please? A. Yes, sir.

The Clerk: Plaintiff's Exhibit 113 has been marked for identification.

Q. (By Mr. Obenour): Will you identify 113, please?

A. 113—I don't know what you call it, books of account of the United Amusement Company, I believe, in Mr. Renstrom's handwriting.

Q. And what period?

A. Well, I am not a bookkeeper, but it says here

(Testimony of Army A. Seijas.)

September 1946 and then it has got a list of dates all the way down to December 31, 1949.

Mr. Obenour: Offer Exhibit 113.

Mr. Mead: We have the same objection, your Honor, as to the previous exhibits.

The Court: As far as the general objection?

Mr. Mead: The time involved.

The Court: All right. On that grounds it is overruled. It may be admitted. [632]

(Thereupon, Plaintiff's Exhibit No. 113 for identification was admitted into evidence.)

Q. (By Mr. Obenour): Now, who would determine when there would be a draw upon the amusement company during the period of 1946 to 1949?

A. Well, we would find out first of all how much money there was in the bank account.

Q. You say "we", who is that?

A. Mr. Morin and I.

Mr. Mead: I assume we have a running objection to all of this?

The Court: Yes.

The Witness: And if there was money in the bank account, why we drew it.

Q. (By Mr. Obenour): How would you receive it? What would be the form in which you would receive payment? A. Check.

Q. What would you do with your check?

A. I would take my check and either deposit it to a bank account or I might have cashed and taken currency. I think my usual practice was to put it in one of my personal bank accounts.

(Testimony of Army A. Seijas.)

Q. What, then, would you do with the distribution of the money you received from the amusement company?

A. I would then write a check to Mr. Forman [633] for one-half of whatever I got.

Q. What would you do with that check?

A. I would deliver the check to Mr. Forman.

Q. What account would you write these checks to Mr. Forman on?

A. On the Pacific National account.

Mr. Obenour: Offer Exhibit 106 which is the Seijas personal account and the check stubs for the period of 1946 to 1949.

Mr. Mead: I assume they are being offered only for those items? There is a maze of——

The Court: Yes, there was a previous item or two in this book to which reference has been made. Now you are offering it with respect to certain items that bear on the subject we are now discussing?

Mr. Obenour: Yes, sir.

The Court: If there is anything else about it, that you have in mind, I want you to advise counsel in advance. However, there is nothing else that you presently know of?

Mr. Obenour: No, sir, other than what we discussed before, and there are several entries pertaining——

Mr. Mead: We have no additional objection, your Honor. [634]

(Testimony of Army A. Seijas.)

The Court: Very well. The general objection is overruled and the exhibit is admitted.

(Thereupon, Plaintiff's Exhibit No. 106 for identification was admitted into evidence.)

Q. (By Mr. Obenour): Handing you Exhibit 106, Mr. Seijas, and also 113—or do you have it there?—can you find the sheet there for your drawing account in Exhibit 113?

A. If you could find it for me—I have it right here.

Q. Do you have it there?

A. Yes, sir. It says, "Drawing Account, A. A. Seijas."

Q. And what is the first draw shown on that book of account for the United Amusement Company after September 1946?

A. You will have to coach me on what you mean by that, by "draw." What side of the ledger do I look at?

Mr. Mead: I don't think the witness needs any coaching, your Honor. He is an experienced attorney.

The Court: It is an unfortunate way to put it.

The Witness: I just don't know what to look for.

The Court: Well, ask some further questions, counsel. [1635]

Q. What is the first entry after September of 1946 chronologically?

Mr. Mead: Which account do you refer to?

Mr. Obenour: I am referring to Exhibit 113.

The Witness: It says, "Debits, $1590" and it

(Testimony of Army A. Seijas.)

says "Credits, $2602.04." Presumably you mean the $1500?

Q. (By Mr. Obenour): Yes, sir. What is the date of that? A. November 21, 1946, $1500.

Q. And whose account was that charged against there?

The Court: Do you mean the debit item?

Mr. Obenour: Yes, sir.

The Court: The $1500?

Mr. Obenour: Yes.

The Witness: It says, "A. A. Seijas, drawing account, H. T. Morin." There are two pages. It says, "$1500, A. A. Seijas, November 21" and it says "$1500, November 21, to H. G. Morin." They are equal sums. Now, you are asking me bookkeeping terms and you have me at a disadvantage. I cannot interpret this for you except that it says "November 21" on both of them and then "$1500."

Q. (By Mr. Obenour): Did you receive a check from the account of the United Amusement Company for $1500 on November 21, 1946? [636]

A. Plaintiff's Exhibit 105 shows I made a deposit of $1500 on November — I didn't make the deposit, the bookkeeper made the deposit for me in this bank account of $1500 on November the 16th, 1946.

Q. Did you write a check to Mr. Forman at this same time?

A. On November the 16th, 1946, I wrote check No. 35 to Bill Forman, $750.

(Testimony of Army A. Seijas.)

Q. And what is your notation on your check stub for check No. 35?

A. It says "drawing."

Q. What was the purpose for which you gave a check to William Forman on November 16 for $750?

A. He was entitled to one-half of the $1500.

Q. What $1500?

A. The $1500 that was deposited that same day.

Q. From where?

A. The note here does not indicate where the $1500 came from.

Q. Do you have the duplicate deposit tickets to this account, Mr. Seijas, for this period?

A. I don't have them here. They may be down in the Marshal's office, if I have them. Duplicate deposit books, do you mean?

Q. Yes, sir. [637] A. It isn't here.

Mr. Obenour: I wonder if we may have the witness go down to the Marshal's office, your Honor?

The Court: Yes.

(Whereupon the witness complied.)

The Court: Go ahead.

Q. (By Mr. Obenour): Mr. Seijas, did you find your duplicate deposit book for the account at that time?

A. Yes. I found a duplicate deposit book for Pacific National from 6-16-45 to 9-17-47.

Q. May I have it, please? A. Yes, sir.

The Clerk: Plaintiff's Exhibit 114 has been marked for identification.

(Testimony of Army A. Seijas.)

Q. (By Mr. Obenour): Can you identify Exhibit 114, please? A. What is that?

Q. Is this Exhibit 114 the——

A. Duplicate deposit book, Army Seijas' personal bank account at Pacific National Bank from June the 16th, 1945, to September 17, 1947.

Mr. Obenour: Offer Exhibit 114.

Mr. Mead: We have no objection, your Honor.

The Court: Exhibit No. 114 is admitted.

(Thereupon, Plaintiff's Exhibit No. 114 for identification was admitted into evidence.)

Q. (By Mr. Obenour): Sir, refer to a deposit ticket for November 16, 1946, in Exhibit 114.

A. Yes, November 16, 1946.

Q. And what items were deposited to your account at Pacific National Bank on November 16, 1946?

A. A check from United Amusement Company of Bremerton in the sum of $1500.

Q. And was this the same check which shows as a draw on your account in the book of the United Amusement for the same period?

A. The ledger sheet marked Plaintiff's Exhibit 113 says November 21, $1500.

Q. And what, sir, was the money that you were giving Mr. Forman in check No. 35?

A. It was one-half of the $1500.

Q. From where? A. Pardon me?

Q. From where?

A. From this deposit of $1500 one-half went to Mr. Forman and the other half to me into the bank.

(Testimony of Army A. Seijas.)

Q. What is the next entry in the account of A. A. Seijas after the $1500?

A. Well, it says, "Debits, December 12, $1000."

Q. Sir, would you refer to Exhibit 106 for December 12, and I will ask you if you find a deposit there on that date? [639]

A. I see my bookkeeper's handwriting a deposit to December 13 of a thousand dollars.

Q. Is there any notation as to the source of it?

A. Not in 106.

Q. 114, do you have a deposit ticket for December 13? A. Yes, sir, a thousand dollars.

Q. And what is the source of that check?

A. Check from—drawn on a bank designated by the figures 19-28.

Q. Do you know what bank that is?

A. I don't know.

Q. Would you check the bank designation for November 16 that you have marked "United Amusement Company" in Exhibit 114, the slip you were just looking at for November 16.

A. There isn't any 16, it is 13.

Q. November.

A. Oh, November. That is United Amusement Company of Bremerton a check with bank designation No. 19-28.

Q. And what is the bank designation for the next check of a thousand dollars?

A. The same, 19-28.

Q. All right, sir.

A. A thousand dollars.

(Testimony of Army A. Seijas.)

Q. Pardon? [640]

A. A thousand dollars.

Q. And did you receive a check for a thousand which you deposited to your account on December 13 from the United Amusement Company as a draw? A. I did.

Q. Do you have a check—what did you do with that thousand dollars, as far as distribution?

A. On December 12 I had given a check to Mr. Forman for $500, the check stub says for drayving, and number 38.

Q. What was this money that you paid to Mr. Forman in the form of check number 38 for $500? What was the money you paid Mr. Forman in the form of check number 38 for $500?

A. One-half of the thousand dollars.

Q. And the next entry in the ledger for the drawing account of A. A. Seijas is what, on the debit side? A. December 14, $102.04.

Q. And what did you do with that?

A. I don't know. I don't even remember the $102.04. In any event, I didn't deposit in this particular bank account.

Q. All right, sir, what is the next one?

A. The next one is January 14, 1917, a draw of $1561.23.

Q. Did you receive a check for $1561.23 as a draw on the United Amusement Company? [641]

A. I received that amount of draw.

Q. Did you deposit that to that account?

A. I do not see a duplicate deposit slip for that.

(Testimony of Army A. Seijas.)

Q. Do you have any recollection of what manner you handled it, cashing or depositing it?

A. I don't recall. I may have put it in another bank account. I don't know.

Q. Do you have a check drawn to Mr. Forman on January 27, 1947?

A. January 27, yes, I do.

Q. What is the amount of the check to Mr. Forman?

A. There is a check number 47 dated January 27, 1947, to Bill Forman drawing $780.61.

Q. And did you give Mr. Forman this check for $780.61? A. I did.

Q. And what was the purpose of the check you gave Mr. Forman in that amount?

A. Well, it looks like it is one-half of $1561.23.

Q. And what is the next entry you have for the account of A. A. Seijas?

A. March 8, I drew two thousand dollars.

Q. From the United Amusement Company?

A. Yes, sir.

Q. Referring to your account for March of 1947, did you make a deposit of the two thousand [642] dollars to your personal account?

A. In Exhibit 114 it shows that on March the 12th, 1947, a check of 1928 for $2,000 was deposited from United Amusement.

Q. Did you write Mr. Forman a check at this same date, check number 54? A. 54?

Q. Yes, sir.

(Testimony of Army A. Seijas.)

A. There was a check written and then voided on that date.

Q. On that date, and that is the same date you deposited $2000? A. Yes, sir, it is.

Q. And on that date what was the check you wrote and voided?

A. It says, "Check number 54, date, March 12, 1947," a check in favor of William Forman for $1000, and it says "voided see number 57."

Q. Do you have a notation as to the purpose of that check? A. It doesn't say.

Q. All right. Is there a—what does the note say?

A. "See check 57."

Q. Would you turn to check 57.

A. All right.

Q. What is check number 57 in Exhibit 106?

A. Number 57 is a check dated March 17, 1947. [643] check in favor of William R. Forman for drawing $3287.14.

Mr. Mead: I beg your pardon, what was that?

The Witness: $3287.14.

Q. (By Mr. Obenour): Now, sir, what was that check for?

A. According to the check stub opposite this check entry number 57 is the figure $3287.14 and "capital gains, $1000, Bremerton Dividend, total, three."

Q. And you made that notation where?

A. In the back of the check stub opposite check number 57.

(Testimony of Army A. Seijas.)

Q. What does the notation "capital gains" refer to there?

A. Capital gains was half of the capital gain tax that would have to be paid on the sale of the route to Mr. Morin.

Q. And you have added what to that?

A. A thousand dollars. That was half of the draw that we made on March the 8th of two thousand.

Q. And the amount of capital gains was how much? A. $3287.14.

Q. And the purpose of that thirty-two hundred, then, was for the total of the two notations you have on the preceding page?

A. Makes that up.

Q. And did you give this check to Mr. Forman?

A. I did.

Mr. Obenour: Now, I would read, if your Honor [644] please, from Exhibit 33, the tax return of Mr. Forman for 1946.

The Court: You may do that.

Mr. Obenour: Showing the net long term gains and losses 49 per cent interest, United Amusement Company of Bremerton, showing the sale as $30,000, in 1946, and acquired in 1911, showing a long term capital gain of $9,148.59, which was one-half to Dorothy Forman and the computation of the amount of tax due on this transaction, $2287.15.

Q. (By Mr. Obenour): What was the reason you paid half of the long term capital gain showed by Mr. Forman for the year 1946 from the sale of

(Testimony of Army A. Seijas.)

49 per cent interest to the Bremerton Amusement Company to H. T. Morin?

A. You say half of the tax or——

Q. Half of the tax.

A. I wasn't aware—I think I paid all the tax, but my information was that I had to pay half of the tax which was $2287.14.

The Court: Half was that amount or the whole tax was that amount, Mr. Seijas?

The Witness: Well, my understanding was that that $2287.14 was half of the entire tax due for capital gain.

Mr. Obenour: That is your Honor, this was split. [645]

The Court: Go ahead.

Q. (By Mr. Obenour): Why did you pay half of the tax paid by Mr. Forman for this sale?

A. Because Mr. Forman, as I understand it, was showing the entire sale, or the sale of the entire one-half of 50 per cent, or whatever it was, as having been sold by him.

Q. Did he in fact sell 49 per cent of his interest to Mr. Morin? A. He sold 49 per cent.

Q. Who owned the 49 per cent that he sold to Mr. Morin?

A. Well, he owned the half interest and he sold that half interest.

Q. Had he in fact sold his half interest or did he retain a half of the remaining interest in the company?

A. Well, he did both. He sold the half interest

(Testimony of Army A. Seijas.)

and he retained half of the remaining interest.

Q. Did you report any of the transaction on your return for 1946?

A. I did not.

Q. Refer to the next entry in the ledger.

A. That would be October 1, 1947, and the duplicate Exhibit 114 does not go that far.

Q. What was the date of the check, incidentally, Mr. Seijas, of $3287.14?. [646]

A. What was the date of that check?

Q. Yes, sir.

A. The date of that check was March 17th.

Q. March 17th? A. 1947, for $3287.14.

Q. And the date of Exhibit 46 shown to have been filed with the Collector March 15, 1947—the ledger account for the amusement company, what date was that for, the next entry?

A. October 1st, 1947.

Q. How much was that? A. $1050.

Q. And what did you do with that check?

A. I don't see it in this particular account.

Q. Did you receive that check?

A. Yes, I received it.

Q. Did you pay Mr. Forman half of that amount? A. I did.

Q. What was the next entry of an amount you received from him?

A. November 14, $5. I don't know what that is for.

Q. And the next?

A. December 17, $351.90.

Q. And the next?

(Testimony of Army A. Seijas.)

A. The same date, December 17, another check for $2040. [647]

Q. And that is what year? A. 1947.

Q. Did you receive the two checks in the amount of $2040 and $351.90 from the United Amusement Company on December of 1947? A. I did.

Q. Did you make payment of half of those amounts to the—that you received, to Mr. Forman?

A. Yes, I did.

Q. And how did you pay him?

A. I gave him check number 90 dated December 18, 1947, a check in favor of William R. Forman, "Refund, United Company, $1195.45" which is exactly one-half of $351.90 and $2040. However, the check stub says that it was cashed and paid to Bill, $1195.45.

Q. What was the next entry you had for a charge on the account?

A. March the 2nd, and that is just $2. It doesn't amount to anything: March 22, 1948.

Q. And how much is that? A. $1020.

Q. Did you receive that amount? A. I did.

Q. And did you pay half to Mr. Forman?

A. I did. [648]

Q. What was the next draw from the amusement company?

A. November the 4th. I skipping a $2.50 item. The book shows that on November the 4th I drew $1020.

Q. And did you receive that check?

A. I did.

(Testimony of Army A. Seijas.)

Q. What did you pay Mr. Forman?

A. I divided it with Mr. Forman.

Q. How did you pay it to Mr. Forman?

A. I have no recollection.

Q. Would you refer to check number 132 for November 2, 1948? A. 132?

Q. Yes, sir.

A. On November 2, 1948, it shows my check—the check stub shows that I gave him a check for —number 132, dated November the 2nd, 1948, William R. Forman, drawing, U. A. account, $520.

Q. What does the "drawing U. A. Company, $520" signify?

A. United Amusement Company.

Q. And was this check in payment of Mr. Forman's share of the draw you made at the same time? A. Yes, sir.

Q. What is the next entry you have on the account of the amusement company?

A. December 31, 1948, I drew a check for $1530.

Q. Did you receive that amount?

A. I did.

Q. And did you give Mr. Forman any of it?

A. I gave him half.

Q. Mr. Seijas, you were subpoenaed, were you not, to produce these checks that which we have been discussing? A. Yes, sir.

Q. And did you find any of them?

A. Yes, sir.

Q. May I have them, please? A. Yes, sir.

Mr. Obenour: I ask that it be marked.

(Testimony of Army A. Seijas.)

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit 115 has been marked for identification.

Mr. Obenour: Offer 115.

Mr. Mead: We have no objections to the exhibit, your Honor.

The Court: 115 is admitted.

(Thereupon, Plaintiff's Exhibit No. 115 for identification was admitted into evidence.)

Mr. Obenour: I would like to read, if your Honor please, check number 38, December 12, 1946, Bill Forman, $500, Army Seijas, and endorsed by [650] Bill Forman, and in pencil, William R. Forman. The second is a check numbered 47, January 27, 1947, paid to Bill Forman, $760.61, signed by Army Seijas and endorsed by Bill Forman. Check number 57, March 17, 1947, William R. Forman; $3287.14; signed Army Seijas and endorsed by William R. Forman.

Q. (By Mr. Obenour): Mr. Seijas, did you identify the endorsements on the back of each of those checks? A. Yes.

Q. Whose endorsement is it?

A. It is Mr. Forman's handwriting.

Q. And did Mr. Forman receive half of all the money that you drew out of the United Amusement Company during the continuation of its operation from September 1st on? A. Yes, sir.

Q. When did the investigation of your tax affairs begin?

A. Well, I can't tell you when they did begin.

(Testimony of Army A. Seijas.)

I can only tell you when it was brought to my attention.

Q. When was it brought to your attention?

A. Sometime in the first part of 1952, I think.

Q. And by whom were you contacted?

A. By Mr. O'Leary.

Q. After that time — well, prior to that time, rather, had you had certain audits made of your businesses, the amusement companies? [651]

A. Yes, sir.

Q. And do you recall any of them by name, the agents who contacted you on these audits?

A. Yes, sir.

Q. Who were they?

A. Mr. Reidel was one, Mr. Clodfelter was another, and that is all I can think of.

Q. Have you ever heard of a man by the name of Fortner? A. Yes, sir.

Q. And after these audits, were you furnished copies of the audit reports made by the agents?

A. Yes, sir.

Q. Do you have those copies with you?

A. I think so.

Q. May I have them, sir? A. Yes, sir.

The Court: While these exhibits are being marked, and counsel is having an opportunity to examine them, this would be a good time for us to have the morning recess. We will take the morning recess at this time, ladies and gentlemen.

(Thereupon a short recess was taken.)

The Court: The documents you have just re-

(Testimony of Army A. Seijas.)

ferred to, have they been marked for identification? [652]

The Clerk: Plaintiff's Exhibit 116 has been marked for identification.

Mr. Obenour: Offer 116.

Mr. Mead: No objection.

The Court: Admitted.

(Thereupon, Plaintiff's Exhibit No. 116 for identification was admitted into evidence.)

Q. (By Mr. Obenour): Mr. Seijas, handing you Exhibit 116, you received copies of the audit reports from the agents who examined your records and books and discussed them with you and gave you that report, is that correct? A. Yes, sir.

Q. Were you contacted and was Mr. Forman contacted in each instance where an Internal Revenue agent conducted an audit of the affairs of the four amusement companies and of yourself?

A. We were both contacted. I don't recall whether it was four amusement companies or two amusement companies or whatever it was, but we were contacted.

Q. And referring to the first audit report there, on or about September 13, 1944, were you and Mr. Forman contacted in connection with that audit that was made with that report?

A. It was sometime prior to that, yes, sir. [653]

Q. And on that occasion were you requested to furnish or make available the books and records of the amusement companies?

(Testimony of Army A. Seijas.)

A. On this particular occasion I have no recollection what it was about, Mr. Obenour.

Q. However, do you have any recollection of being requested during the course of the audits for your books and records of the amusement companies by the respective agents who conducted them?

A. My testimony to that would be generally, yes.

Q. And what did you do when you would be requested for information and for the books and records of the amusement companies?

A. Generally we would turn them over to whoever the bookkeeper was.

Q. For what purpose?

A. To answer whatever questions the investigating agent was propounding.

Q. And at that time did you know that the books and records shown the agents did not reflect the true records and receipts of the income for the respective amusement companies in each of the years in question?

A. 1943, in this particular case, those books did not report certain unreported income.

Q. And did you know that at the time you [651] referred the investigating agent to those books? A. Yes.

Q. And was the same thing true in the audit of the books for 1942? A. '42?

Q. Yes, sir. I mean was that same thing true for the books and records of the amusement companies for the years 1942 shown to the agents? Was it to your knowledge then, that those books

(Testimony of Army A. Seijas.)

were not correct in reporting a true record and receipt for 1942?

A. The bookkeeping records that the bookkeeper kept did not reflect the true income for that year.

Q. All right, sir, and did you know when you referred the investigating agents to the books of the amusement companies for the years 1944-45 that these books did not correctly reflect the true receipts of the amusement companies for those periods? A. Yes.

Q. Did Mr. Forman take any part in referring the investigating agents — yes, the investigating agents the books and records?

Mr. Mead: That is objected to as the investigating agents would be—if he knows, of course, but what he told the investigating agents would——

The Court: That hasn't been called for. The [675] question simply is, as I understand the question, did Mr. Forman take any part in referring the agents to the books. Is that the question?

Mr. Obenour: Yes, sir.

Mr. Mead: That is a conclusion, your Honor.

The Court: We will have to determine that. We can't tell at this time yet. We will have to find that out.

Mr. Mead: If he asked what was done, that was one thing, but if he did take any part in it, then he might say yes.

The Court: Of course, it is a preliminary question and he would have to answer yes or no. If the answer is "yes", then the question of what was

(Testimony of Army A. Seijas.)

done, and so on, will have to be brought out. I think the present question just calls for a yes or no answer. Do you have the question in mind?

The Witness: No.

The Court: Did Mr. Forman take any part in referring the investigating agents to these books and records that have been referred to?

The Witness: I have no independent recollection of any particular thing except that when the agents would come in, Mr. Forman and I would be together. [656]

Q. (By Mr. Obenour): Did Mr. Forman have any reason to your knowledge, not to know that the books referred to the agents in each instance for the years '42 to '45 did not correctly reflect the true receipts of the respective companies for these years?

Mr. Mead: That is objected to as calling for a conclusion, your Honor.

The Court: The question is to his knowledge does he know of any reason why he did not know that.

Mr. Mead: Yes, sir.

The Court: Try rephrasing the question, please.

Q. (By Mr. Obenour): At any time did Mr. Forman ever tell you that he had no knowledge that the books and records of the amusement companies for the years '42 to '45 did not correctly report the receipts of the amusement companies?

Mr. Mead: That is objected to unless the time is fixed, your Honor.

(Testimony of Army A. Seijas.)

The Court: If he says "yes", then we can get that. The question is, did Mr. Forman at any time tell you that he did not know the true condition of the books?

Mr. Mead: That is also a leading question, [657] your Honor, and this witness being a lawyer certainly could answer the question without leading questions. It is a leading question and is objected to on that basis.

The Court: Well, in some aspects it might be so, but I think that I would exercise my discretion in the matter and let the question stand in the form it is given. Please answer it.

The Witness: The question as put to me, I can't tell you. I didn't understand the question except this, you are asking me to tell you what Mr. Forman did not know?

The Court: That is not correct. The question is, did Mr. Forman ever say anything to you

The Witness: As to what he did not know?

The Court: Anything to the effect that he did not know the condition of the books.

The Witness: Mr. Forman never said anything to me that he did not know as to the condition of the books.

Q. (By Mr. Obenour): To your knowledge, did Mr. Forman ever reveal to any of the investigating agents, to your knowledge that Mr. Forman ever —the fact that the books and records of the amusement companies did not correctly reflect the in-

(Testimony of Army A. Seijas.)

come of the amusement [658] companies in the respective periods?

Mr. Mead: That is a leading question and calls also for a conclusion, your Honor. It is objectionable on that basis.

The Court: Overruled.

The Witness: Let me have the first part of the question.

Q. (By Mr. Obenour): To your knowledge, did Mr. Forman ever reveal to any of the investigating agents that books and records of the amusement companies for the years 1942 to 1945 did not correctly reflect the receipts of the amusement companies for the respective periods?

A. My answer to that question would be no.

Q. Mr. Seijas, did you on December 29, 1951, in Seattle submit a net worth statement prepared by Mr. Whittle to the Internal Revenue Office through its agents? A. What was the date?

Q. On or about December 29, 1951.

A. My recollection is that Mr. Whittle had prepared a preliminary net worth statement for the Internal Revenue agents, you say the last of '51, and that would be about that time, or the first part of '52.

Q. Did you submit it or cause it to be submitted to the agents? [659]

A. I did not submit it but I hired Mr. Whittle to prepare one to submit to the agents at their request.

(Testimony of Army A. Seijas.)

Q. Had you discussed it with Mr. Whittle before it was submitted? A. Yes.

Q. Were you aware of its contents as to the cash on hand for December 31, 1945, Mr. Seijas?

A. Offhand I can't answer that because I don't know.

Q. Had you discussed its contents with him?

A. I had discussed the contents with him.

Q. Had you prepared then or caused to be prepared this net worth statement as a true statement of its contents? A. No.

Q. Did you present it as misrepresenting its contents? A. No.

Q. How, sir, did you present this or cause to be presented this net worth statement, to the agents?

A. We presented that as a preliminary statement only in which Mr. Whittle had made a statement in the form of a letter which he explained that the proposed net worth statement was not in keeping with his thinking or his deductions in the preparation of that statement.

Q. At that time, sir, did you include on that net worth statement presented to the agents that you had on hand on December 31, 1945, on Exhibit [660] 74—handing you Exhibit 74, is this the letter of transmittal and the net worth statement which you have been discussing? A. Yes, sir.

Q. And, sir, what is the item for cash on hand on December 31, 1945?

A. I don't see any cash on hand. I see bank accounts.

(Testimony of Army A. Seijas.)

Q. Yes, sir. Then, sir, did you show or cause to be shown on that statement that you had a large amount of currency in the neighborhood of $100,000 to $160,000 as of December 31, 1945?

A. As of December 31, 1945, this exhibit indicates that I had a net worth of $147,000.

Q. Do you show any cash on hand in this net worth statement for December of 1945?

A. No, it just shows a bank account, no cash.

Q. No cash? A. No.

Q. Then, sir, you did not show a large amount of currency from $100,000 to $165,000 kept in your safety deposit boxes at that period, did you?

A. That is correct. This exhibit does not reflect that.

Q. Pardon me, the last entry on the second page——

Mr. Mead: This is not proper, your Honor. He not only is leading the witness but he is prompting him. [661]

The Court: I think he can call his attention to anything in the exhibit. Go ahead.

Mr. Obenour: We would except to the term "coaching" the witness in referring to the exhibit.

The Court: It wasn't meant in any offensive manner. I am certain it was not meant so, and I have no concern about it. The Jury certainly will understand that it was not so intended. Go ahead.

Q. (By Mr. Obenour): Do you show, then, an item for cash on hand?

A. Yes. It has been a long time since I have

(Testimony of Army A. Seijas.)

seen this and I am not too familiar with it anyhow. However, it does show on the second page that I do have cash on hand of about $50,000.

Q. What, sir, was actually the amount of cash you had on hand in the form of money kept in your safety deposit boxes?

A. It was greatly in excess of $50,000.

Q. On or about January 11, 1952, did you make a statement to the agents who were engaged in an examination of your tax liability for the years '42 to '45 in which you stated that you correctly reported your income for those years and caused correct partnership information returns to be filed for that year? [662]

A. I don't recall offhand, I would say yes, generally.

Q. And at that time did you know, Mr. Seijas, that in fact your own returns and the information returns did not correctly reflect your receipts from the pinball companies? A. That is true.

Q. Did you on the same date state to these same agents of the Treasury Department that you had no knowledge of the source of the large amounts of currency, or, rather the source of the funds from which the large increase in assets resulted in the years '46 to '48?

A. That is right. I could not pinpoint the source of the increase.

Q. Did you, Mr. Seijas, at any time tell the investigating agents or anyone connected with the Government that in fact Mr. Forman had a half

(Testimony of Army A. Seijas.)

interest in your 51 per cent of the amusement company from the years subsequent to 1946?

A. Did I ever tell the Government that he owned a half interest?

Q. Yes, sir. A. I did not.

Q. Did you not in the course of the investigation tell Mr. O'Leary and Mr. Oftedal that Mr. Forman sold his interest in the amusement company for $30,000? [663]

Mr. Meaid: Could we have a time on that, if your Honor please?

The Court: If there was a particular date you have in mind, I think you should bring it out.

Q. (By Mr. Obenour): Within the period of February and March of 1952 at your office, did you not tell Mr. O'Leary and Mr. Oftedal that Mr. Forman had sold his interest in the amusement company for $30,000 and had loaned you the money?

A. I don't recall ever telling that to Mr. O'Leary or Mr. Oftedal.

Q. When was the first that anyone connected with the Government learned of the transaction between you and Mr. Forman subsequent to the sale of 49 per cent to Morin for $30,000?

The Court: Do you mean learned from this witness?

Mr. Obenour: Learned in any way.

The Court: As far as he knows?

Mr. Obenour: Yes.

The Witness: As far as I know, the first time

(Testimony of Army A. Seijas.)

the Government ever found out about Mr. Forman having a half-interest was during the latter part of the trial just a year ago.

Q. (By Mr. Obenour): That is what has been referred to as your trial? [664]

A. My trial.

Q. And what was the manner in which the Government or any of its representatives first learned that in fact Mr. Forman had a half interest in your 51 per cent that you paid half of his capital gains tax reported on his returns, and that he received half of all of the monies you drew from the companies during that time?

A. May I see the check stubs? During the course of my trial a year ago the one of the attorneys caused this stub book to be presented in evidence.

Q. For whom?

A. In my behalf, and that was denominated my exhibit—I may be wrong. In any event, I don't recall the number of the exhibit. I thought I had it here in this subpoena, but I don't—this was brought in as an *an* exhibit in connection, I think, with the testimony of one of the bookkeepers who testified regarding these connections, and I think that was the first time that it was discovered that Mr. Forman did have a half interest in the pinball route.

Mr. Obenour: At this time we will also offer Exhibits 40, 41, 42, and 43, being the audits of the returns of Seijas, Army A. Seijas and Betty

(Testimony of Army A. Seijas.)

[665] Seijas, William and Dorothy Forman, for the United Amusement Company of Bremerton and the American Amusement Company, Bremerton Amusement Company, United Amusement Company, for the years 1942 to 1945.

Mr. Mead: Those exhibits again?

The Court: I think they are 40, 41, 42, and 43.

Mr. Mead: We have no objection.

The Court: Very well, they are admitted.

(Thereupon, Plaintiff's Exhibits Nos. 40, 41, 42, and 43 for identification were admitted into evidence.)

Q. (By Mr. Obenour): Mr. Seijas, do you have a written record of the agreement between you and Mr. Forman concerning Mr. Forman retaining a half of your interest in the company when the Morin transaction resulted?

A. Yes, I do.

Q. May I have it, please? A. Yes.

Mr. Obenour: I ask that it be marked.

The Clerk: Plaintiff's Exhibit No. 117 has been marked for identification.

Mr. Obenour: I offer 117.

Mr. Mead: May I inquire, your Honor? [666]

The Court: You may.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, where did this document come from?

A. That document came from my brother Henry.

Q. And when did you obtain it from your

(Testimony of Army A. Seijas.)

brother Henry? A. Just a couple days ago.

Q. And had you made know this document to the Government prior to that time?

A. Yes, they knew about it.

Q. They knew about it? A. Yes, sir.

Q. When did you make known to the Government this exhibit? A. Sometime this week.

Q. Sometime this week? A. Yes, sir.

Q. That was for the first time?

A. First time as far as I know.

Q. And where did your brother Henry have the document?

A. My brother Henry had closed out my office and he had the document himself.

Q. And he was holding it for you for safekeeping?

A. He was holding—when he cleaned out the office he picked up all the documents, all the things that I had left in the office that I had not taken [667] out of the office for the purpose of my first trial.

Q. And did he take all those documents to your home or to his home?

A. He had taken some and some of them he had thrown away and some destroyed. He took the things that he thought were important, I guess.

Q. Did you deliver a copy of this document at the time it was executed to Mr. Forman?

A. Mr. Forman has a duplicate original of the same signed by me.

(Testimony of Army A. Seijas.)

Q. That wasn't the question. Did you deliver a copy to him at that time? A. Yes.

Mr. Mead: We have no objection to the document, your Honor.

The Court: Very well, Exhibit 117 is admitted.

(Thereupon, Plaintiff's Exhibit No. 117 for identification was admitted into evidence.)

Q. (By Mr. Obenour): Whose signatures are those on that exhibit, Mr. Seijas?

A. Myself and Mr. Forman.

Q. And when was that document executed?

A. On or about August the 9th, 1946.

Q. And was it signed at that time?

A. To my recollection, yes. [668]

Mr. Obenour: I ask to read Exhibit 117, your Honor.

The Court: You may do so.

Mr. Obenour: "August 9, 1946. This will acknowledge that on the 8th day of August, 1946, W. R. Forman sold 49 per cent of the amusement device business located in Bremerton, Washington, operated by the United Amusement Company of Bremerton, the American Amusement Company, the Bremerton Amusement Company, and Peninsula Amusement Company, to H. T. Morin and that the remaining 51 per cent of said business is in the name of Army Seijas. This memorandum is to acknowledge that W. R. Forman is the owner and partner of the remaining 51 per cent in equal shares with Army Seijas, and that the original partnership papers covering said operation is cor-

(Testimony of Army A. Seijas.)

rected to comply with this new interest." Signed Army A. Seijas and William R. Forman.

I ask that the Jury be permitted to examine the document, your Honor.

The Court: Go ahead.

Mr. Obenour: You may examine, Mr. Mead.

The Court: That is the conclusion of the direct examination? [669]

Mr. Obenour: Yes, your Honor.

The Court: Are you ready to proceed?

Mr. Mead: I am ready.

The Court: You may proceed.

Cross Examination

Q. (By Mr. Mead): Mr. Seijas, your full name is what, please?

A. My legal name is Army Seijas.

Q. And you are sometimes known as Armador Seijas? A. Yes, sir.

Q. Where were you born, Mr. Seijas?

A. Havana, Cuba.

Q. And when did you come to the United States? A. In 1914, I believe.

Q. And what was the extent of your formal education?

A. I went to grade school, high school, university, and law school.

Q. And where was that, please?

A. Here in Seattle—I mean in Seattle.

Q. What high school did you attend?

(Testimony of Army A. Seijas.)

A. I attended the public high school known as Franklin High School.

Q. So, you had your four years of high school [670] in the City of Seattle, is that right?

A. That is right.

Q. And what college or university did you attend?

A. I attended the University of Washington.

Q. And did you graduate with any degree?

A. I graduated with a Bachelor of Science Degree and a Bachelor of Laws.

Q. And that was in what year?

A. '28 and '31.

Q. So, you graduated with a Bachelor of Laws Degree in the year 1931, and were you admitted to practice law at that time? A. That's right.

Q. You had how many years of college and law school? A. Seven.

Q. Seven years? A. Yes.

Q. Your father lived in Seattle, did he, during the time you were going to school?

A. Yes, he did.

Q. When did he come to Seattle?

A. I don't recall. Probably about 1914 or '15, or sometime prior.

Q. Did he engage in a business of some kind following that time? [671]

A. He did.

Q. What sort of business did he engage in?

A. He ran a hotel, and he ran a restaurant, and he also worked for Seattle Light.

(Testimony of Army A. Seijas.)

Q. And when was the last employment he had that you have mentioned, what year?

A. My father stopped working back in 1930, I think, or '31. About the time I got out of school.

Q. Around 1930 or '31?

A. And he never again sought gainful occupation until 1942, I think.

Q. But he lived in the Seattle area during that time? A. Yes, he did.

Q. When were you admitted to practice law?

A. My recollection is it was June the 28th, 1931.

Q. Prior to that time, Mr. Seijas, had you had some experience practicing law by employment in a law office? A. I did.

Q. And where was that, please?

A. In Seattle.

Q. And for how many years did you have such employment?

A. I worked for two and a half years for John F. Dore and John J. Sullivan.

Q. And so you then at the time that you were admitted to practice law, you had in addition to the formal education [672] of law school, you had about two and a half years of experience in a law office, is that right? A. That is correct.

Q. Now, up to the time that you met Mr. Forman, were you engaged in the practice of law?

A. I was not.

Q. I am sorry? A. No, I was not.

Q. You were not? A. No.

Q. When did you meet Mr. Forman?

(Testimony of Army A. Seijas.)

A. My recollection is that I met him sometime while I was still a student.

Q. And this was while you were a student in law school?

A. Either law school or the university, I don't recall which.

Q. And when did you next meet him or see him again?

A. When he was working down at the Florence Theater.

Q. And he was working for the Sterling Theaters, is that right? A. That is right.

Q. Now, that was about what year?

A. I don't recall. It must have been '29 to '30 or '31.

Q. 1929, '30 or '31?

A. It must have been around in there. [673]

Q. And when did you next see him after that?

A. Well, I can't answer your question because it has been so long ago, and I would see him from time to time, and I just don't recall. I don't know what you mean by "seeing" him, for one thing. Do you mean having social contact daily with him?

Q. Yes.

A. I did not have daily social contact with him.

Q. You did not? A. I did not.

Q. Your acquaintanceship with him was very slight up to the time that he left the employment of the Sterling Theaters, is that correct?

A. Well, that is not correct.

Q. What is the fact in regard to that?

(Testimony of Army A. Seijas.)

A. The fact is this, Mr. Mead, that about the time that Roy Cooper left the Sterling Theaters and Mr. Forman was substituted in his capacity, Mr. Forman and I became rather closely connected, so closely connected that he and I took a trip back east to Chicago on a joint business venture.

Q. What year was that?

A. I don't recall. But I am pretty positive that it was before 1940.

Q. Sometime before 1940? [674]

A. I think so.

Q. Much before?

A. Not too much before. At any rate, I saw a great deal more of Mr. Forman in the latter part of the 30's than I did in the beginning of the 30's.

Q. Do you recall about the time that he left the Sterling Theaters?

A. My best guess to that would be 1941.

Q. About 1941?

A. The beginning of '41 or end of '40. That would be my best guess.

Q. Now, I believe you testified that at that time Mr. Forman had been in the theater business, is that correct? A. That is correct.

Q. And with a substantial background of experience? A. Yes.

Q. About that time, Mr. Seijas, you practiced law about ten years, is that right?

A. That's correct.

Q. How old were you at that time?

A. Do you have a pencil and paper. You just

(Testimony of Army A. Seijas.)

take 1907 from 1940 and you would have the answer.

Q. You are 49 years of age now? A. I am.

Q. You would rather have me make this calculation?

A. You could do a better job with a pencil than I could.

Q. This was about 1941. That was about 15 years ago, wasn't it, then, that you met him?

A. That would make me about 35 or 36.

Q. So, you were about 35 or 36 years of age. How old was Mr. Forman?

A. I think Mr. Forman was five years younger than I.

Q. Five years younger?

A. I think so. I know he was born on January the 1st. I know that.

Q. Now, I think you testified in your direct testimony that Mr. Forman had no theaters at that time but he was looking around inquiring about getting into the theater business, is that right?

A. You are talking about 1941?

Q. 1941. A. Yes, sir.

Q. What month in 1941 do you recall that Mr. Forman left the Sterling Theaters and occupied offices with you or near you in the Smith Tower Building?

A. I cannot answer that question because I do not know.

Q. You don't recall whether it was the early part of the year or the latter part of the year?

A. Of 1941? [676]

(Testimony of Army A. Seijas.)

Q. Yes, sir.

A. I know that it must have been in the beginning of 1941 or the latter part of 1940.

Q. I see.

A. But as to the season of the year, I cannot tell you much less the month itself.

Q. I think you stated that he was your guest in that office, is that right?

A. I would call him a guest if he didn't pay.

Q. And how long did this arrangement go on?

A. It went on until we moved out of that office into the other office down the hall.

Q. How long was that, about, Mr. Seijas?

A. Mr. Mead, I cannot tell you when we went down the hall, sir.

Q. Well, when you went down the hall was it a year or two years or was it six months or was it——.

A. I would say it would be about the latter of 1941.

Q. So, then, within the first year that you were there you moved down the hall, and what was the office arrangement at that time?

A. At what place, 1806 or 1812?

Q. Down the hall in 1941. A. 1812?

Q. I don't know about the number, Mr. Seijas. It was down [677] the hall, in any event, where you moved?

A. All right. Now, in 1806 was the first place, then, we moved from there to 1812, and when we moved to 1812 we shared the expenses of the office

(Testimony of Army A. Seijas.)

50-50. By that I mean that that was the ultimate fact that we had just taken over the pinball receipts.

Q. Now, 1812, which is the place that you moved to down the hall, what was the arrangement there with respect to the office? Did you have more than one office?

A. We had a visiting room, and two offices off of that.

Q. And when you talk about a visiting room, is that what we lawyers sometimes refer to as a reception room? A. A reception room.

Q. Then, your had two offices off of this reception room, is that right? A. That's right.

Q. And was there a stenographer or a bookkeeper or other people then employed in that office?

A. Yes, sir.

Q. And where were they located?

A. In the outside office or the reception room.

Q. Reception room? A. Yes.

Q. How long did that office arrangement continue?

A. That office arrangement continued—I don't remember [678] whether it continued until September the 1st, 1946, or it continued past 1946. I can't tell you offhand.

Q. Well, would you give us your best estimate?

A. My best estimate would be—now, by the time 1946, September the 1st, 1946, came by, we had an additional office space in addition to 1812.

Q. So, there was a change in 1946?

(Testimony of Army A. Seijas.)

A. Prior to 1946 there had been a change. We had expanded.

Q. All right. Will you describe the change that took place in the office space and area? What was the arrangement then?

A. We had rented a room next to 1812, 1811 was rented. We rented that from Mr. Phalen from time to time, and I think we had also rented 1806 or may have rented 1806, I don't recall, but also, Mr. Forman subsequently rented a portion of 1813 and 1814.

Q. Now, Mr. *Forman*, in proportion to the 1813 and 1814, were the offices in the same general vicinity?

A. Yes. They were all in the same vicinity. Now, in the beginning my recollection is offhand now, my recollection is that part of 1813 was subrented from another tenant so that Mr. Forman could have more space—so that Mr. Forman could have an office, and I put in another lawyer in 1812, and then subsequently I think Mr. Forman got—about 1947 or '48, he got [679] more space and he hired a stenographer just to handle his theaters, correspondence, and business.

Q. Now, when did you put another lawyer in the office and did Mr. Forman take over this additional space and make this office charge that you have mentioned?

A. There was a lawyer in 1810 that was working for me, and then I let him go and secured another lawyer and put him in the space that Mr. Forman

(Testimony of Army A. Seijas.)

had, and the date of that I don't think I can remember. It must have been in 1945.

Q. About 1945? A. I think so.

Q. So, then, following that date Mr. Forman had offices which were in the same general vicinity but were not off of any reception room that you occupied?

A. Yes, they were. It was a connecting door between 1812 and 1813 which was just opened up.

Q. Did he have a reception room in this other office that he had, too?

A. No. It was all off of the reception room at 1812.

Q. And he had two adjoining offices, then, is that right?

A. Yes, one for the girl and one for himself.

Q. And this was the situation in about 1945?

A. No. He did not have the girl in 1945. He didn't have the girl until '47 or possibly '48. He just had the [680] adjoining office in 1813.

Q. But he got the adjoining offices in 1945?

A. I think that is when he got the adjoining space in room 1813.

Q. Now, in 1941 you have described the situation when Mr. Forman came there that he had no theater interest—or he had an interest but no ownership, put it that way, is that right?

A. He had a desire to get an ownership.

Q. I mean that actually he was interested in getting into the theater business but he had no ownership of any theater activities, is that right?

(Testimony of Army A. Seijas.)

A. That is my recollection.

Q. And you were interested in going with him over to Bremerton or Port Orchard to inquire into possible theater locations, is that right?

A. Port Angeles.

Q. Port Angeles? A. Yes.

Q. And I take it, then, that Mr. Forman's interest at that time was to get into the theater business? A. That is correct.

Q. Now, you have described in your testimony in considerable detail the background of getting into this pinball activity, and I will inquire into that general situation [681] that has been covered. My understanding is, Mr. Seijas, from your testimony, that ultimately in about the year 1942 or about the year 1942 you and Mr. Forman and others were interested in three pinball routes, we will call them, in the City of Bremerton, is that right? A. Yes, sir.

Q. And those routes were described how? How would you identify them?

A. Do you mean by name or title?

Q. Yes, sir, by name.

A. The United Amusement Company which was the county route outside the incorporated city limits——

Q. Now, Mr. Seijas, I am just asking you about the city routes of Bremerton. Describe them by name.

A. United Amusement Company of Bremerton.

(Testimony of Army A. Seijas.)

the American Amusement Company, and the Bremerton Amusement Company.

Q. Thank you, sir. I will refer to those as the city routes, and by 1942 you had one route in the county, had you? A. Yes, sir.

Q. And what was the name of that route?

A. The United Amusement Company.

Q. Now, at that time each one of these routes were separate partnerships, is that correct? [682]

A. Yes, sir.

Q. And that was for the various reasons you have described with regard to limitations on number of machines insofar as City of Bremerton is concerned? A. That is correct.

Q. And at the beginning of 1942 you had about how many machines in the City?

A. In the beginning?

Q. Yes, in the beginning of '42.

A. Well, the routes were started in March and April of '42, so I tried to give you the best recollection that I have as of that starting point which would have been the routes—probably had that, my best guess is, 105 machines.

Q. 105 machines?

A. In active locations.

Q. And was that the case up to about the end of that year?

A. Yes, 105 machines out on locations in the City.

Q. And how many machines out on location in the county by the end of that year?

(Testimony of Army A. Seijas.)

A. I do not recall.

Q. As I recall your testimony, you thought that it was about 150 machines total, is that about right?

A. That is about right.

The Court: For both county and city? [683]

Q. (By Mr. Mead): For both county and city?

A. Yes, sir.

Q. Now, in 1942, the beginning of that year, who were the so-called collectors that you had that went around and weekly took the money out of the machines?

A. Mr. A. J. Meyers and Mr. Johnson.

Q. And Mr. Johnson's first name is what?

A. I don't know.

Q. How long did Mr. Johnson continue this work?

A. I think up until the end of the year.

Q. And was that in the city or in the county?

A. He just worked in the city.

Q. Was he employed by you or was he employed when I say "you," I mean Mr. Forman and or yourself or Mr. Heberling.

A. He had been hired by Mr. Heberling. I don't recall whether we paid him or Mr. Heberling paid him individually or personally.

Q. Now, following 1942, then, what was the situation with respect to the collectors who went around to the various locations collecting money from the machines on these city routes during each of the years 1943, '4, and '5?

A. Mr. Meyers collected money. He was the

(Testimony of Army A. Seijas.)

the collectors, and I think he was assisted by Mr. Ken Crawford. [684]

Q. Mr. Ken Crawford? A. Yes, sir.

Q. Was he a collector? Did you designate him as a collector, Mr. Seijas?

A. I wouldn't designate him as a collector. I would designate him as a repair man, but my recollection is that he did help with the collections.

Q. With collections? A. Yes.

Q. Was this in each of the years 1943, '4, and '5?

A. That is correct.

Q. Did he also do the same type of work insofar as the county route was concerned for the same years?

A. Well, he acted as repairman. I don't know what his route or district was, but I am sure that he did help with the collections in the county also.

Q. Now, during these years, Mr. Seijas, 1942, '3, and '4, did you have occasion personally to frequently visit the vicinity of these operations and the various locations where these machines were installed? A. During the years '42, '3, and '4?

Q. 1942, '43, '44, and '45.

A. In the very beginning of '41 my answer to your question would be yes. My answer to your question would be no thereafter. [685]

Q. And that would apply both, then, to the city routes as well as the county route?

A. That's correct.

Q. Now, during this period of time, Mr. Seijas, were you also conducting a law practice?

(Testimony of Army A. Seijas.)

A. Yes, I was.

Q. When I say "this period of time," I am referring to the years '42 through '45. A. Yes, sir.

Q. So, then, during the latter part of that time you were not over there very frequently?

A. Well, my recollection is that I went over at least once a month.

Q. About once a month?

A. Yes, sir, to pay the taxes.

Q. And that was for the purpose of paying taxes? A. Yes, sir.

Q. What taxes do you refer to?

A. I am now referring to the city taxes, and I don't remember what the situation was about the county, but anyhow, the city taxes.

Q. Was that city tax that you refer to, both a license tax and a gross—what you might call a gross-sales of the ten per cent that you have described?

A. No. The city tax was a license, and then it was a tax [686] on the gross revenues of the pinball machines.

Q. This was the tax which you went over monthly to pay, is that right? A. Yes, sir.

Q. Were those taxes paid by check?

A. Yes, sir.

Q. Now, as to the county route, what was your arrangement? You went over there monthly to pay those taxes also?

A. No. We had licenses over there.

Q. And did you go over to pay those licenses?

(Testimony of Army A. Seijas.)

A. I paid the license fees.

Q. Those were on an annual basis, I suppose?

A. I think they were, yes.

Q. During this period of time did you have occasion to contact the various collectors from time to time, both Mr. Johnson and Mr. Crawford and Mr. Meyers?

A. If I had extra time and had to wait for the ferry boat to take me back, I would either go down to the shop—we had a shop there, and visit it or else go down by the dock and—or any place around that immediate vicinity, and would go in and visit with the accounts or visit with some of my friends, waiting for the ferry to dock so I could get on and return back to Seattle. [687]

Q. Can I assume from that then, Mr. Seijas, that your answer would be that your connection with these collectors, Mr. Crawford, Mr. Meyers and Mr. Johnson, was merely incidental while you were waiting to catch the boat there, and you had particular contact with any of them?

A. That is correct. My contact during '42 to '45, that is the period you are speaking about?

Q. Yes, that is right.

A. Was incidental to any of the activities of the collectors.

Q. And you did not discuss with them any of the problems that they had?

A. If I saw them, I would discuss their problems, personal and company problems.

Q. And this continued all throughout the years

(Testimony of Army A. Seijas.)

1942 to '45? A. That is right.

Q. Now, you have described the problem that arose, Mr. Seijas, through pilfering or, I don't know whether it might be called tilting of the machines or whatever you do with them, and you needed the services of your father, and your father was employed in about 1942 for that purpose, was he? A. Yes, sir.

Q. And did his employment cover both the city machines and the county machines? [688]

A. Yes, sir.

Q. And did your father furnish a bonafide service for the money that was paid him in the course of this employment? A. I think so.

Q. And was it difficult at that time to employ people? A. Yes, it was.

Q. What was your father's age about that time? I don't mean the exact age, but was he in his sixties or seventies?

A. I would say he was in his low sixties.

Q. And was he a robust man?

A. He was a stout fellow.

Q. Larger than you?

A. Much larger than I.

Q. So he was well-adapted for that job and liked the work, did he?

A. Well, I would say he was well-adapted to that job.

Q. Now, you have described various theatre enterprises which followed this situation, and particularly you mentioned the Green Parrot and the

(Testimony of Army A. Seijas.)

First Avenue Theatre in Seattle. You have mentioned circumstances as to how that arrangement came about, and with particular reference to the employment of your father in these various enterprises, you said you had a discussion with Mr. Forman and that his father was to have an interest in this Green [689] Parrot Theatre as you will recall?

A. That is right.

Q. Isn't it a fact, Mr. Seijas, that there never was any such discussion and that Mr. Forman's father never had any connection at all with the Green Parrot or First Avenue Theatre in Seattle either by way of employment or by way of partnership? A. That is right, he did not.

Q. He did not?

A. No, but the conversation took place.

Q. Oh, the conversation took place?

A. Yes, sir.

Q. I gathered that you had testified that Mr. Sam Forman was actually a partner in that enterprise in your direct case?

A. That is right. That was a representation made to me by Mr. William Forman.

Q. I see. Well, you received copies of the partnership returns, did you not? A. I did.

Q. And did he appear as a partner in that?

A. He did not.

Q. Now, during this period of time of 1942——

The Court: Excuse me, Mr. Mead. When you come to a convenient—— [690]

Mr. Mead: I am ready anytime.

(Testimony of Army A. Seijas.)

The Court: Thank you. I thought perhaps you were.

Ladies and gentlemen, we are going to take the noon recess. All of you keep in mind my admonition. I think my prediction about the increasing temptation is true, isn't it, but in any event, keep in mind it is of paramount importance that you shall not discuss the case among yourselves or with anyone else.

Be prepared to resume at 1:30.

(Whereupon, at 12 o'clock p.m., the noon recess was taken until 1:30 o'clock p.m., of the same day.)

After Recess, 1:30 p.m.

The Court: In order to provide a transcript of testimony during the course of the trial, the Court has authorized the appointment of a second reporter to participate in these proceedings, Mr. Vernon Keller. From my inquiry, I am satisfied that he is fully qualified for the office, and accordingly a minute entry will now be made appointing Mr. Keller to act as court reporter in this trial. Mr. Keller will now take the oath for that office.

(Vernon N. Keller was sworn, as reporter.)

The Court: Call the Jury in, please.

You may proceed whenever you are ready, Mr. Mead.

Mr. Mead: I guess, your Honor, we can't pick up the continuity with a new reporter.

The Reporter: I can go back and get the notes, Mr. Mead.

Mr. Mead: I don't believe that is necessary, but if I overlap a little bit, if the Court will bear with me on that basis.

The Court: Of course.

ARMY SEIJAS

resumed his testimony as follows:

Cross Examination—(Continuing) [692]

Q. (By Mr. Mead): I believe, Mr. Seijas, that we were discussing at the adjournment the matter of these three city routes and the county route and the so-called collectors who collected the funds from these routes.

A. Yes, we were talking about that during the years '42, '43, '44 and '45, not '41.

Q. That is right, we were talking about those years specifically, yes. A. Yes, sir.

Q. In the city of Bremerton and in the city routes, three routes, approximately how many so-called locations were there in which these machines were installed?

A. I don't know offhand. My best guess would be that there might be 10 locations to a route.

Q. So there would then be in the city of Bremerton about 30 locations, in the three routes?

A. For these three routes.

Q. For these three routes.

A. Generally that would be the figure.

Q. Now, all those 30 locations, then, were described, were they not, in the agreement which was signed at the time that a new partner was taken in

(Testimony of Army A. Seijas.)

the city of Bremerton and you transferred part of the interest to him? There was an exhibit, I believe, to that effect, is that right? [693]

A. Not generally. I think it was done in that one case there in 1945, March 31, 1945, I think that was the only one that I can recall wherein the machines and the locations were enumerated. Maybe in the Schneiderman case, too, but I don't recall offhand.

Q. And at least in the one instance, and I don't recall the name, the number of the exhibit, there is a piece of paper in evidence that has attached to it the locations of these various places?

A. Yes, sir.

Q. Now, how frequently did the collectors call at these locations to pick up the proceeds from these machines?

A. I don't know. I suppose once a week.

Q. Once a week? A. I suppose.

Q. But you have no knowledge about that?

A. I do not.

Q. You had nothing to do with supervising them or instructing them about the method of making these collections?

A. Generally that statement is correct.

Q. Is that also true of the county routes?

A. Yes, during the years '42 to '45.

Q. So you then would be unfamiliar, entirely unfamiliar, with the practice as to what happened in the locations and when the collector came there to

(Testimony of Army A. Seijas.)

count the money and take [694] it out of the machines?

A. I am not unfamiliar with the practice. I know what the practice was. But I didn't have any personal knowledge as to how it happened, but I knew what was going on, as to how they would do it.

Q. You are familiar with what went on?

A. Yes, I know that they would go into a place, open a machine, collect it, give the account a slip and then go to the next place.

Q. During this period of time, 1942 to 1945, were you interested yourself in any other enterprises of a tavern or restaurant nature besides these that have been described in which you were associated with Mr. Forman? A. In what years?

Q. During the years 1942 to 1945, inclusive.

A. Yes.

Q. Will you please state which enterprises you were yourself interested in during that period of time, which had no connection with Mr. Forman.

A. I was interested in the Bremerton Finance Company, which was a state-licensed finance company, small loans company, and also in a tavern denominated the Blue Moon Tavern, which was out in Kitsap County.

Q. What was your interest in the Blue Moon Tavern, Mr. Seijas, during this period of time?

A. I had a one-half interest in that tavern, I think—I know I had a one-half interest in the tavern.

(Testimony of Army A. Seijas.)

Q. So were you a partner in that Blue Moon Tavern? A. I was a partner.

Q. Was that a so-called location in which you had these machines in your county route?

A. Yes.

Q. When did you acquire that tavern?

A. That tavern was acquired sometime toward the latter part of 1945.

Q. Could you state who your partners were in that venture. A. Mr. McCusker.

Q. Did that continue then to the end of the period 1945 and thereafter? A. Yes, sir.

Q. Now, you had some connection also, Mr. Seijas, with a venture known as the Castle Club at Vancouver, Washington? A. Yes, sir.

Q. What was your association with that venture?

A. I was the attorney for the club and during a portion of the time I acted as the secretary of the club.

Q. And was that your only connection with it?

A. Yes, sir.

Q. Did you act as an attorney for that organization? A. Yes, sir. [696]

Q. Up to the end of '45 and thereafter?

A. Yes, sir.

Q. Now, you have members of your family, Mr. Seijas, two brothers—— A. Yes, sir.

Q. (Continuing): ——who have been referred to here. One brother's name is Louie Seijas?

A. Yes, sir.

(Testimony of Army A. Seijas.)

Q. And the other one is Henry Seijas?

A. That is right.

Q. Are both of these gentlemen younger than yourself? A. Yes, sir.

Q. During the period from 1942 to 1945 what was the nature of the employment of these two brothers?

A. One was, one worked for a short period of time as a purser on a boat. He also worked as a mechanic. He also worked as a cook. And I think he also worked as a bartender. I can't think of what other jobs he had. The other was a——

Q. (Interrupting): First, would you state the brother you have just described, that you have just been describing, his name.

A. That was Louis.

Q. Louis Seijas?

A. Yes, sir. The other was Henry. And he was in the service. [697] He had also worked, I think, as a cook and also as a bartender. And I don't know whether or not he also had employment as an official in some union. I don't recall whether it was about this time or not.

Q. This, of course, this appointment that you have described for both of these brothers covers the period 1942 through 1945?

A. To the best of my recollection.

Q. Which brother had an association or a connection, if either did, with the Castle Club?

A. That was Louis.

Q. And he had that connection with that organ-

(Testimony of Army A. Seijas.)

ization, in addition to the employments that you have just described? A. Yes, sir.

Q. When did he become associated or connected with the Castle Club?

A. I don't know. I don't recall.

Q. Do you know when that appointment or association terminated?

A. I don't recall that, either.

Q. What was the nature of the employment?

A. He was to overhaul the machinery inside of the slot machines at the Castle Club.

Q. From what you have just said, I take it that the Castle Club during this period of time had a gambling operation, [698] or at least they had slot machines operating, is that right?

A. They had been licensed by the State of Washington to operate slot machines in that club.

Q. And these slot machines are the type that we refer to as the one-arm affair that you pull down and spin around and sometimes the money comes out, is that the kind? A. That is the kind.

Q. And——

The Court: You left off part of the title there, didn't you?

Mr. Mead: Well, I didn't want to be disrespectful, your Honor, and I qualified it by "sometimes the money comes out."

The Court: I see.

Q. (By Mr. Mead): In any event, it was that type of an operation? A. That is correct.

Q. And did Mr. Forman have any connection

(Testimony of Army A. Seijas.)

with that operation at all? A. He did not.

Q. Did he have any connection with the Blue Moon Tavern? A. He did not.

Q. During this period of time what other ventures were your brothers engaged in, in this period of time, this 1942 [699] to 1945, both Henry and Louis?

A. My brother Henry, my recollection is that he testified at the previous trial that he had worked in the smoke shop. I don't recall him ever working there, but he said he did and he would know more about that than I would. And I don't recall of any other ventures that he was in except what I have just related to you now, during this period of time.

Q. How about your other brother?

A. The same would go for him, too.

Q. Would the name "Pop's Inn" refresh your memory as to any venture that either of them might have been in during this period?

A. Yes, they were both in that. My recollection is that that was in '46. I may be wrong, but that is my recollection. If it were '45, they were both in the venture with Mr. McCusker in a tavern known as Pop's Inn.

Q. Do you know when that tavern was acquired, Mr. Seijas?

A. My recollection is that it was in '46.

Q. In '46?

A. That is my recollection, that is my guess.

Q. You handled the transaction, did you not,

(Testimony of Army A. Seijas.)

representing the purchasers, Mr. McCusker and your brother?

A. I prepared the bill of sale, the documents.

Q. But you couldn't state the year in which that occurred? A. I do not recall. [700]

Q. And this was Henry or Louis?

A. This was both.

Q. Both Henry and Louis? By the way, there has been some reference to the fact that either one or both of your brothers are confined to a hospital for medical care at the present time, is that right?

A. That is correct.

Q. They have been here, though, in the courthouse the last few days and you have seen them, haven't you?

A. My brother Henry came once. My brother Louis is back in the sanitorium at the present time.

Q. I see.

A. And Henry, as I understood it, has gone back also.

Q. But he was here a few days ago?

A. He was here for one day, yes, sir.

Q. Do you know whether he was here in response to a subpoena that the government had issued, or was he here in response to your request that he deliver some papers to you?

A. I don't know if he was subpoenaed or not.

Q. During this period of time, Mr. Seijas, you testified that you kept current diaries. I will call them "diaries" because you referred to them as "diaries"——

(Testimony of Army A. Seijas.)

A. I referred to them as "diaries" because Mr. Oconour referred to them as "diaries".

Q. So I will refer to them as "diaries" because you did so. [701] They have been introduced in evidence and marked and been referred to and examined from time to time? A. That is right.

Q. And these diaries are photostatic copies of originals, are they not? A. Yes, Sir.

Q. What sort of documents were the originals? By that, I mean what were they, what kind of books were they? A. The originals were——

Mr. Mood: May we have Exhibit 500, please.

The Clerk: Yes.

Mr. Mood: Would you hand the exhibit to the witness.

A. This would be the type of book that it was.

Q. Do you notice the names of the company that put out that book? A. Yes, I do.

Q. What is the company?

A. Fidelity & Deposit Company.

Q. Was it not the Fidelity & Deposit Company that put out the originals of the books that have been photostated here and introduced in evidence?

A. Whatever's name is on the cover of the exhibits is the name that was on the cover of the book involved.

Q. May I ask where you got the original books in which those [702] entries were made?

A. For instance, on No. 76, it says "Compliments of Lipman & Esfeld, General Insurance, Smith Tower, Seattle, Phone MAin 2841."

(Testimony of Army A. Seijas.)

Q. Were they agents for this company in Seattle, Fidelity Deposit Company?

A. I don't know who they are agents for, but a book similar to this was delivered to our office by this firm, Lipman & Esfeld, along with many other firms, and I just kept the book.

The Court: You mean they along with other firms also delivered books?

The Witness: Yes, sir, other insurance companies and other types of firms would pass around books similar to Defendant's Exhibit No. 500.

Q. (By Mr. Mead): So you recognize that exhibit as being a similar type of book as to the original books from which these photostats were made?

A. Yes, I did.

Q. But you are not able to state whether it was the same company that put out the book?

A. I don't know anything about the company that put out the book. All I know is that the book, No. 76 for instance, was a book that had been delivered to our office by Lipman & Esfeld. [703]

Q. As a matter of fact, each year you have received a number of books of similar type, from either trust companies or banks or insurance companies, is that right?

A. That is right, you are right.

Q. These originals were among the group of documents that you received of that kind on an annual basis, is that right? A. That is right.

Q. Mr. Seijas, you testified with regard to an investigation that was started into your personal

(Testimony of Army A. Seijas.)

income tax affairs, and I think you said that you had knowledge of this investigation in the latter part of the year 1952. Am I correct in that?

A. No, you are not.

Q. What were the facts with regard to that?

A. The fact is that I first became aware of the investigation of my personal affairs in the latter part of '51 and the early part of '52.

Q. And how did you become aware of that situation? How did you become aware, rather, of that situation?

A. In 1951 — this morning I testified '52, but since then, by the questions asked here, I am pretty sure it was '51. I was invited to go to the Federal Courthouse in Seattle, Washington, with regard to my relationship with one Frederick B. Cohen of Bremerton, Washington, and in the course of that examination I was then asked some questions about [701] my financial affairs, and they asked me if I would give them a list of my assets and liabilities, and I told them *that would* have a bookkeeper prepare such a statement for them.

Q. Of course, you recognized that, as a lawyer, when they requested information with regard to your assets and liabilities, that they were inquiring into your affairs rather than those of Mr. Frederick Cohen, is that correct?

A. That is correct.

Q. And this was in the latter part of '51, now, is that right? A. That is correct.

(Testimony of Army A. Seijas.)

Q. Would you say it was in the month of December?

A. The date of December '51 has been mentioned here this morning, and I will have to go along with that as being a guess on my part.

Q. The agents who interviewed you at that time were Mr. Oftedal and Mr. O'Leary, who are sitting at the counsel table, is that correct?

A. I know Mr. O'Leary. I don't recall Mr. Oftedal.

Q. At least, Mr. O'Leary was one of the agents, and you remember him?

A. Yes. Mr. O'Leary had been in my office before.

Q. So this was now in the second contact you had had, from any agent, with regard to the investigation into your affairs?

A. No. When Mr. O'Leary had called on me before it was in [705] connection with the affairs of the Amusement Company, but I don't think that it was in a—I think it was in a sort of a auditing capacity, it was not in an investigative capacity. And it was some years prior. Now, that is a thought that runs through my mind at this time.

Q. So your first contact with Mr. O'Leary was a number of years prior to 1951 and was in his capacity as a revenue agent making a routine audit rather than that of an intelligence agent investigating your affairs, is that right?

A. I think that is correct.

Q. You, of course, are familiar with the dis-

(Testimony of Army A. Seijas.)

tinction between a revenue agent's audit and an intelligence agent's audit?

A. I am now, Mr. Mead.

Q. You are familiar at this time?

A. Yes, I am.

Q. This was the first inquiry, then, into your affairs in connection with this investigation in the month of December 1951?

A. I would say generally, yes.

Q. And did Mr. O'Leary take a statment from you when you appeared in his office at that time?

A. You mean did I write out a statement for him? Or did he take a statement that I signed or something like that?

Q. Did he reduce your questions and answers to writing and have a reporter transcribe them and have you sign them? [706] A. He did not.

Q. He did not. This occasion, then, was merely an oral conversation, is that right?

A. Yes, sir.

Q. When did you next see Mr. O'Leary, or when were you next contacted by him?

A. I don't remember. Sometime the next year.

Q. How late in the year?

A. I don't remember, Mr. Mead.

Q. Were you contacted by Mr. Oftedal in between times? A. I don't remember, sir.

Q. You don't remember?

A. I don't remember, really.

Q. When did you first contact an accountant with regard to this investigation?

(Testimony of Army A. Seijas.)

A. When did we prepare the first net worth statement?

Q. I don't know, Mr. Seijas. I am asking you. It hasn't appeared in evidence here, and I am asking you. I don't know.

A. Well, if we had the date, why, we could tell you. But it was sometime in the year of 1952.

Q. Then, you are not able to state when you first contacted the accountant at this time, with regard to this investigation?

A. You mean in regard to the preparation of the net worth [707] statement?

Q. Yes, or with regard to the investigation that had now been started in December of 1951.

A. Well, I contacted an accountant by the name of Jacobson who threw up his hands at the job because he couldn't make head or tail out of the books, so then I got a certified public accountant, Mr. Whittle, to take over the job.

Q. When did you contact Mr. Jacobson?

A. I think I contacted Mr. Jacobson right [illegible] the request by Mr. O'Leary that I would [illegible] statement and a list of my assets.

Q. You stated that Mr. Jacobson [illegible] make head or tail out of the books, [illegible] what books are you referring to, Mr

A. Whatever books of [illegible] were down at the office, checkbooks [illegible] papers that I might have had.

Q. While we [illegible] subject, what books of

(Testimony of Army A. Seijas.)

account did you keep in your office that you made available to Mr. Jacobson?

A. Well, the girls kept a record of the law practice and the bookkeepers kept a record of the, or a bookkeeper, whoever was employed at the time, kept a record of the income and expenses of the pinball routes, and other bookkeepers in Bremerton kept a record of the other [708] affairs that I had in Bremerton, not connected with Mr. Forman.

Q. Were all these records in your office?

A. No, they were not.

Q. Which records were not in your office?

A. The records of the Bremerton Finance Company were not in my office. The records of the dock concessions were not in my office. The records for the two months we were interested in, with regard to the Smoke Shop, were not in my office. They had their own bookkeepers.

Q. Was the records of the city routes in Bremerton in your office? A. Yes, they were.

Q. And they were there and you showed them to Mr. Jacobson?

A. No. We had our own bookkeeper. And Mr. Jacobson could come down and see them if he wanted to.

Q. Did you show them to Mr. Jacobson?

A. Yes, yes, they were available to him.

Q. When you say, "We had our own bookkeeper," you are referring to yourself, are you, sir, I mean in 1951?

A. '51? No. I am talking about '42 to '45.

(Testimony of Army A. Seija

Q. We are talking about what happened now when you contacted Mr. Jacobson. He came down and could not make head or tail out of the books, is that right, at that time?

A. I see. We are talking about two different periods of [709] time. When Mr. Jacobson came down, he had access to the books down there and the files in my office.

Q. And he had access to the books which were the ledgers and the journals of the city routes in Bremerton?

A. That is right, that I had kept in the office from previous years.

Q. And all the subsidiary records of those previous years with regard to that business, is that right? A. Yes, sir.

Q. You say that Mr. Jacobson threw up his hands and couldn't make head or tail of them. Did he get to the point where he put together a net worth statement?

A. I don't recall, because about that time he was in failing health and a combination of both. I don't recall, but at any rate, he was relieved of his employment in that capacity.

Q. When was that, approximately?

A. That would have been just prior to Mr. Whittle's net worth statement.

Q. Mr. Whittle was employed in June of 1951, was he not? A. '51?

Q. '52, I'm sorry—June of '51, yes. Or when was he employed?

(Testimony of Army A. Seijas.)

A. Well, now you have got me more confused than ever, Mr. Mead.

Q. I am a little confused myself. [710]

The Court: Do you want to refer to Mr. Whittle's testimony? I have a note on that if you want it.

Mr. Mead: Mr. Whittle's net worth statement was dated December 28, 1951, Plaintiff's Exhibit 74 for identification, and I take it he must have been employed sometime prior to that time.

The Witness: That is right.

Q. (By Mr. Mead): Then, I recalled that he testified he worked on it five or six months.

The Court: He said he was engaged in July of 1951, if that is of any value to you.

Mr. Mead: I think it is, your Honor. I was off a month there.

The Court: All right.

Q. (By Mr. Mead): Does that refresh your recollection, Mr. Seijas?

A. Yes. Just move it back one year.

Q. So we will move it back one year. When did this investigation start? We were in error, then, weren't we, on the time?

A. Yes. Then it must have started at the beginning of 1951.

Q. Rather than the end of 1951?

A. That is right.

Q. So would you say, then, that it might have started in December of 1950? [711]

A. I don't think so. I think it started possibly in January of '51.

(Testimony of Army A. Seijas.)

Q. And that was by the contact that you had from Mr. O'Leary, you went to his office about that time? A. Yes, sir.

Q. Then Mr. Jacobson, as I understand it, worked on the matter of reconstructing your records to build up a net worth statement, is that right? A. Yes.

Q. And was that done for the reason that your books and records were not sufficiently accurate, with your income tax liabilities to be determined by referring to them? Was that the reason for that?

A. No, sir.

Q. What was the reason for it?

A. The reason for it was that Mr. O'Leary had requested it and I had agreed to give it to him.

Q. And Mr. O'Leary had requested it and you had agreed to give it to him. So Mr. Whittle, then, a certified public accountant, was employed in the summer, July or June, to work up a net worth statement? A. Yes, sir.

Q. What records did you give to Mr. Whittle and what information did you make available to him to enable him to do this? [712]

A. Mr. Whittle's office was down the hall from mine. I told him to come in, I told him where the records and books were, and I told him to go and seek the information and prepare the statement *from* Mr. O'Leary the best that he could.

Q. Had Mr. O'Leary advised you as to the years that were the subject matter of his investigation?

A. I don't remember whether he did or did not.

(Testimony of Army A. Seijas.)

Q. Do you recall the years which were the subject matter of the investigation?

A. I think they were from 1942 to 1949, or through '48. I am not sure.

Q. Did you know that Mr. Whittle's net worth statement, then, was being prepared for the purpose of submission to Mr. O'Leary, and the representatives of the Treasury Department? A. Yes.

Q. And did you authorize and direct Mr. Whittle to prepare a net worth statement for that purpose? A. Yes.

Q. Did you have conferences with Mr. Whittle before the net worth statement was finally put into typed form, for submission on December 28, 1951?

A. Yes.

Q. Were they numerous?

A. Well, whenever he had a question that he couldn't make out [713] he would ask me the question.

Q. Did Mr. Whittle advise you prior to the time this statement was typed from his worksheets as to what the results of the statement would be when it was finally typed?

A. I don't recall that we ever went over a preliminary form to that statement.

Q. You don't recall having discussed the worksheets before this was finally typed into a final statement? A. That is my recollection.

Q. When was this net worth statement, which has been introduced in evidence, and we will call it "the Whittle net worth statement," for lack of a

(Testimony of Army A. Seijas.)

better term, made known to you? When did you receive a copy of it? A. When it was typed up.

Q. When it was typed up. And was that on or about the date that it bears? A. Yes, sir.

Q. Upon receipt of this statement, did you have a conference then with Mr. O'Leary and any other representative of the department, at which this statement was used? A. Yes.

Q. With what agents did you meet?

A. Mr. O'Leary and Mr. Oftedal.

Q. And did you know at that time that both of those gentlemen were what we have referred to as agents of the Intelligence [714] Division?

A. I did at that time, yes.

Q. They advised you of that, did they not?

A. Yes.

Q. Do you recall when this meeting was, at which this net worth statement was made available to them?

A. I would say it would be shortly after the date that appears on the face of that document.

Q. The date on the document is December 28, 1951, so it would be, then, the early part of the year of 1952, is that right?

A. That is my recollection.

Q. Up to that time, now, then, had any written statements been taken from you by the agents of the Treasury Department with regard to your financial affairs?

A. Not to my knowledge. Not that I recollect, rather.

(Testimony of Army A. Seijas.)

Q. Who attended this meeting in the early part of 1952, at which this net worth statement was presented to the Treasury Department agents?

A. I don't know how many other meetings they might have had with Mr. Whittle. The meeting I am talking about was with Mr. Oftedal, Mr. O'Leary, Mr. Whittle and myself.

Q. And this original then was submitted to Mr. O'Leary, was it, which is Government's Exhibit 74?

A. I don't know if it was submitted to them at that time or [715] earlier or later, I don't know.

Q. At least it was exhibited to them at that time, was it not?

A. I can't recollect whether it was or was not.

Q. Was that the purpose of the meeting, to go over this net worth statement?

A. Yes, but I don't remember whether they had it or didn't have it.

Q. Do you recall what this net worth statement disclosed by way of unaccounted-for income, and in what particular years?

A. Well, I don't remember what it disclosed at this time—are you speaking of the meeting in the first meeting afterwards?

Q. I am speaking of the meeting in January of the year 1952, at which you and Mr. Whittle presented this document to Mr. Oftedal and Mr. O'Leary.

A. I don't recall what the——

Q. You don't know what the document disclosed?

(Testimony of Army A. Seijas.)

A. I don't remember. At that time we discussed it, but I don't remember right now what the, whether all facets of the document were discussed.

Q. In the way of unreported income, you don't remember?

A. No, except that the unreported income was larger than we had expected. [716]

Q. Is it not a fact, Mr. Seijas, that this document indicated that there was unreported income of approximately $165,000 for the years 1946, '47 and '48? A. That might be in that document.

Q. But you have no recollection of it?

A. I don't. Whatever the document says would be the figure that we were discussing.

Mr. Mead. I don't see the figure here. Perhaps you can help me.

Q. Was it not discussed at that meeting when this was produced that there was unreported income indicated by this exhibit of $165,000 or thereabouts?

A. I don't know. Yes, it was a large sum of money, but I don't remember the amount that we discussed at that time.

Q. You don't remember the amount?

A. I don't, and I don't see anything. I don't see any figure here that can help me, unless you can show it to me.

Q. I will not take the time, Mr. Seijas.

Did Mr. O'Leary and Mr. Oftedal have any document or any net worth statement that they had worked up at that time as to what your unreported income might be for those years?

(Testimony of Army A. Seijas.)

A. I don't know what they had.

Q. Did they show you or tell you what their opinion was of unreported income for any of the years at that time? We [717] are talking now about the January 1952 meeting.

A. I have no recollection of that.

Q. You don't remember?

A. I do not remember.

Q. When was your next meeting with the representatives of the Treasury Department?

A. You are now talking about '52?

Q. 1952. I am talking about the meeting of January 1952 and inquiring as to when the next meeting was held.

A. I think it was in May or June of '52. Now, I want to tell you that during this period of time Mr. Offedal and Mr. O'Leary had offices in the Smith Tower, and my recollection is that we were running into them every day. When you were talking about meetings

Q. When I am talking about meetings, Mr. Seijas, I am referring to a formal conference to discuss this matter and not "How are you, Mr. O'Leary" in the hall. That is the type of meeting I am talking about.

A. That is what I thought and that is why I brought that to your attention.

Q. Yes.

A. My recollection is that it was sometime in May or June of 1952.

(Testimony of Army A. Scijas.)

Q. Who was present at that time, at that meeting, in May or June of 1952? [718]

A. I know that I came and did not remain. I think there was just Mr. Whittle and Mr. O'Leary and Mr. Oftedal.

Q. Were any additional documents or any additional information other than that supplied in the Whittle net worth statement furnished to the agents at that time, Mr. Scijas?

A. Not to my knowledge.

Q. You had no knowledge of any additional information?

A. I had no knowledge— Mr. Whittle was meeting with them all the time. He had access to my books and records. What he was showing them I do not know, because I was not present.

Q. You had no knowledge of the net worth statement of December 1951, and you knew the contents of it. Had you furnished Mr. Whittle with any additional information for the purpose of revision of that net worth statement by the time of the second meeting?

A. No. My recollection is that during the interval Mr. Whittle was working out a settlement of the taxes, as I recall it.

Q. I beg your pardon?

A. I said that during the interval, it is my recollection that Mr. Whittle—at least, that is what he told me—was working out a program of settlement of the income tax liability.

Q. And you—— **A.** On a civil basis. [719]

(Testimony of Army A. Seijas.)

Q. I beg your pardon. But you had furnished him with no further information to make any revisions of this net worth statement?

A. I don't recollect doing so.

Q. Now we are up to——

A. The middle of 1952.

Q. The middle of 1952. When was your next meeting held with the agents—and when I say "meeting," I mean where you were present at a formal meeting for the purpose of discussing this problem?

A. I don't recall another formal conference with the agents until April of 1953.

Q. So then from the summer of 1952 there was no other conference with the agents at which you were present until 1953?

A. That would be my recollection.

Q. And in the meantime you knew that Mr. Whittle was having negotiations and discussions with them looking to the end of settling this problem in some way, is that correct?

A. No. During this period of time I don't think there was very much action taken one way or the other about it. At least, that is what was told to me. They were just waiting, just coasting along.

Q. But you had not been contacted by either Mr. Oftedal or Mr. O'Leary for a formal conference during that period of time? [720]

A. No. I had met Mr. Oftedal and Mr. O'Leary numerous times in the hall or down in the coffee shop, and we had discussed some facet of the, of my

(Testimony of Army A. Seijas.)

case on several occasions, but I don't recollect that we ever had any formal conferences during that period of time. Maybe I am wrong, but that is my——

Q. Were any written statements taken up to that period of time by Mr. O'Leary or Mr. Oftedal or any representative of the government?

A. I believe they took the only statements they took from me were ones in the beginning of the year of 1952, subsequent to the issuance of this net worth statement, Plaintiff's Exhibit 74.

Q. Following the exhibiting to them of this net worth statement, they took a written statement from you, did they? A. Yes.

Q. Is that the only written statement that was taken from you?

A. I think they took one or two written statements from me immediately after the giving of this net worth statement, and I don't recall them taking any other written statement from me.

Q. Up until the meeting that you had in Mr. Whittle's office in April 1953, did you furnish any information to Mr. [721] Whittle or any facts for the purpose of aiding him or assisting him in revising the net worth statement of December 1951?

A. We were not in the process of revising the net worth statement at all. We were in the process of trying to work out—at least that is what he told me—a settlement, a civil settlement with Mr. O'Leary and Mr. Oftedal. When he did work on

(Testimony of Army A. Seijas.)

this particular case, he had other cases and other matters, of course.

Q. The question was, Mr. Seijas, did you furnish him with any information to alter, or amend or change or add to or subtract from the net worth statement of December 1951, up until April 1953?

A. There were none furnished. The occasion did not arise, to my knowledge.

Q. So there were none furnished?

A. That is correct.

Q. And you did not tell him of any facts or information which would require the altering of this net worth statement? A. That is correct.

Q. Then, up until that time were you under the impression that your problem with respect to unreported income involved the years 1946, 1947 and 1948 and that the amount of unreported income was approximately $165,000?

A. My understanding was that the unreported income was during [722] the years '42, '43, '44 and '45.

Q. Your understanding of it was? A. Yes.

Q. Had you given Mr. Whittle or anyone else connected with the government or any of your accountants that information?

A. Yes, I gave it to Mr. Whittle. Mr. Whittle was trying to put it into the years '46, '47 and '48.

Q. What information did you give to Mr. Whittle that he was trying to put into the years of '46, '47 and '48?

(Testimony of Army A. Seijas.)

A. I wasn't giving him the information. He was telling me.

Q. Weren't you aiding him and assisting him in getting the facts, Mr. Seijas?

A. No. He had access to the books and he was handling the matter with the agents, and I was looking to him. After all, he had been hired for that purpose, to work out a settlement with the government.

Q. The net worth statement, Mr. Seijas, showed that you had on hand about $50,432 in cash on hand in 1945, at the end of that year, December 31. Where did Mr. Whittle get his information? I call your attention to the second sheet of the exhibit that you hold in your hand——

The Court: You mean the second spreadsheet?

Mr. Mead: The second spreadsheet, your Honor, yes.

Q. (By Mr. Mead): The comparative net worth statement, headed [723] "$50,432.37" at the end of 1945.

A. You are asking me where he got that figure?

Q. Where he got that figure, yes, sir.

A. He got that figure from going through the bank accounts.

Q. From going through the bank accounts. You mean you made available to him your bank books?

A. Yes, sir.

Q. And bank records? A. Yes.

Q. Did you tell him that you had any other cash on hand?

(Testimony of Army A. Seijas.)

A. I don't remember what else I told him. So that he could make up the fifty thousand dollars.

Q. But you gave him no other information, that you had other cash on hand, other than the 50 thousand dollars that you had in various bank accounts, up to that time?

A. Mr. Mead, I don't know where he got the figure of $50,000, except he dug it out from the records and files and the checkbooks and receipt books and duplicate deposit books that were made available to him.

Q. But you did tell him of any other additional cash which you had on hand?

A. I don't recall telling him about any additional cash that I had on hand. If I had any on hand at that time.

Q. And you didn't tell him about it up until the time you had had prepared this statement at the end of 1951, which he had [724] been working on for five or six months, and you didn't tell him about it during the entire year of 1952, and you didn't tell him about it up until April of 1953, is that correct?

A. Generally, I would say yes.

Q. There has been some testimony about a meeting in Mr. Whittle's office in the month of April 1953, between yourself and Mr. Whittle. At that time, Mr. Seijas, had you been informed, or had there been brought to your attention, the fact that criminal prosecution had been recommended for the years 1946, 1947 and 1948 for income tax evasion for those years for you?

(Testimony of Army A. Seijas.)

A. Not to my knowledge.

Q. So then you had no knowledge when you talked to Mr. Whittle in April 1953 that prosecution had been recommended for those years?

A. Not those years.

Q. Did you have any knowledge that prosecution had been recommended for any years?

A. Yes.

Q. What years did you assume prosecution had been recommended for?

A. I didn't assume anything, Mr. Mead. I didn't care what years they were. I didn't want to be prosecuted.

Q. I am sure of that. What information had then come to you with regard to what years you were going to be prosecuted [725] for?

A. The government had written me a letter, Mr. Whittle had a letter, saying that they were going to recommend criminal prosecution. I don't recall that the letter stated any particular years. Now, I may be wrong, but that is my recollection. Now——

Q. I will ask you—— A. Now——

Q. Pardon me. I didn't mean to interrupt you. Go ahead.

A. I took that matter up with Mr. Whittle and I said, "Are we settling this thing on a civil basis or is the government sincere about this matter of prosecuting me criminally?" And he told me not to worry about it, that he thought he had an understanding with the Intelligence agents and the government, and a man by the name of Mr. Wassner,

(Testimony of Army A. Seijas.)

who, I believe, was the head of the Division at that time, to the effect that a civil settlement was to be made. Just prior to this time, I had been so informed, and I had given to Mr. Whittle the sum of a hundred thousand dollars with which to pay whatever tax bill the government had given us, they were to give us a tax bill, and he was to use the hundred thousand dollars to pay whatever was needed; he thought that, at first he thought 75 thousand would be sufficient to cover any and all delinquencies, and then he said that they needed 25 thousand dollars more, [726] so I gave Mr. Whittle another 25 thousand, or caused, I don't remember whether I gave it to him, or I mailed it in, 25 thousand dollars more, which made a total of a hundred thousand dollars with which to settle with the government regarding the taxes. They were to furnish us a bill and then we were to go over the bill, and also to check on this particular net worth statement to find out what the actual accurate account of delinquencies were. For that reason, to my knowledge, nothing was done from May or June 1952 until this conference in 1953, in April.

Q. Mr. Seijas, the question was, when were you advised, by what method, that criminal prosecution was contemplated?

A. I was advised either by a letter or by a statement from Mr. Whittle.

Q. Is it not a fact, Mr. Seijas, that you received a letter addressed to you from the Internal Revenue Service advising you that an investigation by that

(Testimony of Army A. Seijas.)

department had revealed unreported income for the years 1946, '7 and '8, and that fraud was indicated, and advising you that if you had an explanation to make, that a meeting could be arranged for that purpose? Is that not the letter that you refer to?

A. What was the date of that letter?

Q. I don't know. Do you have the letter?

A. I do. [727]

Q. You do have the letter?

A. I don't remember of receiving such a letter. I remember of receiving a letter in the year 1952, which Mr. Whittle had told me was a routine practice of the government, advising that the matter of my income tax returns had been under investigation and that the matter of criminal prosecution was under contemplation by the government. And nothing was done for a long period of time thereafter. Now, in April of 1953 Mr. I don't remember the name now the southern gentleman

The Court: Mr. Patten?

The Witness: Mr. Patten, that is the fellow.

A. (Continuing): I found out that Mr. Patten had already sent in a report, and I think we requested the conference in April of '53 at that time.

Q. (By Mr. Mead): I ask you if it is not a fact, Mr. Seijas, that prior to the meeting in Mr. Whittle's office between yourself and Mrs. Whittle in April, in which you produced these diaries, you had already been advised and already knew that criminal prosecution for the years 1946, '47 and '48 had been recommended.

(Testimony of Army A. Seijas.)

A. I do not remember the years '46, '47 and '48. I do remember the letter, either that I received or that Mr. Whittle received, or both of us received, advising us that the government was considering and had under contemplation a [728] criminal prosecution of the matter. I do not recall that any specific years were mentioned.

Q. Was this prior to the time that you had submitted these diaries to him? A. Yes.

Q. And you were aware that Mr. Whittle's net worth statement disclosed unreported income for the years 1946, '47 and '48, is that right?

A. He said that, yes.

Q. And you were aware of the contents of the net worth statement? A. Yes.

Q. Who made the arrangements for appointment at Mr. Patten's office in April for the April 1953 conference?

A. Mr. Whittle made the arrangements in Mr. Whittle's office.

Q. Did he call Mr. Patten?

A. I don't know what he did.

Q. You were not there?

A. I was not there.

Q. Do you recall the date of your meeting in Mr. Whittle's office at which these diaries were exhibited to Mr. Whittle?

A. I do not recall the date.

Q. How long prior to that time did you know that criminal prosecution was contemplated? [729]

A. A short time before.

(Testimony of Army A. Seijas.)

Q. A short time prior to that? A. Yes, sir.

Q. Would you give us your best estimate of the time? A. Maybe 60 days before.

Q. Do you recall the date in April, 1953 that you went to Mr. Whittle's office to show him these diaries?

A. I do not recall the date. I think it was the latter part of the month.

Q. Do you recall Mr. Whittle's advice to you as an accountant that you had better get a lawyer? Is that right?

A. We already had lawyers at that time.

Q. You already had lawyers at that time?

A. Yes.

Q. Did Mr. Whittle make such a recommendation to you?

A. He wanted me to change lawyers.

Q. He wanted you to get some other lawyer?

A. Yes.

Q. Did Mr. Sager then come into the picture?

A. Mr. Sager was in the picture, you were in the picture, and Mr. Dore—not Mr. Dore, but Mr.—Mr. Whittle wanted me to retain John F. Dore, Jr.

Q. You say I was in the picture, Mr. Seijas. I represented Mr. Forman, did I not?

A. That is right. [730]

Q. I have never represented you at any time, have I? A. No, sir.

Q. Following then your meeting in Mr. Whittle's office, you employed the services of Sager, or had he been already employed?

(Testimony of Army A. Seijas.)

A. My information is that Mr. Sager was already in the picture, in my belief.

Q. And how much sooner or earlier than that meeting of April 1953 was Mr. Sager employed?

A. I don't recall offhand.

Q. Was it a week earlier or a month earlier? Could you give us the best estimate of the time?

A. I would say 30 or 60 days.

Q. And Mr. Whittle then arranged the conference with Mr. Patten? A. Yes, he did.

Q. What was the purpose of your conference with Mr. Patten in April, 1953?

A. Present at this conference was a gentleman by the name of Mr. Wilford Payne. Mr. Payne was the head of the Internal Revenue, some branch of the Internal Revenue Service. And the purpose of the meeting was to convince Mr. Payne and Mr. Patten that there was no criminal intent involved for the purpose of evading the taxes, and consequently that the matter should be settled on a civil basis. [731].

Q. Was the purpose also, Mr. Seijas, to convince Mr. Patten and Mr. Payne that there was no income tax liability or no unreported income on your part for the years 1946, '47 and '48?

A. I don't remember whether that was discussed, whether those particular years were discussed or not.

Q. You don't know whether the years 1946, '47 and '48 particularly were discussed in Mr. Payne's office and Mr. Patten's office?

(Testimony of Army A. Seijas.)

A. We were in Mr. Whittle's office.

Q. We are up to the meeting now, I thought, in Mr. Patten's office.

A. We are in Mr. Whittle's office.

Q. Was the meeting with Mr. Patten——

The Court: Get in one or the other.

Mr. Mead: I would like to, your Honor.

Q. (By Mr. Mead): Was the meeting with Patten held in Whittle's office?

A. Yes, right down the hall from my office on the 18th floor of the Smith Tower.

Q. So Mr. Payne and Mr. Patten came over to Mr. Whittle's office to have this April conference, is that right? A. You are right, Mr. Mead.

Q. Thank you. And that was in the latter part of April, 1953? A. Yes, sir. [732]

Q. Were all these offices in the Smith Tower, the Intelligence office and Mr. Payne's office and Mr. Patten's office and Mr. Whittle's office?

A. I don't know where Mr. Patten's office was. I know that Mr. Payne's office was in the Smith Tower. I know that the Regional Counsel's office for the Internal Revenue was in the Smith Tower, I knew that Mr. O'Leary and Mr. Offedal were in the Smith Tower. I knew that Mr. Whittle was on the 18th floor of the Smith Tower, and Mr. Forman and I were right near him, right next to him on the 18th floor of the Smith Tower.

Q. You had everybody in the same building?

A. Everybody on the same floor.

Q. Everybody on the same floor?

(Testimony of Army A. Seijas.)

A. I mean, for the purpose of this meeting, everybody was on the same——

Q. I understand that. I was under the impression from the discussions that this meeting was held in Mr. Patten's office, that you have described.

A. No, sir.

Q. Who else was present at this meeting besides Mr. Whittle, Mr. Payne, Mr. Patten, Mr. Sager and yourself, if anyone?

A. Offhand I would say that there was another chap present, but I am not sure about it. I would be guessing.

Q. Was there any reporter present to report the proceedings [733] take a statement from you?

A. No, sir.

Q. And the meeting then was at either your request or Mr. Whittle's request, made pursuant to your suggestion, is that right? A. That is right.

Q. And the purpose was to head off criminal prosecution? A. Yes, sir.

Q. But you are not sure just for what years?

A. That is right.

Q. What did you or Mr. Whittle or Mr. Sager, on your behalf, offer by way of explanation that there was no fraud, you say, in this situation, and no intent to defraud, to avoid criminal prosecution?

A. The matter was gone into as to the undeclared income and the conversation was to place the unreported income prior to 1946——

Q. The conversation was to place the unreported income prior to 1946? A. Yes, sir.

(Testimony of Army A. Seijas.)

Q. Now, this unreported income shown on Mr. Whittle's net worth statement?

A. No, this, I think was, dealt with the unreported income from the pinball machines.

Q. But it was unreported income which was discovered from [734] the calculations of Mr. Whittle's net worth statement, $165,000, is that right?

A. You keep mentioning 165 thousand dollars, but I am not thinking along with you as to that figure.

Q. Would you refer to the exhibit which you have there, Exhibit No. 74, and to the second spread-sheet, the comparative net worth statement continued, and under the columns for the years 1946, '47 and '48 and under the designation "income to be accounted for," state what income remained to be accounted for pursuant to his net worth statement for the year 1946. A. 1946?

Q. Yes, sir. A. Thirty-five thousand.

Q. Six hundred thirty-two dollars—you are rounding it out, is that right?

A. Yes, we are now into democratic figures, so I am just taking large figures.

Q. Very well, Mr. Seijas, for the year 1947.

A. Twenty-two thousand.

Q. For the year 1948?

A. One hundred seven thousand.

Q. The aggregate of those figures is 165 thousand, in round numbers, is it not?

A. I don't know, but if you say so. [735]

Q. Would you take a pencil and a piece of

(Testimony of Army A. Seijas.)

paper, we will give you one, and add it up. These are your figures. A. I guess 164 thousand.

Q. You get 164 thousand?

A. Which is close enough.

Q. Well, it is close enough, but we would like it to be accurate, Mr. Seijas.

A. I am just taking 22 thousand, 35 thousand and 107 thousand.

Q. You have knocked off $632 for one year and $682 for another, and $321. If those were added in, the amount would be over 165 thousand, wouldn't it? A. Yes.

Q. So, for the purpose of our discussion, 165 thousand is the figure of unaccounted-for income to be accounted for, and Whittle's statement shows that income to be accounted for in the years of 1946, '7 and '8, does it not? A. Yes, sir.

Q. And there is no income to be accounted for in the years 1942, '43, '44 or '45 on Mr. Whittle's statement? A. That is correct.

Q. Now, as Mr. Obenour asked you on direct examination, as a lawyer you are aware of the Statute of Limitations? A. Yes.

Q. And you had had the advice of Mr. Sager prior to your conference with Mr. Patten and Mr. Payne? A. Yes, sir. [736]

Q. And Mr. Sager was Mr. Obenour's predecessor, and experienced in the trials, in the handling of cases of this kind, was he not? A. Yes.

Q. And had Mr. Sager and yourself at the time of that meeting been aware of the effect of the six-

(Testimony of Army A. Seijas.)

year Statute of Limitations? A. Yes.

Q. And you were aware of the effect of that statute? A. Yes, sir.

Q. And you had had, I assume, conferences with Mr. Sager for a month to two months that you have described prior to that meeting, that this matter had been discussed?

A. I had conferences with him prior to the meeting.

Q. And I think you stated that you employed him 30 days or 60 days, was it, prior to this meeting?

A. Yes, sir. But that doesn't necessarily mean that I had a conference with him every day.

Q. I understand that. Now we have unexplained income for three years '46, '47 and '48 of 465 thousand dollars, to be accounted for, and it was your purpose in going to this meeting, or having this meeting with Mr. Payne and Mr. Patten, to satisfy them that there was no fraud and no income in these years that were open and not barred by the Statute of Limitations, was it not? [737]

A. Yes, sir.

Q. This you knew, that as a result of Mr. Whittle's statement, that the years '46, '7 and '8 were the years involved and the years to be explained away?

A. From this statement, yes.

Q. From this statement. Not only did you know that, but Mr. Patten and Mr. Payne advised you that these were the years involved, did they not?

A. I don't remember of them advising me, but

(Testimony of Army A. Seijas.)

I can see from this statement that that might have happened, I can see that now from this statement.

Q. Well, it did happen, did it not, Mr. Seijas?

A. Not to my recollection, I don't——

Q. You don't remember?

A. I don't remember that they brought out the fact that these four years, or three years, were the ones involved. I—excuse me. I was placing the income in the four prior years.

Q. And you don't remember that the years 1946, '7 and '8, the three years, were the years involved which you went there to explain away or to satisfy them that there was no income unreported in those three years?. You don't remember that those were the three years?

A. I don't remember that they specifically pinpointed it down to that proposition. I remember that we talked about [738] all of these years, '42, '43, '44, '45, '46, '47 and '48, because obviously in my discussing with them I remember telling them that Mr. Whittle was wrong, because I could not have earned 107 thousand dollars in the year 1948, or whatever the sum was——

Q. Is it not a fact——

A. Pardon me. Let me finish that answer.

Q. Go right ahead.

A. Because I remember the conversation turning about on the question of my making the loans in that year, 1948, and the fact that I had made loans in that year of a hundred thousand dollars didn't necessarily mean that I had earned a hundred

(Testimony of Army A. Seijas.)

thousand dollars in that year, that it had been money that had been accumulated sometime prior thereto. I remember that being a part of the conversation.

Q. So it was then part of your plan to satisfy them that this 165 thousand dollars of unexplained income in the years of '46, '7 and '8 had in fact been earned in prior years which were barred by the Statute of Limitations?

A. They were not barred as far as I was concerned, because if you will remember, Mr. Forman's income tax return had been filed on, or about March 15, 1947, whereas mine had not been filed until July the 6th or 7th of 1947, which would make me still liable for the year 1946, and I would not be barred by the Statute of Limitations as to [739] that year, but that Mr. Forman was now clear.

Q. Is it not a fact that the position was taken at that time by yourself and Mr. Sager that this income was earned in prior years and that they were barred insofar as you were concerned?

A. I was trying to take the position that they were earned prior to 1946.

Q. That is right. Now, back to these diaries with respect to which you have testified. You had the originals of these diaries with you at that time, did you not, sir? A. I did not.

Q. At the time of the meeting in Payne's office you did not have them? A. I did not.

Q. You did not? A. I did not.

Q. They were discussed, though, weren't they?

(Testimony of Army A. Seijas.)

A. Not at the beginning of the meeting.

Q. Were they the subject matter of discussion at any time?

A. During the course of the meeting I had stated, or Mr. Whittle had stated, either Mr. Whittle or Mr. Sager had stated the position that this was money earned in prior years. And then Mr. Patten said, "What evidence do you have to corroborate that statement?" Then Mr. Sager turned to me and said, "What do you have to corroborate that [740] statement?" I then asked that we be given a short recess and asked to be excused from the room. That recess was granted. We went outside in the hall, halfways between Mr. Whittle's office and my office, and Mr. Sager and Mr. Whittle and I discussed what evidence I had to corroborate my statement that a large part of this unearned income had been earned in years outlawed by the Statute of Limitations.

Q. So that the Statute of Limitations, then, was the subject-matter of your discussion and was the defense that you presented at this meeting in Mr. Whittle's office with Mr. Patten and Mr. Payne to avoid criminal prosecution for the years 1946, '47 and '48? A. That was one of the matters, yes.

Q. Did you then produce the originals of the diaries at that time and show them to them?

A. No. We said in the hall, out in the hall, and discussed what evidence I had. I then told Mr. Whittle and told Mr. Sager, "Mr. Sager," I said, "I can show you the original entries that I have in

(Testimony of Army A. Seijas.)

my desk, if you want to see them." So they suggested that I produce them, that the Statute of Limitations had already run as to Mr. Forman and that the statute had run as to '45 as to me. And I told them that was what I had. So I went down to the office and brought out the entries that we have denominated [741] and I gave them to Mr. Sager. We looked through them and then Mr. Sager said, "Mr. Patten has already sent in a report recommending that you be prosecuted. That report has already gone in. There isn't anything to lose by showing them these entries, because you are going to be indicted, in any event."

Q. This was a conference which took place between you and Mr. Sager in some sideroom or in your office or in the hallways?

A. In the hallway.

Q. In the hallway. Very well.

A. We returned to the conference and Mr. Sager and Mr. Whittle produced these entries, showed them to him, and Mr. Patten said that he would write a supplemental report forthwith and send it back to the Department of Justice. We also said that we would like to have a conference with the Department of Justice and would he expedite the sending back of his supplementary report to the Department of Justice back in Washington.

Q. Now, you have outlined in considerable detail, with quotations, the statements that the various people made. This being a very important matter, I assume that it is still very clear in your mind?

(Testimony of Army A. Seijas.)

A. The matters that I have testified to as being clear, I have tried to make clear to you. The matters that are not clear, I have tried to make clear, or indicate that they are [742] not clear to me.

Q. Was the meeting and the statements made there by the various parties, with Mr. Patten, Mr. Sager, Mr. Payne and Mr. Whittle and yourself, are those details all clear in your mind?

A. What I have testified to here as being clear is clear in my mind.

Q. And you have a good recollection of those details? A. That is my recollection.

Q. So then these diaries were exhibited, the originals of them, at this meeting?

A. At the latter part of the meeting, yes, sir.

Q. Had you shown the originals of those diaries to Mr. Sager before that time?

A. Mr. Sager never saw those diaries, Mr. Whittle never saw those diaries, or entries, until that moment.

Q. Then, it is not a fact, Mr. Seijas, that prior to that meeting you had exhibited those diaries to Mr. Whittle, the originals of them?

A. Mr. Whittle never saw those diaries until that moment that I have just told you about when I brought it in from my office, from my desk.

Q. And this was on the very day of this meeting with Mr. Payne and Mr. Patten?

A. I am sure that anybody, Mr. Whittle or Mr. Sager or [743] anybody else who has testified here who says they saw those diaries before that date,

(Testimony of Army A. Seijas.)

or before that matter, that point that I have told you, is mistaken.

Q. You are certain about that, of course?

A. I am certain about that, yes, sir.

Q. With respect to the diaries and to the entries made in them, particularly the notations that are not covered or masked out, it has been your testimony that those entries are all items which were so-called holdouts which Mr. Meyer had collected and turned over to Mr. Forman from these various locations, with the exception of those items which are noted as having been received from Mr. Heberling, from two locations, and that you had no contact in connection with the receipt of those items whatsoever from Mr. Meyer, is that correct, that Mr. Meyer on every instance turned those receipts over to Mr. Forman and Mr. Forman turned them over to you in an envelope with a notation or advised you as to the source of them? Is that correct?

A. My testimony is that Mr. Meyer made the collections of the holdouts and gave them to Mr. Forman, who in turn distributed with me, with the exception of those two items or locations that Mr. Heberling collected.

Q. And on no occasion were these items ever turned over to you, they were all turned over to Mr. Forman, he received them from Mr. Meyer, and Mr. Meyer turned them over to you? [744]

A. With the exception——

Q. (Interrupting) Or Mr. Forman, I mean, I beg your pardon, turned them over to you?

(Testimony of Army A. Seijas.)

A. With the exception of those occasions when he would leave the sealed envelope in my care with Mr. William R. Forman's name on the outside of the envelope, in which case I would surrender the envelope to Mr. Forman unopened.

Q. So then it is a fact that on no occasion during this period of 1942, '43, '44 and '45 did you receive any of these funds from Mr. Meyer or Mr. Heberling or anyone else other than through Mr. Forman's hands, except in isolated cases where you might have taken an envelope that was sealed, with Mr. Forman's name on it, handed him the envelope without knowing the contents, and then in return gotten back from him some proceeds which he told you were one of these holdouts?

A. You are correct.

Q. Is that correct? A. That is correct.

Q. And this is very clear in your mind, is it, sir?

A. Well, it is my recollection.

Q. And then it is your recollection that on each of these occasions you made a notation in these diaries of the amounts which you received, with the detail of the total amount received, and divided it, with a notation that half of it was [745] given to Mr. Forman, in effect, and half of it was received by yourself, is that right?

A. With a notation as to the amount that I received.

Q. With a notation as to the amount that you received? A. That is right.

Q. And I think that you then identified figures

(Testimony of Army A. Seijas.)

on certain entries in these diaries where you stated that one-half, on slips, was put on there by Mr. Forman?

A. That is correct.

Q. And those slips were on all occasions entries which were made in the 1945 diary? There were no slips pasted into the 1944, '43, or '42 diaries?

A. I don't recall. I think you are right, though.

Q. Now, Mr. Seijas, if you had no supervision of the collectors and all this information came to you secondhand through Mr. Forman, where did you get your information with respect to which you have testified here and with respect to which you have testified in the first case, as to the source of these funds and how they were obtained?

A. The source, I believe, was written or typewritten right on those little sheets, that is, that are pasted in the books.

Q. Those sheets are for a few of the items in 1945, but none in the earlier years, as I recall. I could be in error, but I believe that the earlier books, 1942 '43 and '44, [746] have no pasted slips in them, is that correct?

A. I don't know. I suppose it is.

Mr. Mead: Will you please hand the exhibit——

The Court: I have been trying to wait for an appropriate break here, Mr. Mead. I didn't want to interrupt your train of thought or that of the witness, but I do think we should have our afternoon recess now.

Let's have it now, ladies and gentlemen.

(Testimony of Army A. Seijas.)

The Clerk: Court is now in recess for 15 minutes.

(Whereupon a short recess was taken.)

The Bailiff: Court is reconvened following the recess.

The Court: You had just turned to the books to see which ones had sheets in them. I presume you did that at the recess.

Mr. Mead: May we have the last question and answer read back, please.

(The last question and answer were read by the reporter.)

Mr. Mead: Would you please hand to the witness the diaries, photostatic copies of the diaries.

Q. (By Mr. Mead): Will you refer to these exhibits, Mr. Seijas, which are the diaries, photostatic copies of them, [747] rather, and tell us which years have slips pasted in them. A. 1945 only.

Q. 1945 only, is that correct?

A. Yes, sir.

Q. Now, there has been some inquiry made into the originals of these diaries and what became of them on direct examination. Is it a fact, Mr. Seijas, that the last time you saw the originals of these diaries was in Mr. Whittle's office?

A. That is my recollection. After we had come back from having them photostated.

Q. So upon the day that these diaries were photostated was the last day that you saw the originals?

A. No. It would be after that.

Q. I thought you said after you came back from

(Testimony of Army A. Scijas.)

having them photostated—did you go back to Mr. Whittle's office?

A. Well, Mr. Whittle and I discussed these afterwards.

Q. You discussed the diaries?

A. Let me tell you. I think the conference in Mr. Whittle's office was toward the end of the week, and either the next day or day after, which would make it a Saturday, I believe, is when we had these diaries photostated at the United States Treasury Department Service.

Q. Do you recall the date that these diaries were photostated?

A. I do not. I do recall that it would be the Saturday—that [748] my recollection—it would be the Saturday following the date of the conference in Mr. Whittle's office.

Q. So that—and this is the conference which Mr. Patten and Mr. Payne were talking about?

A. That is right.

Q. So it would be, then, in April, or May at the very latest, 1953, is that right? A. Yes.

Q. And these diaries were photostated in the presence of yourself, and in the presence of Mr. William Oftedal, one of the agents, is that right?

A. Yes.

Q. And you took the diaries with you when you left the office where they were photostated and remained present during the entire time that these photostats were made, did you not? A. Yes.

Q. And, as the pages were turned in each diary

(Testimony of Army A. Seijas.)

and the photostats taken, you covered certain entries in each one diaries with a piece of paper so that the photostats would not reproduce certain items on those diaries, did you not? A. Yes.

Q. And did Mr. Oftedal at that time request from you permission to examine those items that you covered?

A. I don't—if I understand your question, you mean a general [749] permission to examine the——?

Q. When you started covering these items, when you commenced covering certain items, did Mr. Oftedal state to you, "I would like to see those items you are covering," or words to that effect?

A. Yes, that is the way it happened.

Q. He did state that to you?

A. He asked me, he said, "What are you covering there?" or something like that, you know, and I told him there was other matters that did not concern him, and he took my word for it, and they were covered, and that was all.

Q. But he still protested and wanted to look at them, didn't he?

A. No, I wouldn't say he protested. He just asked me what it was, and I told him that it did not concern him, and I therefore covered the matter and that ended it.

Q. That is right. Now, you would not permit Mr. Oftedal or any of the government representatives to take these diaries for photographing out of your presence, you wanted to be present when they

(Testimony of Army A. Seijas.)

were photographed? A. That is right.

Q. And you would not permit these diaries to be taken out of your possession?

A. That is right. By Internal Revenue agents.

Q. Yes. Well, did you permit them to be taken out of your [750] possession by anyone else?

A. I don't recall whether or not Mr. Whittle had them.

Q. You don't recall?

A. I don't recall whether he did or did not.

Q. Is it your testimony, Mr. Seijas, that you have ever turned these diaries over to Mr. Whittle or left them with him in his office and surrendered possession of them to him for any period of time?

A. Yes, yes. Yes, it is. My testimony is, Mr. Mead, that when we were trying to make a revised net worth statement, that he and I went over these diaries together and individually in order to add up the amount of monies that was unreported and tried to doublecheck those figures. Now, if he went over it individually, he had possession of the diaries or at least control of it while he was doing that.

Q. My question, Mr. Seijas, was did you ever leave these diaries in Mr. Whittle's possession and go out of his office and go away and leave them there, to your knowledge, or surrender possession of the diaries at any time to Mr. Whittle? Or did you ever exhibit them to Mr. Whittle and permit him to examine them without remaining at all times present when that examination took place? That is my question. A. I thought I had answered it.

(Testimony of Army A. Scijas.)

Q. I didn't understand so, sir. A. Well——

Q. Do you understand the question?

A. I understand the question. I thought I had answered it. If you will permit me and the Court permits me, I will do it again. We sometime during, prior to my trial, we wanted to have a new net worth statement prepared. We went over these documents together—I am now referring to Exhibits 76, 77, 78 and 79—we went over them together, we made a tape on it. Then he went over them alone in his own office, I went over and made a tape in his office also. Now, whether I was there during all of the time that he made the tape, going through these four volumes, I can't tell you, I don't remember. But at least he made his own tape, from his own examination, and I made a tape from my examination, and we both made a tape together, we made three different tapes, and, as I recall, we secured three different figures, three different totals.

Q. Is it not a fact, Mr. Scijas, that on every occasion that Mr. Whittle made a tape and went over these diaries, that you were personally present and that you did not go away from his office and leave these diaries with him on any occasion?

A. I will not deny that.

Q. You would not deny that? [752]

A. I would not deny it. It may be possible.

Q. it is a fact?

A. I won't say it is a fact. I will say it is possible to be a fact.

(Testimony of Army A. Seijas.)

Q. So then it is your testimony that you don't know? **A.** That is correct.

Q. Is there any other individual to whom you have ever surrendered possession of these diaries or left them in their possession, to your recollection?

A. Not to my recollection, Mr. Mead.

Q. Mr. Seijas, you have explained these entries in the diaries, which we will refer to as so-called "holdouts", and which total up to approximately 86 thousand dollars, I believe, has been your testimony, in round numbers, as having been funds taken from these machines, as you have described it, off the top. Now, do you mean by that, sir, that there was in a machine, for the purpose of illustration, a hundred dollars, that when the collector would go to that establishment and take from that machine part of these funds that are in these items designated "holdout", that he would take $20 off the top and put it in a pot or a side pocket, we will call it, and that the other $80 would be divided up, then, with the location owner, $40 to the location owner and $40 to the machine operators, except for such adjustments as there might be [753] paidouts that you have described, for licenses or for taxes? Is that the system that you described, that resulted in these so-called "holdouts"?

A. Mr. Mead, I am not aware that I described any such system.

Q. Well, would you please describe, then, what you had in mind as to the source of these so-called holdouts?

(Testimony of Army A. Seijas.)

A. Well, let's take the first one here, January 2, 19——

Q. What year, sir? A. '45.

Q. January 2, 1945?

A. That one is not a good one. Let's take a different one.

Q. Will you select another one.

A. Let's take January 22, 1945.

Q. Well, for illustration, we are referring now to January 22, 1945?

A. Yes. Do you have it before you?

Q. I have it before me, sir.

A. Now, on January 22, 1945, I received from Mr. Forman $125. I was told that George had brought the money over, that George had brought four hundred dollars from the Crow's Nest and fifty dollars from the KT, which probably means Knett, and fifty dollars which is not explained, making a total of five hundred dollars, and half of that was $250, and I was given $125, which I have placed a "½ equals $125" in this book. Now, how [754] George got that money, I do not know. All I know is that it was reported to me that George had come over with $500 and he had gotten $400 out of the Crow's Nest and $50 out of Knett's. At any rate, I received $125.

Q. And how, where this came from or how it was obtained, you don't know?

A. The manner in which it was obtained I do not know. It was not told to me. I was interested in

(Testimony of Army A. Seijas.)

the ultimate fact, which was what was put down here.

Q. And you have never, you never testified that these items were so-called "holdouts" off the top?

A. That is not my recollection.

Q. And——

A. (Interrupting): I think I testified about taking the taxes off the top and the license fees.

Q. How about the holdouts?

A. I don't recall testifying to that.

Q. You don't remember testifying to that?

A. No, I don't. I don't remember testifying as to the mold or procedure as to how the money was obtained.

Q. Let's refer, Mr. Seijas, to the same diary that you have, 1945, and to the period September 15.

A. Yes, sir.

Q. There appears to be on that date a pasted piece of paper, is that right? [755]

A. Yes, sir.

Q. And on the top of it is the notation "9/15".

A. Yes, sir.

Q. Now, the entries on that are what, sir, on that piece?

A. Yes, sir. "Ralph's 15, PO Pool 50, Pastime 150, Star 25, Chuck's 50, total 290, ½ equals $145."

Q. What is your understanding, sir, with regard to the source of those funds?

A. That out of Ralph's Tavern or Ralph's Restaurant, whatever it was, $45 was procured and $50 out of the Port Orchard Pool, $150 out of Pastime,

(Testimony of Army A. Seijas.)

$25 out of Star, $50 out of Chuck's making a total to be distributed of $290, of which I received $145.

Q. Do you know how these monies were obtained? A. I do not.

Q. You don't know? A. I do not.

Q. All you know is that Mr. Forman handed you these funds. And did he also hand you this slip on which these entries are made, or is this in your handwriting?

A. This particular slip is in my handwriting.

Q. This particular slip is in your handwriting?

A. Yes, sir.

Q. So this particular information you wrote down on a slip and then pasted in here, is that right? [756] A. Yes, sir.

Q. What is your explanation, Mr. Seijas, for the fact that in this year—and by "this year" I mean 1945—most of the entries in this book are on slips of paper pasted in, or many of them are, whereas on the other books they are written in on the respective pages?

A. The slips of paper that are given, that are in this book, in 1945, practically all of them, with the exception of the few that we had in Mr. Forman's handwriting and my handwriting, are either typed or printed, and printed by Mr. Meyer, the collector, who evidently prepared them and gave them to Mr. Forman, who then passed them on to me.

Q. You say "who evidently gave them to Mr. Forman". Where did you get that information, the information that he gave them to Mr. Forman?

(Testimony of Army A. Seijas.)

A. Because Mr. Forman gave them to me, and I recognize Mr. Meyer's handwriting.

Q. And he gave them to you and you put them in this book? Is that right?

A. Mr. Forman gave them to me, together with a sum of money, explaining the money that he was giving me.

Q. And you have no other information than that about the matter?

A. That is right, that is correct.

Q. And whether these funds were taken off the top, so to [757] speak, or just how they were obtained, you have no information?

A. I do not know the manner and how they were obtained.

Q. Did you during this period of time ever inquire into it? A. I am not awatre that I did.

Q. You never did?

A. I am not aware that I did.

Q. So for four years these funds were handed to you by Mr. Forman and you had no connection with the, or contact with the, collectors, Mr. Crawford or Mr. Meyer or Mr. Johnson or Mr. Heberling, and you accepted these monies without making any inquiry into the matter at all, from these various people, is that right?

A. Mr. Mead, you have forgotten, I think you have forgotten that I testified as to how this practice started.

Q. I haven't forgotten that, Mr. Seijas. I think you just testified that you made no inquiry or con-

(Testimony of Army A. Seijas.)

tact during this four-year period with these various collectors to determine just how these funds were received or the details with respect to them. Is that correct?

A. I didn't inquire of the collector, no, sir, or of Mr. Forman.

Q. It was all Mr. Forman?

A. I say, I didn't inquire of Mr. Forman or of the collector.

Q. You didn't inquire of anybody, either Mr. Forman or the collectors? [758]

A. No, I didn't inquire.

Q. You took this money, 86 thousand dollars, and made no inquiry into it at all?

A. I didn't have to make any inquiry.

Q. You didn't have to make any inquiry?

A. No, sir.

Q. Why?

A. Because, you will recall how the practice started.

Q. That wasn't the question, Mr. Seijas. I asked you, during this period of time you made no inquiry, that these funds were handed to you by Mr. Forman, you made no inquiry of him or of the collectors with respect to these monies?

A. That is right.

Q. That is correct? A. That is correct.

Q. So you don't know just how these monies were accumulated actually?

A. I don't know how the collector accumulated

(Testimony of Army A. Seijas.)

the money, when he brought it in and gave it to Mr. Forman.

Q. Now, the books—and when I say "books" I refer to the ledgers and journals, permanent books, of these four partnerships, the city routes and the county routes—do you know what has become of those books?

A. We have the ledger sheets here, a ledger.

Q. I am talking about the books. Where are the permanent-bound [759] books of this organization?

A. The ledger of the United Amusement Company is here, for about three years.

Q. For which years, sir?

A. Well, I mean—let me see, I can tell you.

Mr. Mead: I don't recall the exhibit.

The Court: Exhibit 113.

Mr. Mead: Yes, 113.

Q. (By Mr. Mead): Here is the exhibit, Mr. Seijas.

A. Well, I am now looking at the place that is marked with a paper in it, where it says "drawing account, A. A. Seijas", that is the one we're discussing this morning; and it says, the first figure is December 31, 1946, and the last figure is December 31, 1948.

Q. Now, this is the drawing account you are looking at? A. Yes.

Q. Do you have the account of receipts in that ledger for that period?

A. I just run across another page. It says "De-

(Testimony of Army A. Seijas.)

cember 31, 1949". I found a sheet entitled "Net Income".

Q. Do you find the receivables, the accounts receivable of this organization for even the period '46 to the end, that you have there? Receipts were cash, I guess, so there would be no accounts receivable, would there, Mr. Seijas? Receipts is what I mean.

A. I can't help you in answering that question. I don't——

Q. Well, in any event, all the records that you are looking at there, that are in that exhibit, are all for the year 1946 and subsequent years, aren't they? Whatever you have there?

A. Well, that—well, now here is a page named "Cash", quite large figures, I don't know if this is the page you want. On a slip of paper it says "Old Sheets".

Q. What year is it, Mr. Seijas?

A. September 1946, November 30, December 31, evidently it's the monthly income.

Q. Where is the ledger sheets or the journals that will show the day-to-day receipts of this business for the years 1942 to 1945, inclusive, sir?

A. Mr. Mead, I don't know the difference between a journal and a ledger. I can only tell you what this paper says, this sheet here.

Q. This sheet that you are looking at is for 1946 or subsequent, a later time, isn't it?

A. Yes.

Q. So there is nothing you have there which

(Testimony of Army A. Seijas.)

shows any receipts of this business for the year 1942, '43, '44 or '45?

A. I haven't found any yet.

Q. And where are those ledgers and journals which are the permanent records for those years, from '42 to '45? [761]

A. I don't know.

Q. Have you ever searched to obtain them, look for them?

A. I don't know whether we had them at the other trial or not.

Q. Is it my understanding, Mr. Seijas, that you don't know what a journal or a ledger is?

A. I do not, Mr. Mead.

Q. You don't know?

A. No, I am sorry to tell you. As far as I am concerned, the words are interchangeable.

Q. They are interchangeable?

A. Aren't they?

Q. Not to my way of thinking. But I am not an accountant, either. In any event, you have no records there that show the day-to-day receipts for this business for the years 1942 '43, '44 or '45 and you don't know where they are, do you, sir?

A. I don't know where they are. This is the record that I have here.

Q. In any event, the record that you have there, all it has to do with is 1946 and subsequent years?

A. Yes, sir.

Q. Who had control of these records the last time you know about it, where were they?

(Testimony of Army A. Seijas.)

A. These records—pardon me, which ones are you talking about, '42 to '5 or subsequent? [762]

Q. '42 to '45, the records, whether you call them journals or ledgers, which show the day-to-day receipts of this business. Where are those records?

A. Those books were kept in my office and kept in one of the filing cabinets. When the bookkeeper would want them, he would take them out, take them to his office, work on them; when he had finished, he would put them all back in the filing cabinet.

Q. So the last you saw of these books, we will call them, which would show this information was in your office, in your files?

A. They were either in my files in the office or they had been taken home.

Q. Taken to your home? A. Yes, sir.

Q. Did the subpoena that was directed to you by the government require or request that you produce these books for this period of time?

A. Yes, sir, it did.

Q. It did require or request that you produce these books? A. Yes, sir.

Q. Why haven't you produced them? Or did you produce them? A. No, I do not have them.

Q. You do not have them? A. No, sir.

Q. So these books, then, have disappeared, have they, sir? A. Yes, sir.

Q. And you are not able to account for their disappearance?

A. Yes, sir, that is right. They have either been

(Testimony of Army A. Seijas.)

thrown in the garbage or destroyed, either when my office was cleaned up or at home.

Q. And when would this destruction have occurred, do you believe?

A. Either after my trial last year or sometime after the first of this year when my office was closed.

Q. So up to the time of your trial, which was about a year ago, in this court, as I recall, was it not, sir? A. Yes.

Q. Those records were available then, but since the date of your trial they have disappeared?

A. Well, when I say they were available, that is because I don't have any recollection of what was done with them and whether I kept them over the three-year period or not, I don't recall.

Q. Were you——

A. (Interrupting) You see, pardon me, in 1955, I don't know whether I was still keeping records of 1941 and '2.

Q. You knew, Mr. Seijas, that there was a criminal case pending which involved these records, and these businesses for these particular years, did you not, sir, in which [764] you were a defendant?

A. Mr. Mead, the trial, as far as I was concerned, did not have anything to do with these records.

Q. The trial, as far as you were concerned, did not have anything to do with these records?

A. That is right. I don't know, I don't recall that the, that we went over the records of the

(Testimony of Army A. Seijas.)

United Amusement Company for the years 1942, '43, '44 or '45 during the other trial.

Q. You knew, of course, Mr. Seijas, that whether or not the receipts of these pinball businesses were entered on these records for the years 1942, '43, '44 and '45 was a critical question to be determined in this case, did you not?

A. I didn't have to have the books to determine whether they had been entered or not.

Q. You didn't have to have the books?

A. No, sir.

Q. Did you make those books available to Mr. O'Leary and Mr. Oftedal prior to the time of your trial and permit them to examine those books and records for the years 1942, '43, '44 and '45 before they were destroyed last year, or lost?

A. My recollection is that Mr. O'Leary came to my office either in '52 or '53 and that I had made available to him all the records that were kept in [765] that office, both personal records of my own, of my practice, of all the companies in which I had a financial interest, both pinballs and otherwise.

Q. So your recollection is that in 1942, or 1943 sometime, you made these records available to Mr. O'Leary or Mr. Oftedal or both of them?

A. I think you misquoted yourself.

Q. I am sorry. If I did, will you please correct me.

The Court: You used the wrong years.

The Witness: You said '42 or '43, and I said '52 or '53.

(Testimony of Army A. Seijas.)

Q. (By Mr. Mead): I am sorry. I meant '52 or '53 obviously, that is correct.

A. But, as I say, whatever records I had in the office at that time, whether I kept records that went back 10 years or not, I don't recall whether we had them in the office or did not have them in the office at the time that Mr. O'Leary came down to the office to examine my records.

Q. Mr. Seijas, where did these ledger sheets, for the years 1946 and subsequent years, come from?

A. These ledgers, or this ledger, this journal, was kept by and started by Mr. Renstrom, as I recognize his writing. After Mr. Renstrom left our employ we hired Mr. C. B. Gustafson and his office to keep books for us. The books were transferred up to Mr. Gustafson's office whenever [766] we hired him, which was either 1948 or '49 or '50, I don't recall — it must have been '49, because I recognize that December 31, 1948, writing as Mr. Renstrom's. Then, when the pinball company went broke the records were still kept up there. Then I went up and picked up the records and they were taken out of bindings, you know, and given to me in this fashion, because they wanted to keep the bindings for other use.

Q. So where did these records come from, Mr. Seijas, from your office? You produced these records that you have there?

The Court: You mean these particular ones?

Mr. Mead: Yes.

A. They came from Renstrom to Gustafson to Sager in this trial a year ago.

(Testimony of Army A. Seijas.)

Q. (By Mr. Mead): When you produced them in this trial, Mr. Seijas, from where did you obtain them?

A. These records, Mr. Sager had at the conclusion of my case.

Q. I beg pardon?

A. At the conclusion of my trial Mr. Sager had presented an order to the Court to be allowed to withdraw exhibits that I had filed. He withdrew the exhibits and kept the exhibits in his office, together with other exhibits that he had withdrawn.

Q. So at the end of your trial a year ago these documents were withdrawn as one of the exhibits [767] and they have been in Mr. Sager's possession? A. That is right.

Q. Did Mr. Sager retain possession of all the exhibits that were introduced by you on the occasion of your trial and does he still have possession of those exhibits, or any of them?

A. No. Since this trial has started and since I have been served with a subpoena, I have picked up the exhibits that I had, that he was keeping for me.

Q. So you have all the exhibits which were introduced by yourself at your trial?

A. Yes, sir.

Q. And I assume the government has also withdrawn the exhibits that were introduced by it at your trial? A. I do not know.

Q. You don't know anything about that?

A. I don't know anything about it.

Q. Do you know whether Mr. Sager had any

(Testimony of Army A. Seijas.)

permanent records of this pinball venture for the years 1942 to 1945?

A. I am pretty sure that he did not.

Q. You are pretty sure that he did not?

A. Yes, sir.

Q. You think they have disappeared because of the moving of records from your office to your home, is that right?

A. Either that or because of old age on the part [768] of the records, they have been destroyed, as you periodically clean out old material from an office.

Q. I assume, Mr. Seijas, in view of the fact that this particular, these particular items, the permanent records, journals and ledgers of this venture were subpoenaed and you were directed to produce them, that since that subpoena has been served on you you have had the opportunity of going to your home and searching the records to determine whether they were there?

A. Yes; I did have that opportunity, and I did search, and I did not find any.

Mr. Mead: I am wondering if we could examine the subpoena to see the items that have been requested of this defendant, your Honor.

The Court: Very well.

Q. (By Mr. Mead): I notice, Mr. Seijas, during the course of the production of your various exhibits that have been produced here, you have checked them off. Was it on this list that you were checking them off?

A. Yes, sir.

Q. To determine whether you had produced

(Testimony of Army A. Seijas.)

them, is that right, so you would have a record of it? A. That is not the reason.

Q. Then all the information that you have with regard to the entries that are in here came to you [769] solely from Mr. Forman, whose hands these all went through to you, and you had no contact with the collectors, so to speak, during this period of time to determine just how these funds were obtained?

A. That is right. I never questioned the collector about any of those items.

Q. Now, Mr. Seijas, since this period of time, 1945, the end of it—when I am talking about "period" I am always talking about 1945—have you had occasion to question either Mr. Meyer or any of the other collectors about the source of these items? A. No, sir.

Q. You have never had any occasion to question them?

A. I have never talked to them about it.

Q. You have never talked to them about it?

A. No, sir.

Q. You have never talked to Mr. Meyer about it or Mr. Crawford or Mr. Johnson?

A. That is right.

Q. Or Mr. Heberling? A. That is right.

Q. And since 1945 you have had no discussion with any of these three people about these various collections?

A. That is right. Since 1945.

Q. Since 1945? [770] A. Yes, sir.

(Testimony of Army A. Seijas.)

Q. And that would be right up to the present time, I assume?

A. Yes, sir. January 1, 1946, to the present time.

Q. During the period of '42 to '45 you had no discussions with them, or any of them, with regard to these details? A. Yes, I did.

Q. Will you please enlarge upon that, please? This is 1942 to 1945, now.

A. Yes, sir. In December of 1944, when we had the meeting with Heberling Bros. when we had the meeting with them we discussed the question of taking money for a reserve for taxes—not for taxes, but for licenses, and also in the course of that conversation the question of holdouts was mentioned.

Q. 1944? A. Yes.

Q. With Heberling? A. Yes.

Q. You mentioned it?

A. I did not mention it. They mentioned it.

Q. They mentioned it?

A. The question of holdouts came up, and discontinuing holdouts.

Q. The question of discontinuing holdouts in 1944. Do you remember the particular month?

A. December.

Q. And the occasion?

A. The occasion was this meeting that we had with the Heberling Bros. regarding, first of all, the Isley Corporation, and winding up by they giving me an option to buy their interest in the city. One of the conditions was that there was to

(Testimony of Army A. Seijas.)

be no retaining of funds into this license reserve for the purpose of paying licenses or license shares by the accounts before April 1, 1945, if I chose to exercise that option.

Q. So was the holdout discussed in connection with the licensing and taxes?

A. Yes, sir. The question, I may be wrong, I may be wrong, but my recollection is that Mr. George Heberling stated that he did not want to hold out any more money.

Q. For taxes and licenses, is that right?

A. That was not my recollection of his statement.

Q. Hold out for what purpose?

A. Holdouts as reflected in these exhibits.

Q. What is your understanding of this holdout business? Will you please describe it. I thought you had previously, but you state that you have not. Will you please describe your understanding of this holdout.

A. Mr. Heberling, as indicated from these records, had been making holdouts in either the Crow's Nest or Knett's or some other place. [772]

Q. Tell us what you mean by a "holdout".

A. That is unreported income.

Q. In what way, in what manner?

A. By bringing over money that was not shown on the books.

Q. And how was the money obtained?

A. I don't know how he obtained it, except that

(Testimony of Army A. Seijas.)

it was taken out of the machines, divided with Mr. Forman, who divided with me.

Q. And the method of obtaining this money was never discussed?

A. That was a detail that was not discussed.

Q. You didn't inquire into it, nor do you have any knowledge of it?

A. I have no personal knowledge as to their actions.

Q. Do you have any personal knowledge as to the method of obtaining these holdouts which you say were collected by Meyer or Crawford or any other collector?

A. I have no personal knowledge as to what they did. I have personal knowledge only of the beginning, like Mr. Forman and I did.

Q. What is your understanding of these holdouts which aggregate 86 thousand dollars, which you say you received? How were they obtained?

A. My understanding is that the practice was for them to take the money out of the machine and, [773] Mr. Meyer was to take it out of the machine, and he brought it over to Mr. Forman, and he would divide with me and that is all there was to it.

Q. When Mr. Meyer used to take the money out of the machine, Mr. Seijas, what do you mean by that? What were the mechanics of that?

A. I don't know how his mechanics were.

Q. You don't know?

A. I don't know how he did it or how he determined how much to take out. I do not know

(Testimony of Army A. Seijas.)

any of those mechanics, except that the money was to come out of the machines.

Q. And you never talked to Mr. Meyer about that?

A. I did not talk to Mr. Meyer about that at all.

Q. And you don't know whether that money came off the top, so to speak, or whether it was divided with the owners at these locations or what the situation was?

A. That is right. I cannot discuss it.

Q. You have no knowledge about it?

A. I have no knowledge of what he did, as to what he did.

Q. Mr. Seijas, I believe you stated that you were first introduced to Mr. Meyer by Mr. Forman, that Meyer had formerly been employed by the Sterling Theater Company, and that Forman was acquainted with him, introduced you to him, and he went to work for this venture as a collector. Is that right, sir? [774] A. That is right, sir.

Q. And that employment continued up until the time that Mr. Forman sold out and you sold out the county routes in '46, or '45, and Mr. Forman then sold out the city routes the following year and the new partner came in, Mr. Moran, and then Mr. Moran stepped into Mr. Forman's shoes, as you have explained it, and Mr. Meyer continued on thereafter. How long did Mr. Meyer continue in your employment as a collector in this pinball ven-

(Testimony of Army A. Seijas.)

ture after Mr. Forman's sale in 1946 of the city routes?

A. He was the last to go. He stayed on to the bitter end, which I think was either '49 or '50.

Q. So he remained then as an employee of this company until 1949 or '50? A. Yes, sir.

Q. And you describe it as "the bitter end". What happened at that time? Was it liquidated or sold, or what happened to the business?

A. My recollection is that we gave the machines away for one dollar.

Q. You gave the machines away for one dollar?

A. Yes, sir.

Q. And wound up the affairs, is that right?

A. The license expired; as I recall, when the license expired the matter was terminated as far as we were concerned. [775]

Q. And Mr. Meyer then terminated that employment?

A. I think he was the last to go.

Q. All right. Now, since 1945 and up to the present time, what has Mr. Meyer been doing, what sort of employment, what kind of work has he been following? A. From 1945?

Q. From 1950 up to the present time.

A. He has been in the real estate business.

Q. Where has he been engaging in that business?

A. Well, I don't know of any other places, I only know of one place that he worked, and that was up in the Denny Regrade in Seattle.

(Testimony of Army A. Seijas.)

Q. And he has been engaged in the real estate business, to your knowledge, ever since, is that right?

A. In some fashion or other, yes.

Q. Yes. And during this period of time——

A. He may have sold cars, automobiles, too, but I am not sure. [776]

Q. During this period of time, Mr. Seijas, and up to the time of your trial, and prior to 1953, '52, you had occasion to act as Mr. Meyer's attorney and you have seen him on frequent occasions, have you not?

A. From the time that the pinball business terminated, I think, for a period of several years I did not see him until one time when I ran into him on the street, and I think I told Mr. Forman about it, and Mr. Forman took him out to lunch, and then I did not see him again for a long period of time thereafter, and I don't recall whether I have ever represented him in any legal matters or not, but I have seen him, and I consider him a friend.

Q. You have seen him, and you do consider him a friend. You couldn't state whether you have represented him in any legal matters or not?

A. I can't say because I don't recall.

Q. You don't recall? A. I do not.

Q. Limiting the time to 1950 up to the time of your trial, a five-year period, can you state whether or not you have ever represented him in any legal matters?

(Testimony of Army A. Seijas.)

A. I don't recall ever representing him in any legal matters.

Q. How many times did you see him in 1952?

A. 1952? I don't recall seeing him at all in 1952.

Q. How many times did you see him in 1951?

A. I am pretty sure I didn't see him at all in 1951.

Q. How many times did you see him in 1953?

A. Well, I think I will change that testimony. I think I probably saw him in '52 and didn't see him in '53.

Q. How many times did you see him in '52?

A. Maybe two, three, four, a half dozen times. I don't recall.

Q. Two, three, four, a half dozen times?

A. Yes, sir.

Q. How many times did you see him in 1954?

A. I have no recollection.

Q. 1955?

A. In 1955 I saw him. I would say, quite frequently, by comparison, maybe half a dozen times, maybe a dozen times in '55.

Q. In '55? A. Yes, sir.

Q. Mr. Meyer, this gentleman who was a collector during this period of time was a witness in your case with regard to these collections, wasn't he, Mr. Seijas? A. Yes, he was.

Q. Do you want us to understand now that you have never discussed with him at any time since 1946 these so-called holdouts that you have referred

(Testimony of Army A. Seijas.)

to? A. Yes. [778]

Q. You never have?

A. I haven't discussed it with him to my recollection, or the technique, as you have been questioning me about; I have not discussed that with him either.

Q. And your memory is clear with respect to that, I assume? A. I think it is.

Q. Now, Mr. Seijas, at the time you called on Mr. Patten—I am jumping around a little bit, but it's on the same subject—or he called on you, at least you had this meeting with Mr. Payne, Mr. Whittle, and Mr. Patten, what explanations did you offer with regard to this unexplained income for the years 1946, '47, and '48, as shown by Mr. Whittle's statement or net worth statement, as you call it?

A. My recollection is that he wanted to know the sources of the moneys in connection with this unexplained income, and I think it finally resolved itself down to the proposition that there was $80,000, more or less, plus available to me, certain, funds that I had received from my father, and also moneys that were available for my use that had been earned by my two brothers.

Q. So then your explanation of the unreported income per Mr. Whittle's audit or net worth statement was that this $156,000 was explained by moneys that you had received from your father, one item? [779] A. Yes.

Q. What moneys were those, sir?

A. Those were moneys that he had earned in

(Testimony of Army A. Seijas.)

the—when he had gone to work for us over at Bremerton, together with the moneys from my brothers.

Q. How much did that total, sir, that item?

A. Which item?

Q. The moneys that your father had earned, that you explained as your father being the source of to Mr. Patten?

A. I would say between fifty and sixty thousand dollars.

Q. This is the occasion, Mr. Seijas, of the meeting on April, 1953?

A. I think it would amount to that. I am not sure.

Q. Is it not a fact that you did not state that, that you only advised Mr. Patten and Mr. Payne that the source of funds that you had from your father was from the earnings that you have related?

A. You are right. You are right. And when you asked the question, I recognized that I had made a mistake there. The other moneys were represented in the Argus Company, which were not brought out at that time, you are right.

Q. So the only items of funds, you say, which were available to you, cash, were these earnings of your father during this period of time?

A. Yes, you are right. [780]

Q. Is it not a fact that that amounted to how much, $11,000? A. $11,000 net, I think.

Q. Is it not a fact, in response to Mr. Payne's inquiry, or Mr. Patten's inquiry, as to how your father lived during that period of time, if he turned

(Testimony of Army A. Seijas.)

those funds over, you stated to him that your father was on welfare or relief during that period of time and didn't need the funds?

A. No, sir, Mr. Patten is mistaken, because I can remember him testifying that way in the trial. I remember that very well. Now that you call it to my attention I remember that very well. Obviously the man couldn't be on relief if he was drawing a hundred dollars a week, but I did make a facetious remark to Mr. Patten at that conference.

Q. So you wish——

A. (Interrupting) But if I recall the conversation myself, it was that I, myself, was on relief, not my father. Mr. Patten testified to a different version of that conversation during my first trial.

Q. So it is now, then, you are——

A. (Interrupting) Just a moment.

Q. I beg your pardon, you are not through yet?

A. I am through, but I don't want you to start that way.

Q. I want you to finish your answer, Mr. Seijas. Have I given you an opportunity to do that? [781]

A. You have. And I finished my answer. I was just jumping the gun on you a little bit, Mr. Mead.

Q. Then it is not a fact as you stated that the reason your father was able to make these funds available to you was that he was on relief or receiving welfare at that time?

A. I did not state that at that conference. Mr. Patten testified that I did. Mr. Patten was wrong.

Q. Mr. Patten was in error when he gave that testimony? A. Yes, he was.

(Testimony of Army A. Seijas.)

Q. What other source of income or funds available to you did you point out at that time to Mr. Patten and Mr. Payne to explain that you had this hundred and sixty-five thousand or more on hand at the beginning of 1946?

A. I told them that I had available to me the sum of moneys that my brothers had earned, which I thought was a net of about fourteen or fifteen thousand for Louis and about twenty thousand for Henry.

Q. How much for Louis and how much for Henry?

A. I think my—I think I told them about fourteen or fifteen thousand for Louis and about twenty thousand for Henry.

Q. Fifteen thousand, was it, for Louis?

A. Yes, in round figures.

Q. And how much for Henry? A. Twenty.

Q. Twenty thousand. [782]

A. And eleven for my father.

Q. And eleven from your father. Was there any other item that I have overlooked?

A. I don't recollect any.

Q. Besides, of course, this $86,000 that we have—I don't think I mentioned that at this time.

A. That is right.

Q. Those were the four items, were they not?

A. Yes, sir.

Q. What explanation did you offer to Mr. Payne and Mr. Patten at that time when they inquired as to why, if you were holding these funds for your

(Testimony of Army A. Seijas.)

brother Henry, and he was the owner of those funds, that you made loans to him and charged him interest for these loans?

A. I don't recall that that matter was discussed, but I will answer your—I will discuss it with you if you want me to.

Q. Is it your testimony that that matter was not discussed?

A. I don't recollect at this time that it was. It may have been.

Q. What is your explanation of that, whether it was discussed or not, Mr. Seijas?

A. Henry was in the service.

Q. What year or years was he in the service?

A. '43 and '44. He was in the service and Louis was staying home or beginning to, see. You want to know about the interest? [783] I forgot about that. With regard to the question of interest, I think you will find, if you look at the records, that very little interest was earned, and that was because I did not want them to go into that particular venture. They went into it against my recommendation and ultimately went broke, and, as the record will further show, those notes laid up there in the bank for five or six years without nothing being done about it.

Q. So you didn't sue him on the notes for his own money? A. I didn't have to.

Q. You didn't have to?

A. As a matter of fact, I had forgotten all about the matter until Mr. O'Leary called it to my atten-

(Testimony of Army A. Seijas.)

tion that he had these notes laying up there in the bank.

Q. But you did have him sign notes and you did have him pay interest, and you did report some of the interest as income that he had paid?

A. I think that was in so far as Henry was concerned, but not as far as Louis was concerned.

Q. I see. Now, this was on his own money?

A. That was the money that we had.

Q. That you had available to you?

A. That I had available. And the matter was let go and dropped.

Q. Now, if you had not discussed these holdouts with Mr. [784] Meyer or Mr. Heberling, why did you tell Mr. Payne and Mr. Patten that Mr. Heberling or Mr. Meyer would confirm this statement that you had this eighty-six thousand dollars of holdouts?

A. They didn't know I had eighty-six thousand, but they would confirm the practice of the holdouts, I am sure.

Q. But before you made this representation to Mr. Patten and Mr. Payne you had not talked to Mr. Meyer, although he was a friend of yours, to determine whether he would confirm it or not?

A. I am pretty sure that that was the practice, and they, either one of them, would have confirmed it, although I had not talked with either one about it, if I made that statement to Mr. Patten or Mr. Payne.

Q. It is a fact, is it not, Mr. Seijas, that you did make such a statement to them?

(Testimony of Army A. Seijas.)

A. I don't recall if I did, but if I did I would still say that I am pretty sure these men would, if they were telling the truth, confirm it.

Q. Although it is your testimony that you had not contacted him before making this representation, although he was a good friend of yours, to determine that fact?

A. Yes, sir, I did not even think about it.

Q. You did not discuss it with him.

Now, if you did not know the method of acquisition of [785] these funds from these various locations, and you had not discussed with any of the collectors the method of acquisition, where did you get your information that you gave to Mr. Payne and Mr. Patten in describing the method of obtaining it?

A. Mr. Mead, I was three times seven when I went into that office, and I knew how much money there was, and I knew that they were interested in the ultimate fact of how much money I had, and it doesn't take too much imagination to determine how the money was obtained.

Q. So the representations, then, that you made were by reason of the fact that you were three times seven and you used your imagination, is that right?

A. I didn't have to use any imagination. If I were three times seven I didn't have to use any imagination. Besides I knew how the practice had started in the beginning.

Q. I will ask you, Mr. Seijas, whether or not, in

(Testimony of Army A. Seijas:)

explaining these holdouts, you gave to Mr. Payne and to Mr. Patten the following explanation: that the collectors went to the various locations where the pinball machines were located, I believe, on Tuesday and Thursday, although I am not too certain of that, and they took the money out of the machines and they split it 50-50 with the location owner, but they gave the location owner a slip showing the collection of substantially less money than was [786] actually taken out of the machines, and then the collector came back to Seattle and turned in an amount of money to the bookkeeper for the partnership, which agreed with a slip, and turned in the excess currency to either Mr. Seijas or Mr. Forman, according to who was present at that time. Is that about what you told Mr. Patten and Mr. Payne?

A. Isn't that about what I have told you here?

Q. I am not asking you that, Mr. Seijas. That is not the question.

Mr. Mead: Would the court ask the witness to answer the question?

The Court: Yes.

A. I would say substantially that would be what I would tell them. I don't recall telling them that, but I would have told them that substantially.

Q. (By Mr. Mead): So you told Mr. Patten and Mr. Payne that these collectors turned the money over to you or to Mr. Forman whoever was there? A. That is right.

Q. But, now, it is your testimony that they al-

(Testimony of Army A. Seijas.)

ways turned the money over to Mr. Forman, or if he was gone it was in an envelope and you didn't open the envelope, and handed it to him, and let him open it, and then divide half of it with you?

A. I could tell that there was money in an envelope without seeing it, and I think you can, too.

Q. That isn't the question. Mr. Seijas, at this time you were advised by Mr. Patten and Mr. Payne that rather than $165,000 of unexplained income for the period of 1946, '47, and '48, that, in accordance with the reports that they had from the agents, Mr. Oftedal and O'Leary, there was approximately $200,000 of shortages, were you not?

A. I don't recall that.

Q. At that time you did not advise Mr. Payne or Mr. Patten that you had another source of funds available to you at the beginning of 1946, which was fifty to sixty thousand dollars that you had received from your father, who had brought the funds back from Spain in 1934 or 1935, is that right?

A. That is right. We did not discuss, we did not discuss at that time, my father's funds.

Q. Nor did you disclose that to them, although you were then attempting to explain away the unreported, apparently unreported, income for the years 1946, '47, and '48?

A. Mr. Mead, we did not go into that situation at that time because it was not brought forth and we were not prepared to go into it at that time, it wasn't discussed at that time.

(Testimony of Army A. Seijas.)

Q. You knew about it. Why didn't you bring it forth at that [788] time, Mr. Seijas?

A. No, we did not discuss it at that time. Now, what the reason was or whether we got sidetracked or whatever it was I do not have any recollection at this time. In any event, the matter was limited and crystallized only to a small facet of this problem.

Q. So it is now your testimony that you got sidetracked and the matter was limited to a small facet of the problem, and you overlooked this fifty to sixty thousand dollars and didn't see fit to mention it, is that correct?

A. Mr. Mead, you are using unfair words and putting unfair words in my mouth, or trying to. That is not the situation.

Q. I am sorry if I have.

A. You know that it isn't the situation.

The Court: Just answer the question, Mr. Seijas.

Mr. Mead: I ask that remark be stricken.

The Court: Yes, it may be stricken.

Q. (By Mr. Mead): Will you please explain, Mr. Seijas, why you didn't mention to them at that time the fifty to sixty thousand dollars that was available from your father's funds that he had brought over from Spain?

A. Because those funds were not in my name and we did not discuss that. We were discussing what was in my name. And we did not go into any other details except my, the moneys [789] that were in my name only.

(Testimony of Army A. Seijas.)

Q. These funds were available to you in cash, were they not, at that time?

A. We had formed a corporation, as you well know, and we had used the money in connection with a corporate venture.

Q. Upon the occasion of your trial where you were then attempting to account for unreported income for the years 1946, 1947, and 1948, and to explain that you had these funds on hand at an earlier time, you did take the position that these fifty to sixty thousand dollars of funds and cash were available to you from your father and that he had brought them over from Spain, did you not, sir?

A. We so discussed the matter at the previous trial.

Q. You not only discussed the matter, Mr. Seijas, but you testified with respect to that, did you not, sir? A. Yes.

Q. And you testified in this court that these funds —was it fifty or sixty thousand, I do not recall——

A. I don't either.

Q. You don't remember whether it was fifty or sixty?

A. No, sir, I don't. I think it was somewheres between fifty and sixty, but I don't recall the exact amount.

Q. You don't recall the exact amount that you testified to?

A. No, I am not talking about what I testified to; I am talking about the actual fact, actual amount. [790]

(Testimony of Army A. Seijas.)

Q. You are not certain, but, in any event, you did take the position that that fifty or sixty thousand was available to you at the beginning of the period?

A. Yes, sir.

The Court: I have been waiting for a subject break.

Mr. Mead: Thank you, your Honor.

The Court: Ladies and gentlemen, we are going to recess now over the week-end and I am going to ask that you return at 9:30 on Monday morning. In view of the fact that we have so long a separation on this occasion perhaps I ought to admonish you more at length than I have since the original admonition, but I see that you, by your expression, all have very clearly in mind what I have so frequently referred to, the imperative necessity that you receive no information or purported information of any kind about this case, and when I say any kind I mean any kind whatever, and that you do not discuss it with anyone or permit anyone to discuss it with you. Keep in your hearts and minds and conscience all that you have heard, refresh yourself by a pleasant week-end and return ready for further duty Monday morning at 9—I overlooked that we have a calendar call of some other matters on Monday morning [791] that will probably take us some time. I am going to start very early myself to get them cleared. I think if you will be here at 10:15 we will be ready to proceed with the present case.

10:15, Monday morning, ladies and gentlemen. Have a pleasant week-end.

(Thereupon the hearing of this case was adjourned at 4:35 p.m., Friday, the 3rd day of August, 1956, until 10:15 a.m., Monday, the 6th day of August, 1956, at which time counsel for the respective parties as first hereinbefore set forth appeared and the following further proceedings were had before The Court and jury:)

Proceedings, August 6, 1956

The Court: Good morning, ladies and gentlemen. I hope you had a pleasant weekend. Good morning, Counsel.

I regret to announce that Mr. Songer, Juror No. 10, has suffered a critical attack of angina pectoris, and his physician informed me that further attendance upon the court in the opinion of the physician might jeopardize his health or even life. Accordingly, we express our sympathy to Mr. Songer, and I now excuse him from further attendance upon the court, and I direct that Mr. Cecil Miller, alternate juror number one, take Mr. Songer's place on the jury.

Mr. Christensen will be juror number one, and, of course, in the meantime will continue in the capacity now held of alternate juror number one.

Is there anything counsel wishes to say in connection with this matter?

(No response.)

The Court: Very well, proceed.

The Clerk: During recess, Exhibits 501 and 502 have been marked for identification.

The Court: Thank you. [793]

Mr. Mead: We do not have a transcript of the records so I will just have to use my memory.

The Court: That will be perfectly all right, Mr. Mead.

ARMY A. SEIJAS

being previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Mead): Mr. Seijas, during the years 1942 to 1945, what taverns or locations, as the are sometimes referred to, did you or your brothers have an interest in or ownership in?

A. I think outside of the Smoke Shop that I discussed the other day, I think during the latter part of '45, my brothers secured an interest in a tavern known as Pop's Inn, and I secured an interest in a tavern known as Blue Moon.

Q. Now, the tavern known as Pop's Inn which your brother secured an interest in, where was that located? A. In West Bremerton.

Q. And could you state the approximate date that they acquired this interest? [794]

A. No, I could not.

Q. It was sometime in 1945?

A. My recollection is that both of these taverns were acquired in the latter part of '45.

Q. Did you provide the funds for your brothers' acquisition of the interest in this tavern?

(Testimony of Army A. Seijas.)

A. The funds came through my hands.

Q. And what do you mean by that, Mr. Seijas?

A. I mean that I handled the drafting of the papers although they and their partners handled the negotiations and then I think the checks were made out of the trustee account.

Q. But whose funds did your brothers use to, or your brother use, to acquire the interest in Pop's Inn?

A. They were funds that we got out of the house, my father's house.

Q. And whose funds were they?

A. They were commingled funds that we handled out of the house, and I think they were run through the trustee's account to try to set them apart from the rest of the funds.

Q. These were your brother's own funds, then, that you loaned?

A. I don't know whether you could say they were my brother's own funds or my father's own funds. [795]

Q. You don't know whose funds they were?

A. I can't just tell at this time whose funds they were except that I do recall that I am pretty sure I ran them through the trustee bank account rather than through my own personal bank account.

Q. But you had the money in cash at your home, is that right?

A. No, I don't think we had it in cash out at the house. We may have, but I don't remember.

Q. Was it in a safety deposit box?

(Testimony of Army A. Scijas.)

A. It may have been.

Q. You don't know? A. I don't remember.

Q. Do you have any records with respect to that transaction?

A. As to where the money came from, no.

Q. No, with respect to the purchase of the transaction, and where the money came from.

A. I don't recall that I have any records of where the money came from.

Q. Do you have any records with regard to the date of the purchase of that Pop's Inn?

A. I may have but I can't tell you right now.

Q. Who were the other partners in that enterprise?

A. There was a chap by the name of Matt McCusker and my [796] two brothers.

Q. And what other taverns or locations did you or your brothers have an interest in during that period of time, 1942 through 1945?

A. None other than I recalled.

Q. Now, you had some interest in taverns and locations other than your brothers during this period?

A. The Blue Moon was the one that I recall.

Q. The Blue Moon was the only one?

A. Yes.

Q. Who was your partner in that enterprise?

A. That was the young chap who was a partner of my brothers in Pop's Inn.

Q. His name was what? A. Matt McCusker.

(Testimony of Army A. Seijas.)

Q. And what was your respective interest in this enterprise?

A. Mr. McCusker was in the tavern business in Seattle, and he went into the tavern business in Bremerton, outside of Bremerton, and I advanced the funds with which to go into that business, and we were to be fifty-fifty partners. He was to run it and operate it, just like the dock concessions and the Smoke Shop.

Q. You put up all the money, then, for this tavern deal, Blue Moon, and Mr. McCusker did not put up any funds? [797]

A. No, McCusker put up his share or the greater portion of his share. He didn't put up all of his fifty per cent.

Q. And the capital investment——

A. (Interrupting): But I advanced sufficient funds so that he would have put up fifty per cent interest in the tavern.

Q. What was the capital investment in that enterprise?

A. I think we paid $25,000 — no, the cost was $25,000, and I think we put in a down payment of $12,000 or $12,500. I don't recall.

Q. Of that you contributed how much, and Mr. McCusker contributed how much?

A. I don't remember how many thousands he put up, but I think I put up my half plus I loaned to him a sufficient amount to have him make up his half of the down payment.

Q. And you can't state the approximate date

(Testimony of Army A. Seijas.)

that you bought that, that it was sometime in 1945?

A. Latter part of '45.

Q. Now, were there some other investments in taverns and locations that you had an interest in with others during this period of time, Mr. Seijas?

A. Not to my recollection.

Q. In the year 1946 did you acquire an interest in any [798] taverns or locations with others?

A. Yes, I did.

Q. And what were those locations?

A. In Moses Lake Mr. McCusker discovered a piece of property, a building and a tavern, and I went in with him on that building and on that tavern and restaurant in Moses Lake.

Q. And what was the approximate date of that investment? A. That was July, 1946.

Q. And do you know the capital invested in that business by each of you?

A. I don't remember whether it was—whether I put up $15,000 and he put up $15,000 or not. I don't recall. My best guess at this time is that we went into Moses Lake with a down payment of about $30,000.

Q. That was the total between the two of you?

A. Yes.

Q. Your best estimate is that you each put up half of that, is that right? A. Yes.

Q. How long did that enterprise continue?

A. We operated that tavern until 1949, I think.

Q. Was it sold then in 1949? A. Yes.

Q. And when was the Blue Moon liquidated or

(Testimony of Army A. Seijas.)

sold? [799] A. I think that was sold in 1948.

Q. In 1948? A. I think so.

Q. Now, you had an interest in the Apex Tavern, Incorporated, did you say?

A. That was in '48 or '49.

Q. '48 or '49? A. Yes.

Q. What was that enterprise, where was it located?

A. That was another tavern that Mr. McCusker was operating, and that was located in Pasco, Washington, in which I think the total capital investment was $30,000, of which I put up $15,000 or half of it.

Q. And when was that enterprise acquired or the interest in that enterprise?

A. I think that was acquired in '48 and dissolved in '49. I think so. That is my best guess.

Q. Was it sold or liquidated in that year?

A. Liquidated.

Q. In 1949? A. I think so.

Q. And the capital investment was approximately $30,000 of which you contributed half and McCusker contributed the other half?

A. Yes, sir. [800]

Q. Now, were there any other taverns or locations in which you had an interest in the years 1946 through 1949 with any other party or with McCusker or anyone else?

A. I don't recollect of any.

Q. You don't recollect any others?

A. No.

Q. What was the Argus Investment Company?

(Testimony of Army A. Seijas.)

A. That was a company which owned some property, real estate.

Q. And where was that located?

A. In Seattle.

Q. And who were the owners of that enterprise?

A. My father and I.

Q. That, of course, was a corporation, was it, sir? A. Yes.

Q. What was the Moses Lake Development Company?

A. That was the tavern that I spoke of before, about in Moses Lake.

Q. I notice on the balance sheet, the profit and loss statement, prepared by Mr. Whittle — strike that, please — on the comparative net worth statement prepared by Mr. Whittle, there is listed both the Moses Lake Development Company and the Apex Tavern. Were they one and the same, or was this tavern located in the same property? Would you explain that, please?

A. The Moses Lake Development Company was the company that [801] owned the land upon which the building was located that operated the White Elephant Tavern. That was a partnership between Mr. McCusker and I.

Q. So that was, the White Elephant then was another location?

A. The same location, only different name.

Q. Was that the same business as the Apex Tavern, Incorporated? A. No, sir.

Q. Would you explain that, please?

(Testimony of Army A. Seijas.)

A. Counsel, the Apex was in Pasco, and the Moses Lake Development Company or White Elephant Tavern was at Moses Lake.

Q. Now, what was the capital investment in the White Elephant Tavern or the Moses Lake Development Company or both of them if they are not one and the same?

A. I think it was $30,000 of which I put up half and Mr. McCusker put up half.

Q. And when was that investment made?

A. In July 1946.

Q. In July of 1946? A. Yes, sir.

Q. And did that investment continue or that business continue for sometime thereafter?

A. Yes, sir. [802]

Q. How long did it continue?

A. It continued just about two years.

Q. And it was liquidated or sold?

A. It was sold and then taken back and resold again.

Q. So what was the capital invested in the Moses Lake Development Company or the White Elephant Tavern if they are one and the same—one was a corporation? A. Yes.

Q. The other was a corporation?

A. No, one was a corporation and the other was a partnership.

Q. Now, the Moses Lake Development Company was a corporation? A. Yes.

Q. What was the capital invested in that enterprise?

(Testimony of Army A. Seijas.)

A. The capital in that, as I recall, was $30,000. We, in turn, took half of it and made a down payment on the tavern, to buy out the tavern and license, so when you get right down to it, it was the corporation was divided in half. He had half the stock, and I had half of the stock, and then he operated the tavern in which he had half interest and I had half interest. The total of the tavern and the corporation showed a $30,000-invested capital.

Q. All right, now, of that $30,000 invested capital in [803] Moses Lake Development Company and the tavern.

How much did you contribute and how much did Metusker contribute?

A. He contributed half and I half.

Q. And the date of that investment was in 1945, was it?

A. No. It was in July of 1946.

Q. July of 1946?

A. Yes, that is my recollection.

Q. And when was that liquidated?

A. We sold that, I believe, sometime in 1948. Then we received it back in 1949 and resold it in 1949 again.

Q. Now, if it was sold in 1948, what was the amount received in connection with that sale.

A. My recollection is that we received an interest in a home in Seattle that went to the real estate agent who made the sale, and I think about two or three thousand in real money.

(Testimony of Army A. Seijas.)

Q. Two or three thousand dollars in real money for that you mean in cash?

A. Yes, not equities.

Q. I don't mean in cash in the sense that it was not a check, but I mean in the sense that it was cash or money. A. Yes.

Q. Now, did you have any other investment during this [804] period of time with McCusker?

A. In 1946?

Q. From 1942 up to 1948 or '49 other than those you have outlined?

A. In the same year he and I bought a building in Moses Lake.

Q. Now, when you say the same year, could we straighten that out? A. 1946.

Q. 1946?

A. Yes. That was just before the Moses Lake Development Company which would be sometime maybe in June of '46.

Q. And that was held as an incorporation, or was it bought jointly?

A. That was a corporation.

Q. What was the name of that company?

A. Moses Lake Investment Company.

Q. And what was the capital investment in that company?

A. I think, if I recall correctly, I think we paid $12,500 down on a purchase of a building, the price of which was $40,000.

Q. All right. Now, that was apparently what the corporation paid for a piece of property purchased,

(Testimony of Army A. Seijas.)

but what was your capital consideration to that corporation in 1946? [805]

A. Half of the $12,000 or $6,000.

Q. And McCusker put in the other half, is that right? A. Yes.

Q. That was in the form of cash?

A. Yes.

Q. By that I mean money that you put in?

A. Yes.

Q. And when was that business sold or liquidated, that building?

A. I don't remember. Probably about 1949 or '50, '51. I don't recall.

Q. Do you remember the price received for it?

A. Yes.

Q. What was it, the price received for it?

A. $30,000.

Q. That was a cash sale, was it?

A. No. We got cash, and he assumed the mortgage.

Q. Now, in addition to the capital consideration that you made to the Moses Lake Investment Company, did you make a loan to that company?

A. Yes.

Q. And what was the amount of the loan that was paid?

A. I think we had paid in by the end of the year $15,000 which left a balance of about $25,000 on the mortgage. The man who owned the mortgage, I think, was trying to [806] sell the mortgage so I

(Testimony of Army A. Seijas.)

picked up the mortgage with Mr. McCusker's consent, and I bought the mortgage for about $25,000.

Q. And that was in what year?

A. I think 1946.

Q. 1946? A. I think so.

Q. All right. Now, in addition to the White Elephant Tavern, the Apex Tavern, Incorporated, the Moses Lake Development Company, Moses Lake Investment Company, the Blue Moon Tavern, and was McCusker in Pop's Inn? I don't recall that.

A. I was in with my brothers.

Q. And Pop's Inn, did you have any other investment during this period of time or business interests with McCusker?

A. Not to my recollection.

Q. Now, you had invested, then, with Mr. McCusker during this period of time the various capital investments which you have made, and you liquidated these various enterprises as you have described them, most of them, before the year 1948 or during the year 1949, with one exception, I think of a building which you said might have been sold at a later year. Did you ever make an accounting to Mr. McCusker for the proceeds of the sales or the liquidation of any of these various enterprises [807] that you have described? A. We did.

Q. When did you make this accounting?

A. The date is '75 now, sometime in about '52 - '51 or '52.

Q. So it is your testimony that sometime in 1952, you made an accounting to Mr. McCusker for

(Testimony of Army A. Seijas.)

the proceeds of the various enterprises that were sold and liquidated as you have described?

A. That is right.

Q. I will ask you, Mr. Seijas, if it is not a fact that you have never made an accounting to Mr. McCusker for any of the enterprises that you have described and that there is now a lawsuit pending against you in King County brought by Mr. McCuster a few months ago demanding an accounting for these various enterprises and for the proceeds of the sales of these various enterprises?

A. There is a lawsuit pending with regard to settlement of the enterprise known as Seven Seas Tavern.

Q. Is that another one that we have omitted?

A. Yes, sir.

Q. So you didn't tell us about the Seven Seas Tavern as an investment with Mr. McCusker?

A. That is not an investment with him. I loaned money to [808] the corporation, and that company went broke. That was his company.

Q. All right. What was the Seven Seas—First before we get to that, it is your testimony, then, Mr. Seijas that you had made a complete accounting to Mr. McCusker for all these various enterprises that you have described in which you and he had invested the capital that you have mentioned, and at the time you mentioned that there is now no accounting due from you to Matt McCusker for any of those enterprises?

A. That is not my testimony.

(Testimony of Army A. Seijas.)

Q. Would you please state in what respect that is incorrect, sir?

A. You said complete accounting. Now, we could not have a complete accounting, Mr. Mead, for the simple reason that in the—in one of the taverns, the Paseo tavern in which he and I were both officers, the question of the internal revenue department having a lien against our proceeds for income taxes due, which, incidentally, I have never received a statement or a bill from the internal revenue department as to the taxes that are due.

Q. Taxes that are due from you?

A. From me directly or indirectly to the United States Government. Consequently, when Mr. McCusker and I had [809] our settlement, he was aware of this together with the fact that the government was claiming some monies. At least, it had been brought to my attention that they were claiming some monies, and that I was not going to divide any monies that he or I might have until such time as I got a bill from the United States Government as to what taxes I owe from any of these ventures, and for which he would have to pay one half of the tax, if it was an incorporation tax. Consequently, he has a letter from me to the effect that when the time comes that the internal revenue department and I make a settlement as to my taxes, that then he shall have a complete settlement in writing by a certified public accountant to that effect.

Now, with regard to the Seven Seas Tavern, he had borrowed money. He was in that deal with my

(Testimony of Army A. Seijas.)

brothers. He had borrowed money. The Tavern went broke, and I had a mortgage and I foreclosed my mortgage after they had lost their license and had gone broke, and he now wants an accounting as to what I had done with the money—with the property that had been foreclosed upon after he and my brother had abandoned it, whenever the date of it was.

Q. So that it is then your testimony, Mr. Seijas, that with respect to the accounting suit that is pending [810] between you, or suit for an accounting would be a better way to state it, the only issue in that case is an accounting with respect to the one operation known as the Seven Seas Tavern, is that correct?

A. That is his chief contention. I don't recall what his lawyer's claim in the complaint is as a lawyer would know how complaints are prepared and cover a multitude of matters, but that is his chief complaint, as I understand his cause of action.

Q. Well, the complaint has been served on you, hasn't it? A. Yes.

Q. And you have read the complaint?

A. Yes, I have.

Q. You are familiar with the contents of it?

A. Well, I have read it and it's been—it was served on me in January of this year, and I don't recall what it says in detail except as I have told you here, that it's a suit for an accounting of the Seven Seas particularly. [811]

(Testimony of Army A. Seijas.)

Q. Would you say it isn't an account for all these other enterprises?

A. No. You see, Mr. Mead—when the White Elephant Tavern sale was settled I received a certain amount of money which I told him I was going to hold in trust.

Q. When was this sale?

A. That was back in 1949, but we didn't get the money until I think '52, after the Internal Revenue Department was already trying to go into these various matters the same as you are today, so I told him that I was not going to divide up that money until I found out what the situation was with regard to income taxes, and that I was going to hold that money pending a determination of my status and my liability with the Government. I never received a statement as yet because, as I understand it, they have to get rid of criminal matters before they take up civil matters.

Q. Well, the inquiry——

A. And that was agreeable to him. That was agreeable to him and gave me a letter to that effect that I gave him a letter just like Mr. Forman and I used to exchange what we call these little markers to indicate what his rights were and what my rights are.

Q. So, then, your reason for not making an accounting to Mr. McCusker or a complete accounting —excuse me? [812] A. Excuse me.

Q. Your reason for not making a complete accounting to Mr. McCusker was due to the fact that

(Testimony of Army A. Serjas.)

the Internal Revenue Service was investigating your income tax returns and you did not wish to turn Mr. McCusker's money over to him until your tax liability could be determined, is that correct?

A. No, that is not correct. The question of the tax liability of Mr. McCusker as an officer of the Apex Tavern and my income tax liability as an officer of the Apex Tavern was also under investigation.

Q. Well, now, then, it is your testimony that you did make an accounting to Mr. McCusker but that it was in 1952, is that correct?

A. We had an accounting, and he knows——

Q. Would the witness be instructed to testify with respect to the fact, your Honor, and not with what Mr. McCusker knows.

The Court: You had best answer the question directly, if you can.

The Witness: May I have the question, please?

The Court: Read the question, please, Mr. Reporter.

(Thereupon, lines 12, 13, and 14 above were read by the reporter.) [813]

The Witness: Yes.

Q. (By Mr. Mead): And that was a complete accounting, did you say, or just a partial accounting?

A. No, that—I would call that a preliminary accounting. He knows how much money is involved.

Mr. Mead: Now, your Honor, could that be stricken as not responsive?

(Testimony of Army A. Seijas.)

The Court: Yes, I think so.

Q. (By Mr. Mead): How much money——

The Court: However, the question is of a character that might well elicit such a response.

Mr. Mead: What Mr. McCusker knows, of course, he will testify to.

The Court: The answer is stricken, but I think the question was in a form that might be difficult for the witness to thoroughly understand.

Q. (By Mr. Mead): How much money did you turn over to Mr. McCusker in 1952 on the occasion of this accounting that you made to him?

A. I did not turn any money over to him.

Q. So, up to the present time, then, you have not turned any of his money over to him for any of these ventures that you have described which were liquidated? A. He has no money coming.

Q. He has no money coming? [814]

A. No, he has no money coming as far as our accounting shows.

Q. As far as your accounting shows?

A. That is right.

Q. So, now, then, it is your testimony that rather than delaying this accounting to Mr. McCusker because of the fact that your income taxes were under investigation and your liabilities had not been determined, you haven't turned his money over to him because he has no money coming?

A. No, I won't go that far, Mr. Mead.

Q. What is the fact, sir?

A. The fact is that in my opinion and according

(Testimony of Army A. Seijas.)

to my bookkeeper he does not have any money coming, and in his opinion he thinks that he has paid off the note, but, nevertheless, the monies that we have I am still holding intact until a certified public accountant can go over these matters and at the same time determine what tax liabilities are owed, first, to the Government, and, second, as between ourselves.

Q. All right. Now, Mr. Seijas, you have stated that you are holding this money intact?

A. Yes.

Q. Where are you holding them, what bank account?

A. I don't know what bank account I have them in, but I [815] do know that part of the funds are in Moses Lake and part of them are in Seattle.

Q. All right. And what bank are the funds in in Moses Lake that you are holding for Mr. McCusker and yourself matter can be checked?

A. Part of it is in the Moses Lake Branch of the Seattle First National Bank.

Q. All right, sir, and in what other bank?

A. The rest of it, I think I have in currency.

Q. The rest that you are holding is in currency?

A. Yes.

Q. And where is that currency held?

A. In Seattle.

Q. And is it held in a safety deposit box?

A. I think I have it at home.

Q. You think you have it at home?

A. Yes.

(Testimony of Army A. Seijas.)

Q. Then, the money you are holding intact for Mr. McCusker's accounting is held at home in currency and in the Moses Lake Branch of the Seattle First National Bank? A. That is right.

Q. And in whose name in that bank is that accounting?

A. Moses Lake Development Company.

Q. And you are an officer of that corporation?

A. I am. [816]

Q. And that is the only bank account that any of these funds are held in and the rest are held in your home in cash? A. That is right.

Q. Is it not a fact, Mr. Seijas, that some of these investments that you have made during these years, 1946, 1947, and '48, were made from the funds received by you and Mr. McCusker from liquidation of these various enterprises for which you have not made an accounting to him?

A. No, sir, that is not the fact.

Q. That is not the fact? A. No.

Q. Now, I believe you testified, Mr. Seijas, on your direct testimony with respect to the enterprises known as the Green Parrot Theater?

A. Yes, sir.

Q. And which you stated that in considerable detail the conversations between yourself and Mr. William Forman that his father should have an interest in this enterprise, and you described his father, Sam Forman had an interest of 25 per cent and you described your interest and William Forman's interest and his brother Al Forman's inter-

(Testimony of Army A. Seijas.)

est. Is it not a fact that you were aware when you gave that testimony that Mr. Sam Forman, [817] William Forman's father, passed away just a few months ago? A. I am not aware.

Q. You didn't know his father passed away?

A. I am not aware of that.

Q. I will ask you if it is not a fact, Mr. Seijas, when you were called upon during the occasion of your trial, to describe the partners in this venture, that you did not state that Mr. Sam Forman was a partner but stated that the other individuals, yourself, Bill Forman, and Al Forman, were the partners in this enterprise and you did not mention Mr. Sam Forman at all?

A. Mr. Sam Forman's name does not appear on the income tax returns indicating that he ever was a partner.

Q. You knew he never was a partner?

A. I knew he was never a partner in March of 1946 when the income tax papers were given to me?

Q. And you knew when you testified on your direct case that he was not a partner?

A. He never was a partner. That is exactly what I am trying to tell you.

Q. Did you testify that he was?

A. I didn't testify he was. I testified he was supposed to be.

Q. And you didn't testify that he was a partner? [818] A. Not to my knowledge.

Q. In any event, when you testified in the former trial you testified that he was not a partner

(Testimony of Army A. Seijas.)

and the partners were William Forman, Al Forman, and yourself?

A. That is right; and that is the same thing I testified to in this trial.

Q. And that is the recollection of your testimony?

A. I don't remember what I testified to then. I am telling you what I testified to the other day. My recollection is that Mr. Sam Forman should have been a partner but was not a partner.

Q. He should have been a partner?

A. Yes.

Q. Now, Mr. Seijas, you testified in your direct testimony on numerous occasions that these holdouts that you have described were not entered in the books or records of the partnership business of the pinball enterprises between yourself and Bill Forman during the years '42 to '45 inclusive, and you also testified that the books and records were destroyed or lost, substantially, for this period of time, is that right? A. Yes, sir.

Q. Where are the journals and ledgers of the business which would show the receivables during this period of time?

A. '42 to '45? [819]

Q. '42 to '45.

A. You are talking about ledgers and journals?

Q. The ledgers and journals which would show the receivables of this business day by day, the day by day receipts, or whatever you call them, the permanent records

(Testimony of Army A. Seijas.)

A. I don't know where they are.

Q. You don't know where they are?

A. I don't know where they are.

Q. When did you last see them?

A. I don't know when I last saw them. I don't know if we used them or didn't use them prior to the trial a year ago. I don't know.

Q. They were in your possession, were they not, sir?

A. They have been in my possession for a long period of time and during the period of investigation of this income tax matter.

Q. Those records were never destroyed?

A. I never destroyed them.

Q. There was some mention, Mr. Seijas, of a destruction of some records of the pinball enterprises which were left in Mr. Phalen's office, Mr. E. D. Phalen. These permanent records were never destroyed in connection with that destruction, were they?

A. Well, you have the exhibit there in front of you that would tell what was destroyed. I don't recall what was [820] destroyed. I don't remember.

Q. Will you hand this to the witness?

A. It says, "Inadvertently discarded, useful records from company, and cancelled checks, check stubs, distribution sheets, collection reports, deposit books, deposit slips, employees' records, payout slips, weekly expense slips" is what it says was destroyed there.

(Testimony of Army A. Seijas.)

A. I don't remember whether I went after I left your home.

Q. Now, I will ask you, Mr. Seijas, if it is not a fact that you made a demand on Bill Forman about two weeks before this conversation in my home in Los Angeles, California, that he advance you then $70,000, approximately?

A. I would have to deny that, Mr. Mead.

Q. You state you would have to deny it. It is a fact or not a fact?

A. My best recollection is that it did not happen.

Q. But would you state that it did not happen or it did happen or you can't remember?

A. I can't remember, but my best guess is that it did not happen.

Q. That would be a guess, however?

A. Yes, sir.

Q. Did you tell Mr. Forman that he had an agreement to indemnify you against any damage or loss which might arise out of your advancement of $100,000 in 1948?

A. Your question is, did I tell him?

Q. On the occasion within two weeks prior to the time of [823] my conversation with you in Los Angeles?

A. I have no recollection about the meeting two weeks before at all.

Q. You have no recollection?

A. I wouldn't have to tell it. He should know about it, about the agreement.

(Testimony of Army A. Scijas.)

Mr. Mead: I move, your Honor that portion of the witness' remark be stricken.

The Court: Yes, that is a volunteered statement and it is stricken.

Q. (By Mr. Mead): Did you at any time following your indictment, then, prior to your trial make a demand on Bill Forman for $70,000 or approximately that amount?

A. Not that I recollect.

Q. Would you say that you did or you didn't or you just don't remember?

A. I would say that I didn't because I never had the bill from the government showing what my tax liability was.

Q. So that is the reason why you say that you don't think you ever did? A. That is right.

Q. On the day following your conviction in this court last summer, I will ask you whether or not you called Bill Forman's residence in Los Angeles where he was living at that time and talked to his wife Dorothy [834] Forman?

A. It wasn't the day following my conviction. It was two days. It was a Sunday morning.

Q. A Sunday morning which was two days following your conviction? A. Yes, sir.

Q. And did you not then advise Mrs. Forman at the time of that telephone call that if Bill Forman knew what was good for him, he better get up here in a hurry?

A. I advised her that there had been certain matters brought into evidence that Bill Forman

(Testimony of Army A. Seijas.)

Q. There is nothing about journals or ledgers, permanent records? A. No.

Q. You saw those recently as shortly before your trial last year, in 1955, didn't you?

A. I wouldn't say shortly before. I know they were available either to the bookkeepers or to the Government. I had nothing to do with them. They were in the office and they served no purpose as far as I was concerned. I had nothing to do with them or looking them over. Even if I did look them over, I wouldn't have been able to understand them anyhow.

Q. And so you don't know where they are now?

A. I haven't any knowledge of where they are, Mr. Mead.

Q. Now, Mr. Seijas, following the period of your indictment, which I believe was in November of 1953, did you make any demands upon William Forman for the payment of monies? [821]

A. I don't think I made any demands on Mr. Forman. We had an understanding and he complied with the understanding.

Q. During the period of 1953 from the time of your indictment, and particularly in 1954, did you not make demand for money upon him to pay some taxes that you said you owed and wanted to pay?

A. I am not aware of that.

Q. You did not make any such demand?

A. I am not aware of that.

Q. You are not aware of that?

A. No, sir.

(Testimony of Army A. Seijas.)

Q. Is it a fact that you might have overlooked it?

A. It may be. If you will refresh my recollection, why perhaps I can answer your question.

Q. I will ask you, Mr. Seijas, that if prior to a few days or a few weeks prior to December 9, 1954, at Los Angeles, California, you demanded that Bill Forman advance to you and give you $67,000 to $70,000 of money for the purpose of paying some taxes which you said you wanted paid?

Mr. Obenour: What was the date?

Mr. Mead: Within two weeks of December 9, 1954.

Mr. Obenour: December?

Mr. Mead: December 9, 1954. [822]

The Court: Is the question concluded, Mr. Mead?

Mr. Mead: Yes, sir.

The Witness: I wish you would restate it because I have been waiting for him to finish.

The Court: I thought you were going to finish also because of your looking at your papers there. Would you restate the question to get it clearly before the witness and all of us. Restate it, please.

Q. (By Mr. Mead): I will ask you whether or not in the month of November, 1954, in Los Angeles, California, you demanded that Bill Forman advance to you some $70,000?

A. My answer to that question would be no.

Q. Your answer to that is no? A. Yes.

Q. I will ask you, Mr. Seijas, whether or not at

(Testimony of Army A. Seijas.)

7:30 p.m. o'clock on December 9, 1954, you came to my home in Portland and advised me that you had made an agreement in 1948 with William Forman at which time you advanced a hundred thousand dollars in the nature of a loan to some of Bill Forman's associates in California to the effect that if any tax liability arose on his part or your part, or was incurred on your part, that Bill Forman [823] had agreed to indemnify you from any loss or financial responsibility. Did you so advise me at that time when you came to my home?

A. I don't recollect advising you, but it was the fact that that was our agreement.

Q. And did you not so advise me at that time?

A. I don't recollect whether you and I discussed it or not, but the fact remains that was our agreement.

Q. Did you not come to my home at that time for that purpose?

A. I don't remember what the purpose was, but I do remember coming to your home and discussing the matter of the tax case.

Q. And did you not at that time advise me that Bill Forman had not advanced you that money or had given you that money and that he did not seem inclined to give it to you, and that there were matters about this case which I did not know about and that you had some records or documents which Mr. Forman did not know about, and that those documents or records could be construed several ways, and that they would prove that he was connected

(Testimony of Army A. Seijas.)

with your venture after 1946, and ask me to bring that to Mr. Forman's attention and to then see whether he would advance you the $70,000 that you wanted at that time, and was not that your sole purpose in coming to [824] my home?

The Court: There is quite a number of matters there. If you feel able to answer all of that, you may do so. Otherwise I would require it to be broken down somewhat because there are a number of matters involved in that question.

Mr. Mead: Strike the latter part of that question, your Honor.

The Court: Strike the latter part with respect to "your sole purpose." Can you answer the rest of it?

The Witness: I don't think I can.

The Court: Do you want it read?

The Witness: Yes.

The Court: Read it, please.

(Thereupon, the last question was read by the reporter as follows: "Question: And did you not at that time advise me that Bill Forman had not advanced you that money or had given you that money and that he did not seem inclined to give it to you, and that there were matters about this case which I did not know about, and that you had some records or documents which Mr. Forman did not know about, and that those documents or records could be construed several ways, and that they would prove that he was connected with your venture

(Testimony of Army A. Seijas.)

after 1946, and ask [825] me to bring that to Mr. Forman's attention, and to then see whether he would advance you the $70,000 that you wanted at that time, and was not that your sole purpose in coming to my home?")

The Court: The last portion has been stricken, go ahead.

The Witness: My recollection of coming to your home, Mr. Mead, is to discuss with you the status between Bill Forman and I in connection with the case that was pending——

Mr. Mead: I would like to have the question answered just yes or no.

The Court: Well, if you can answer the question yes or no, you may do so, and then give any explanation you want. The reason I am concerned, Mr. Mead, is because the question calls for three different matters and it might be difficult for the witness to keep——

Mr. Mead: Maybe it would be better if I started all over again.

The Court: I think so. I think you had better break each matter down. I don't want to interfere with your examination, particularly cross-examination, but I do think that this is a compound question. [826]

Mr. Mead: Thank you, your Honor.

Q. (By Mr. Mead): You did come to my home at that time, Mr. Seijas, didn't you? A. Yes.

Q. And you had called me on the telephone pre-

(Testimony of Army A. Seijas.)

vious to that on December the 6th and on December the 7th, did you not?

A. I don't recall whether I had or had not.

Q. You don't recall?

A. I don't recall whether it was on the 6th or 7th or not.

Q. Did I advise you that I was home ill with the flu? Was that your reason for coming to my home rather than to my office? A. Yes.

Q. That was the reason?

A. That's right.

Q. So you recall that we did have a telephone conversation?

A. Yes, I recall we had a telephone conversation, and I recall being at your home in the evening, and I recall you being sick with the flu.

Q. Now, did you at that time when you came there, advise me that you had made a demand upon Bill Forman for $70,000 of money?

A. I don't recall ever telling you that that I had made a demand on him for $70,000. [827]

Q. You don't recall that? A. No, sir.

Q. Do you recall having made a statement to me at that time that you had demanded of Bill Forman that he advance you approximately $70,000 at that time?

A. I don't recall that I had told you that I had demanded of Bill Forman that he pay $70,000 at that time.

Q. Is your testimony, then, Mr. Seijas, that you don't recall it or that it never took place?

(Testimony of Army A. Seijas.)

A. No. My testimony is that I do not recall the question that you asked me.

Q. You do not recall it? A. Yes, sir.

Q. Your testimony would not be that it did not take place?

A. I have no recollection of it, so, therefore, I can't tell you whether it did or did not take place. I just don't have any recollection of that particular question.

Q. Did you not request that I advise Bill Forman that he should give you the sum of $70,000 at that time? A. I did not tell you that.

Q. Is your testimony that you did not do it or that you do not recall it?

A. I do not recall it, but I am pretty sure that I didn't tell you that. [828]

Q. Did you not tell me at that time that *there facts* about the case that I did not have information on and that you had——

A. Just a moment. You are going into a compound question again. I would like to answer that. Break it down for me and I think I could answer it precisely.

Mr. Mead: I think I should be permitted at least to complete the question.

The Court: Complete the question but keep in mind generally the fact that these compound questions do lead to difficulty.

Q. (By Mr. Mead): Did you not at that time advise me that there were facts about the case that I had no knowledge of? A. Yes.

(Testimony of Army A. Seijas.)

Q. Did you not at that time advise me that you had some documents or papers which would indicate that Bill Forman had a connection with your pinball business after 1946?

A. Yes, and that was the chief purpose of my visit to you, Mr. Mead.

Q. And did you tell me what that document was?

A. I don't recall that I disclosed it to you.

Q. Did you not tell me that I should get the information concerning that matter from my client, that it was not [829] up to you to give me that information?

A. I can best answer that question by telling you that you didn't have the facts in the case and you had better get the facts from your client.

The Court: That is what you told him?

The Witness: That is what I told Mr. Mead at that meeting.

Q. (By Mr. Mead): Substantially, the answer to my question would be yes?

A. To that last, yes.

Q. Did I not inquire as to the nature of the document and you told me I should get that information from my client? A. Yes, sir.

Q. Did you not request that I contact Bill Forman and advise him of the situation?

A. My recollection is that I told you to tell Bill to tell you the truth and give you all of the facts.

Q. And did you not request that I tell Bill Forman that you had some document that you had refused to disclose to me? A. No.

(Testimony of Army A. Seijas.)

Q. You did not?

A. No. We didn't go into that, I don't think.

Q. I beg your pardon? [830]

A. I say, we didn't go into that, I don't think.

Q. Did you not advise me that you had made a demand upon Bill Forman for approximately $70,000?

A. I don't recall ever telling you that.

Q. Well, you don't recall it or would you say that it never took place?

A. I don't know that—my testimony would be that I don't recall it because I can't say that it never took place because I have no recollection on it.

Q. At that time, of course?

A. At this time right now, that I am testifying, I have no recollection of talking to you about $70,000.

Q. At that time? A. Yes.

Q. Did you not tell me that you had an alleged agreement with Bill Forman made in 1948; that if tax liability should result from the advancement of $100,000, that he was to indemnify you from any liability in that connection?

A. I told you that.

Q. I beg your pardon?

A. I told you that.

Q. You told me that? A. Yes, sir. [831]

Q. And that indemnification, of course, would be in the form of money, would it not, sir?

A. We didn't talk in what form it was to be in,

(Testimony of Army A. Seijas.)

but I told you about the agreement that Mr. Forman and I had.

Q. And was not that then stated in connection with the demand that you had that he advance $70,000?

A. Mr. Mead, I don't recall ever talking about any sum of $70,000 because, to my knowledge, I have never received any bill from the government yet.

Q. But, it is your recollection that we had such conversation, is it not, that you came to my home, and we had a conversation at that time?

A. It is my recollection that I came to your home and had a conversation with you concerning my tax matter.

Q. And you state that you came there and told me that there was information that I did not have, I should get it from my client?

A. I told you that your client wasn't telling you all of the facts involved in this case.

Q. And you also told me about the agreement which you claim you had with him, that he would indemnify you or hold you harmless for any tax liability arising out of the advancement of this $100,000?

A. That is correct. I told you that.

Q. So you did tell me those two things? [832]

A. Yes, sir.

Q. You were there about an hour, were you not, or less? A. An hour or less.

Q. And you went back to Seattle that night?

(Testimony of Army A. Seijas.)

A. The only checks that we could find were three. When I say "we" I mean my family and I.

Q. So then the only checks that you could find were the three that you produced here?

A. Yes, sir.

Q. Did you find your checkstubs, however, for the balance of that year, 1947, 1948?

A. I think the checkstubs are already in evidence.

Q. But you could not find any other check where that had been accomplished, had it?

A. I don't understand your question.

Q. You could not find another check that was in evidence for [850] that period of time that showed that that had been done?

A. The checks that are in evidence, the three checks that are in evidence and the checkstub book that is in evidence is all that I could find.

Q. Mr. Seijas, I will ask you if it is not a fact that this situation of Mr. Forman remaining in the business was discussed, but that actually that was never done and there was a bona fide loan from you to Mr. Forman—from Forman to you, rather. Is that correct?

A. That is not correct, Mr. Mead.

Q. That is not correct? A. No, sir.

Q. I will ask you, Mr. Seijas, whether or not it is also a fact that your arrangement with Mr. Forman with regard to the repayment of this 15 thousand dollar loan was that you would apply at least one-half of your drawing until the loan was

(Testimony of Army A. Seijas.)

repaid. A. No, sir.

Q. That is not a fact?

A. That is not the fact.

Q. I will ask you if it is not a fact that he requested payment of the loan at the occasion that he had of paying his capital gains tax the following year, and you paid him that amount at that time, in addition to a thousand dollars, because you owed him that money at [851] that time.

A. No, sir.

Q. That is not a fact?

A. No, sir, that is not a fact.

Q. Who is Mr. Robert Rankin?

A. Mr. Rankin was a certified public accountant that I employed at the last—at the first trial.

Q. So now Mr. Jacobson was succeeded by Mr. Whittle, and was succeeded by Mr. Rankin in your behalf at the time of the last trial? A. Yes, sir.

Q. Did you turn over records and information and make statements with regard to your financial position to Mr. Robert Rankin for the purpose of enabling him to prepare a net worth statement for use at your trial? A. Yes, sir.

Q. I will ask you, Mr. Seijas, whether it is not true that you represented, at the time of your trial, and had prepared by Mr. Rankin for use thereat, this net worth statement that you have referred to.

A. I don't know what you have in your hand, but let us say that Mr. Rankin prepared a net worth statement for the purpose of my trial.

Q. And that was introduced in evidence and you

(Testimony of Army A. Seijas.)

should know about, and that he better come up and look at them. That was Sunday morning.

Q. I will ask you whether you did not state to her at that time that if he knew what was good for him, he better get up here and see you in a hurry?

A. Not to see me, but to see the evidence.

Q. See the evidence? A. Yes.

Q. So that is your recollection?

A. That is my recollection.

Q. You didn't say that to her, then, that he had better—if he knew what is good for him, he better get up here in a hurry and see you? You did not make that statement? [835]

A. No. I don't recall whether or not I told Mrs. Forman about an exhibit that had gone in, that I thought Mr. Forman should see, but I was talking about Mr. Forman coming up and looking over the exhibits, one of which I had not intended that be introduced in evidence.

Q. I see, so that was the sole reason that you called her?

A. The sole reason that I called——

Q. Or called him? A. Yes.

Q. And talked with her?

A. And talked with her was to advise Bill Forman of certain matters that had been introduced in my trial which were detrimental to Mr. Forman, and so that he could better protect himself during his trial.

Q. Did you tell her that you had a document which would be detrimental to Mr. Forman?

(Testimony of Army A. Seijas.)

A. No, I did not tell her I had any document. I was talking about exhibits being introduced, a certain document. Specifically, it was my checkbook, my stub checkbook. Now, whether I told her it was the stub checkbook or not, I don't recall. It was not my intention that that document be introduced in evidence.

Q. So it is then your testimony that you did not tell her in effect, "That if Bill knows what is good for him, he better get up here and see me"? [836]

A. I cannot tell you exactly what the words were, but I am telling you what I think they were and as I recollect them. I called Bill Forman Sunday morning following my conviction in which I wanted to advise him, and I told Dorothy to tell him that he or somebody for him should look at these exhibits, that I had not intended a certain exhibit to be introduced in evidence.

Q. So that is your sole reason for calling?

A. That is the only reason I called Bill Forman was to advise him as to what had gone on insofar as evidence in my trial was concerned.

Q. That was your sole reason for calling at that time? A. Yes, sir.

Q. All right. Now, with regard to the paper which you produced here in evidence, for admission in evidence, which was a document dated, I believe, August 1946. That document you produced here or found in your records or possessions last Friday or your brother found; is that right?

A. My brother had it.

(Testimony of Army A. Seijas.)

Q. He had found it?

A. He had it. I don't know where he—probably got it out of his office.

Q. When did you turn that document over to your brother?

A. I don't recall that I ever turned it over to him. He [837] cleaned out my office.

Q. And so he just had that document because he cleaned out your office?

The Court: Incidentally, which brother are you speaking of now?

The Witness: Henry. What is your question, please?

Q. (By Mr. Mead): He had that document among all the other documents when he cleaned out your office? A. Yes.

Q. Did you request that he bring that document here? A. Yes, I did.

Q. When did you first advise the government, Mr. O'Leary or Mr. Oftedal or Mr. Obenour or anyone representing the government of the existence of that document?

A. I don't remember when I first advised them or whether my brother advised them. I don't know how.

Q. When did you first advise them?

A. I don't remember when I first advised them.

Q. You don't remember? A. No, sir.

Q. But in any event, the document was produced for their examination on last Friday, approximately?

(Testimony of Army A. Seijas.)

The Court: Exhibit 111, please.

Q. (By Mr. Mead): A day or two before you testified with [838] respect to it?

A. I don't know. Whenever my brother got it, that is the date it was brought over here. That is all I know.

The Court: Excuse me. May I interrupt here? Are you referring to Exhibit 111 so that the record may show what you are talking about? Here is 111.

Mr. Mead: No, I don't think so, your Honor.

The Court: I would like to have the——

Mr. Mead: No, this is not it.

The Court: Which exhibit number are you referring to so that we may understand what this is all about?

Mr. Mead: Exhibit 117, your Honor.

The Court: 117. Is that the one you have been referring to, Mr. Seijas?

The Witness: Yes, it is, your Honor.

The Court: All right. Go ahead. Excuse me for interrupting.

Q. (By Mr. Mead): And you state, Mr. Seijas, that you don't know when that was brought to the attention of the government? A. No, I do not.

Q. You do not know? A. No, sir.

Q. But in any event, your brother Henry brought it to you [839] here, did he, at the court house?

A. I think he brought it to me here in the marshal's office, yes.

Q. And delivered it to you in the marshal's

(Testimony of Army A. Scijas.)

office? A. Yes.

Q. When did he do that, what day?

A. I don't know what day it was.

The Court: Do you mean last week sometime?

The Witness: Yes, it was last week. I started testifying Wednesday. I think it was Wednesday or Thursday.

Q. (By Mr. Mead): Did he bring it here to you at your request?

A. Yes, he brought it to me at my request. I mean he delivered it to me at my request rather than delivered it to Obehour.

Q. You knew he had the document?

A. I knew he had the document.

Q. And that was sometime last week he brought it to you? A. Yes, sir.

Q. And had you ever shown that document to Mr. O'Leary or Mr. Oftedal or told them about the existence? A. Had I showed it to them?

Q. Yes, sir.

A. I never showed it to them before.

Q. Had you told them of the existence of the document? [840]

A. We had discussed this document.

Q. When did you first discuss it with Mr. O'Leary or Mr. Oftedal?

A. I think we discussed this document, I think, the day before my brother brought it.

Q. So it was only a day or so before he brought it to you here, and that was last week sometime he brought it? A. Yes, sir.

(Testimony of Army A. Seijas.)

Q. Is that right? A. Yes, sir.

Q. So that was the first time, then, that you advised them about the existence of it?

A. That they knew about this document as far as I was concerned.

Q. Exhibit 117, is that right?

A. Yes. Just a moment, Mr. Mead, let me have that question again, if you please.

The Court: You may.

The Witness: Read the question.

(Whereupon Lines 6 through 15 on this page were read by the reporter.)

The Witness: I am talking about 117.

Q. (By Mr. Mead): Exhibit 117, is that correct, sir? A. Yes, sir.

Q. Is that the paper or the document that you had reference [841] to when you called at my home on the evening of December 9, 1954, and told me that there was documents that I didn't know about?

A. I don't recall that I had any particular documents in mind at the time I talked to you, Mr. Mead.

Q. You didn't have any particular document in mind?

A. No, sir. My conversation with you dealt with the overall picture or lack of information on your part.

Mr. Mead: Now, could we have Defendant's Exhibits, I believe, 702 or 3?

The Clerk: 701.

Q. (By Mr. Mead): Now, Mr. Seijas, back to

(Testimony of Army A. Seijas.)

the sale to Mr. Morin of the interest of Mr. Forman in the City of Bremerton which occurred in the year 1946, in August. Was it your testimony that Mr. Forman negotiated with Mr. Morin for that sale?

A. Yes.

Q. And he conducted the negotiations with Morin? A. Yes.

Q. How long did those negotiations continue?

A. My recollection is that he came in just before lunch, and he talked to Mr. Forman, and Mr. Forman and he went out to lunch. I don't think anything was done about it until the day after.

Q. And what happened the day after? [842]

A. The day after, why, the deal was closed between Mr. Forman and Mr. Morin.

Q. So Mr. Morin came to the office and went to lunch with Mr. Forman. Did you go with him?

A. I did not.

Q. And the following day he came into the office and the deal was closed?

A. No. If he came in on a Monday, the deal was closed on Wednesday.

Q. So the negotiations lasted over a period of time from Monday to Wednesday?

A. No. The negotiations I don't think lasted over an hour or so or maybe two hours, but the deal wasn't actually closed there was no further talk between the parties, as I recall, until two days after the first day in which on the third day is when they closed the transaction.

Q. And all these negotiations on the one day,

(Testimony of Army A. Seijas.)

Monday, were held between Mr. Forman and Mr. Morin?

A. Yes. That was the purpose of my going out and seeing Mr. Forman, to see which one of us was going to talk to Mr. Morin.

Q. And it was concluded that Mr. Forman would talk with him? A. Yes, sir. [843]

Q. And that then on Wednesday Mr. Morin came in and the deal was closed, and he paid the $30,000, is that right? A. Yes, sir.

Q. And you prepared the papers, did you?

A. Yes, sir.

Q. Now, then, it is your testimony now that Mr. Forman remained a partner in this venture after the year 1946 and had a one-half interest in your one-half in this venture until the time it was wound up, is that right? A. Yes, sir.

Q. And that the money that was paid, I think you stated that the $15,000 was paid to him at that time and some sum of money was retained by you?

A. Yes.

Q. Is it not a fact, Mr. Seijas, that actually Mr. Forman sold his interest at that time and had no interest after that time, and that the $15,000 that was retained by you was in the form of a loan to you? A. No, sir.

Mr. Mead: We offer in evidence, your Honor, Defendant's Exhibit 501 for identification. I think Mr. Obenour is familiar with it.

Mr. Obenour: No objection.

The Court: It hasn't been called to the attention

(Testimony of Army A. Seijas.)

of the witness. Do you wish it to be [844] identified?

Mr. Mead: I would like to have it shown to the witness, if your Honor please.

The Court: Yes. The document is offered, and no objection you say?

Mr. Obenour: No objection.

The Court: It is admitted.

(Defendant's Exhibit No. 501 for identification was received in evidence.)

The Court: It is not customary to admit documents without some identification in advance but since——

Mr. Mead: The reason I did was Counsel produced it at my request and I knew he was familiar with it.

Mr. Obenour: I have no objection.

The Court: I wasn't being critical. I merely indicated that ordinarily the court is advised of what the nature of the document is before it is admitted in evidence, but since you both agree it be admitted, there is nothing further for me to be concerned about.

Mr. Obenour: With that one thought, I have no objection to its admission. However, I would request that identification of just what [845] it is.

The Court: I assume you are going on with that. I wasn't in any sense being critical.

Mr. Mead: The reason Mr. Obenour is familiar with it is because he produced it for me, and so I knew he knew the contents.

(Testimony of Army A. Seijas.)

The Court: Go ahead.

Q. (By Mr. Mead): What is that exhibit, Mr. Seijas?

A. This is a stipulation entered into between myself and yourself and Mr. Obenour concerning the description of certain investments that I had which did not require any proof, but which we admitted these to be the facts without having to prove them in order to shorten the time of trial.

Q. Is it not a fact, Mr. Seijas, that that stipulation was not entered into between Mr. Obenour and myself and yourself, that I had nothing to do with it at all, that my signature does not appear on it?

A. No, your signature does not. I am just reading from the beginning. It says, "Stipulated by defendant, Army Seijas and his counsel and defendant, William R. Forman, and his counsel and by the Plaintiff, United States of America, that were witnesses called, they would testify that Army Seijas acquired the following assets or interests in such assets for the amount and at the time [846] stated below, and that said assets or interests therein were retained by Army Seijas until December 31, 1949," et cetera.

Q. So, actually, Mr. Seijas, it is a stipulation entered into between yourself and your attorney, Mr. Sager, and Mr. Obenour on the occasion of your trial? A. Yes, sir.

Q. And no other persons are party to that stipulation? A. Yes, sir.

(Testimony of Army A. Seijas.)

Q. That is a fact? A. Yes, sir.

The Court: There is apparently, however, a recital to the contrary in the document.

Mr. Mead: That is true, your Honor, but it is a stipulation only between Mr. Sager and the government.

The Court: That is right.

Mr. Mead: No one else.

The Court: It's 12 o'clock. Do you want to go on for a moment, or are you ready to adjourn for lunch?

Mr. Mead: This will be a good place to break.

The Court: I thought so, too. We are going to have our lunch now until 1:30. I hope you have [847] a pleasant lunch, and keep in mind my admonition to you also. You will get tired of hearing me say that, and perhaps might be lulled into a sense of not paying any attention to it. I hope you won't. I mean it seriously everytime. I am just trying to shorten it down.

Have a pleasant lunch.

(Whereupon, the noon recess was taken until 1:30 p.m. of the same day.)

After Recess

The Court: Court is reconvened following the recess. Everyone is present. You may proceed when ready.

Mr. Mead: Thank you, your Honor. I believe the witness has Defendant's Exhibit 501.

Q. (By Mr. Mead): Mr. Seijas, with regard

(Testimony of Army A. Seijas.)

to the sale of the pinball routes in the City of Bremerton in August, 1946, I think you testified that Mr. Forman was still a partner with you and that the $15,000 that you retained was not a loan? I will ask you whether or not it is a fact that on the occasion of your trial here in this court last summer, that you and your attorney signed a stipulation with the government, which is the stipulation that you have in your hand, in which this $15,000 was reported as a loan, to which you were indebted to Mr. Forman for? A. Yes, it does.

Q. Is that a false representation, Mr. Seijas?

A. Yes, it is.

Q. And you signed this with your attorney and with Mr. Obenour and made this representation to the Court at that time?

A. I signed the stipulation.

Q. Now, Mr. Seijas, you stated, I think, that this City [849] Pinball venture was continued until 1948 or 1949, and that there were drawings during that period of time, although the business was not particularly successful. Is that correct?

A. Yes, sir.

Q. And you also stated that you applied for one-half of these drawings or turned them over to Mr. Forman. Is that correct? A. Yes, sir.

Q. And you produced your checkbook, in which you showed, I think, two or three transactions where that was done. Where is the rest of your checks which show that these drawings were applied and turned over to Mr. Forman?

(Testimony of Army A. Seijas.)

caused it to be introduced in evidence during the course of your [852] trial? A. Yes, sir.

Q. I will ask you whether it is not a fact that that net worth statement, prepared by Mr. Rankin for that purpose, showed on it that you were indebted in 1947 to Mr. Forman for the amount of the 15 thousand dollars, this loan being one-half of the sale to Morin, the proceeds.

A. I don't have it before me, but my recollection is that he treated it as a loan, in the preparation——

Q. (Interrupting) I beg your pardon?

A. He treated it as a loan in the preparation of the net worth statement.

Q. Is it not a fact, Mr. Seijas, that you advised him that it was a loan.

A. My recollection is that I did not advise him, that he secured that information from the previous net worth statement that had been prepared by Mr. Whittle.

Q. Is it not a fact, Mr. Seijas, that the previous net worth statement that you referred to, prepared by Mr. Whittle, did not have this item listed as a loan?

A. My recollection is that Mr. Whittle had it listed as a loan.

Q. That is your recollection?

A. That is my recollection.

Q. Could you be in error in that? [853]

A. Of course I could be in error.

Q. Will you please point out in Exhibit 74, which has been handed to you, where Mr. Whittle listed

(Testimony of Army A. Seijas.)

this 15 thousand dollars as a loan to Mr. Forman at the end of the year 1946, a loan due to Mr. Forman? A. I do not find it, Mr. Mead.

Q. So then when you stated that Mr. Rankin got this information from Mr. Whittle's net worth statement you were in error? A. That is right.

Q. Mr. Seijas, is it not a fact that you yourself advised Mr. Rankin that you were indebted to Mr. Forman in the amount of 15 thousand dollars at the end of the year 1946?

A. I have no recollection of advising him to that effect.

Q. Is that not a fact?

A. I say, I have no recollection, Mr. Mead.

Q. You have no recollection of that?

A. Of advising him to that effect. I thought that he had secured the information from this record known as Government's Exhibit 74.

Q. Is it not a fact also, Mr. Seijas, that you advised Mr. Robert Rankin, the certified public accountant whom you employed for that purpose, that you had an arrangement with Mr. Forman with regard to the repayment [854] of that loan, that you were to apply at least one-half of your draws from this business until the loan was repaid? Did you so advise Mr. Rankin?

A. My answer to that would be that I, my best guess is that I did not advise him to that effect. I think that was his conclusion.

Q. That was his conclusion, you think?

A. I think so.

(Testimony of Army A. Seijas.)

Q. But you did not advise him of that?

A. I did not advise him of that.

Q. You heard Mr. Robert Rankin's testimony in the trial in which he testified in your behalf last year, did you not? A. Yes, I did.

Q. And you produced him as a witness in your behalf upon that occasion? A. That is right.

Q. And you heard his testimony, I think you stated? A. Yes.

Q. Would you concur, Mr. Seijas, in this explanation of the payment of one-half of the draws upon this loan, would you concur in this statement:

"His explanation to me was that it had been agreed between them, that is, between he and Forman, that when Mr. Morin purchased Forman's interest, that [855] he, Forman, would take one-half of that money and that he would loan Mr. Seijas the remaining half. The understanding was, further, that the repayment of the loan would be based upon one-half of the monies which he withdrew from the Bremerton Amusement Company. He was to pay him one-half. That was the arrangement.

"Question: That is, Seijas was to pay Forman?

"Answer: One-half, as he withdrew the payment.

"Question: In repayment of the loan?

"Answer: That is right."

Do you agree to that, sir? Would you concur in that statement? Or is that in error? As an explanation of this transaction.

The Court: It is not entirely clear to me whether

(Testimony of Army A. Seijas.)

you want the witness to say whether that appears to be what Mr. Rankin said about it, or whether you want him to state whether that is the fact of the matter. Which is it that you have in mind?

Mr. Mead: I want him to answer whether he concurs in this explanation of the transaction.

The Court: Not whether that is what Rankin said?

Mr. Mead: No. That would be improper, your Honor.

The Court: Go ahead. [856]

Q. You concur that that is the fact?

A. I do not.

Q. Did you make that explanation to Mr. Rankin?

A. Assuming that you are reading from the transcript and that that is what he testified to, I would have to say that I do not recall ever making that explanation to Mr. Rankin with regard to that particular loan, or that particular item. He classified it as a loan.

Q. So it is your statement, then, Mr. Seijas, that you do not recall making that explanation, or your testimony to the effect that you did not make any such explanation?

A. No, I do not recall ever making that explanation to Mr. Rankin. As I stated before, that was his conclusion. I am sure he did not get the explanation from me—pardon me, I don't want to say I am sure—I want to say that that is my best

(Testimony of Army A. Seijas.)

guess, that I did not make that explanation to Mr. Rankin.

Q. So then it is a guess, is that right, Mr. Seijas?

A. It's a guess that I did not.

Q. You did not? A. No.

Q. I will ask you whether or not, also, it is a fact that you provided Mr. Rankin with the records, the checkstubs and the journal entries that corroborated the statement that I have just made with respect to the explanation of this [857] transaction and the repayment of the loan.

A. Mr. Mead, we turned over to Mr. Rankin all of the records that we could get, either from Mr. Whittle or myself, to Mr. Rankin. And he worked from those records that Mr. Whittle had in his office, the records that I had in my office or a combination of both.

Q. Did you examine Mr. Rankin's net worth statement, which we have referred to, and which was introduced as an exhibit in the trial that you had here last summer?

A. I don't remember doing it, but I am sure I must have examined it.

Q. And you were aware that that 15 thousand dollars was listed as a liability to Mr. Forman at the end of the year 1946?

A. I am aware that we had treated it as a loan during this period of time, that is, in the preparation of net worth statements, either Mr. Whittle's, which it is not in, or Mr. Rankin's, which I have not seen for this long period of time.

(Testimony of Army A. Seijas.)

Q. Where are all the records with respect to check receipts and journal entries that Mr. Rankin had at that time, to examine, of the pinball business in Bremerton? Where are those records at the present time?

A. As I told you before, I do not know. I am sure that [858] Mr. Rankin returned all of the records, every record that he had, that belonged to me, that was used in connection with this case—with my case a year ago, I am sure it was returned to me.

Q. They were all returned to you?

A. That is my recollection.

Q. Where are those records now?

A. I don't know where they are.

Q. Have they been lost or misplaced?

A. They have either been lost or destroyed or eliminated. I don't know.

Q. Were they intentionally destroyed, Mr. Seijas?

A. I would say that they were intentionally destroyed in this regard, that they were of no further value as far as I was concerned, and I am sure that when my friends closed up my office they only took the things that they felt were of any importance.

Q. At the time those records were returned to you and when they were destroyed, you knew that this case was pending and that the matter of inquiry into the affairs of the Bremerton pinball business would be the subject matter of this case, did you not, sir?

A. Mr. Mead, I was in McNeil Island Peniten-

(Testimony of Army A. Seijas.)

tiary. I had nothing to do with the closing up of my office. I wasn't present there. [859]

Q. Were they destroyed before you closed your office and went to McNeil Island, Mr. Seijas?

A. No, sir.

Q. You didn't destroy them?

A. No, sir. As far as I know, all of my records were left, with all of my court files, and all of my personal files, down at my office.

The Court: Do you mean at the time that you went to the penitentiary?

The Witness: Yes, sir.

Q. (By Mr. Mead): And these records were stored by your brother, were they, or some relative, at your request?

A. Yes, sir. Many of the court files of pending matters were transferred to another lawyer's office, matters of personal records that he felt were of value were taken to my home. I was served with a subpoena and I searched at my home for the matters included in this subpoena, and I brought those matters here, that I found or could find, which were supplementary to other matters that were resting in Mr. Sager's office from the previous trial.

Q. At the previous trial that you referred to, Mr. Seijas, there was involved, of course, your income tax liability and the evasion of that liability for the years 1946, '47, and '48, is that correct, sir?

A. That was the counts upon which I was tried.

Q. And, as a result of that trial, you were found

(Testimony of Army A. Seijas.)

guilty and were sentenced to the Federal Penitentiary for five years, is that correct?

A. Yes, sir.

Q. When did you resolve, Mr. Seijas, to enter a plea of guilty to the 15th count of the indictment, which involved Mr. Forman and yourself?

The Court: The count now on trial?

Mr. Mead: The count now on trial.

A. I made up my mind to plead guilty to that count, or to the rest of the indictment, oh, I venture to say, maybe 60 days after the, maybe 60 or 90 days after the conclusion of the previous trial.

Q. If you made up your mind to do that at that time, why did you wait until the Friday before this trial commenced, which was on a Monday, a week ago today, before entering your plea of guilty?

A. I surrendered myself to the warden at the penitentiary and after I surrendered myself I did not have very much choice as to where I was going or what I was going to do, Mr. Mead.

Q. Would you please answer my question, Mr. Seijas.

Mr. Mead: May the witness be directed to answer the question. [861]

The Court: Well, I think he has answered. If you want to pursue——

Mr. Mead: He didn't know the place where he was going, but that wasn't the question.

The Court: When you ask him one of those "why" questions, and this is his answer—you may pursue it further, of course.

(Testimony of Army A. Seijas.)

Mr. Mead: Could we have the question, please.

The Witness: I can remember the question, I can answer the question.

Mr. Mead: Read the question, Mr. Reporter.

(The reporter read as follows:

"Q. If you made up your mind to do that at that time, why did you wait until the Friday before the trial commenced, which was on a Monday, a week ago today, before entering your plea of guilty?")

A. Many people do not understand that in the penitentiary you have to do what the warden tells you to do, and it wasn't for me to tell him that I wanted to come over here and plead guilty or not guilty in this or any other federal case. That wasn't for him to decide, or I, as to what we were going to do about my case or when.

Q. (By Mr. Mead): Did you have any consultations with your [862] lawyer or with any representatives of the government, Mr. Obenour, or any of the agents, after you were incarcerated, Mr. Seijas?

A. After I was incarcerated, did you say?

Q. Yes, sir.

A. Yes, I did, after I was incarcerated.

Q. With whom did you have such conferences and when did they take place?

A. I think Mr. O'Leary came over to the penitentiary to interview me some time this spring.

Q. Was that the only conference or contact you had with any representative of the government with regard to this case? A. This case?

(Testimony of Army A. Seijas.)

Q. Or your case or any matter involving this transaction after you were incarcerated.

A. Yes, sir. To the best of my recollection, it was sometime this spring. I think Mr. O'Leary, and some other fellow came over with him.

Q. And that was the only conference you had?

A. Yes.

Q. Who was the other man who came with Mr. O'Leary?

A. The young man sitting in the back of the courtroom, back there, Mr. Keeney.

Q. When did you make known to Mr. Sager your desire to [863] plead guilty in this case?

A. Sometime after I left the hospital last fall.

Q. And that was then before——

A. Pardon me. And after I had read a part of the transcript of the previous my, trial.

Q. So that determination, then, to enter a plea of guilty was conveyed to Mr. Sager prior to the time you were incarcerated? A. Yes, sir.

Q. Now, then, if you had resolved to enter a plea of guilty and you had coiveyed that intention, to Mr. Sager before you were incarcerated, why then did you not enter your plea before you were incarcerated?

A. It was no concern of mine, Mr. Mead, and I did not have anything to do, neither did my attorney, as to when this case was coming up for trial.

Mr. Mead: I don't believe that was the question.

The Court: Put a new question.

Q. (By Mr. Mead): You stated, Mr. Seijas,

(Testimony of Army A. Seijas.)

that you were not able to enter a plea of guilty because you were not a free agent and you were incarcerated in the federal penitentiary, and you went on to explain how that interfered with this. Now, it developed that you had resolved to enter a plea of guilty, you had informed your attorney of that situation, and this all took place before your [864] incarceration. That being so, why did you not enter a plea at that time?

A. The case hadn't been set, and it was no concern of mine. I wasn't going to, I wasn't going to run the case. It wasn't up to me to, or my—when I say "me" I mean my attorneys or I—to liquidate this case or anything else. I was going to the penitentiary and that was the end of that. The time was going to run out on my appeal, and that is all there was to it. When the time ran out, why, I was going to the penitentiary and this case was of no concern of mine particularly.

Q. This case was no concern of yours?

A. That is right.

Q. Did you convey to Mr. O'Leary your intention of pleading guilty and of cooperating with the government in connection with this case?

A. I did not.

Q. Was there any representation made to you by Mr. O'Leary or any other representative of the government that in the event that you cooperated with the government in this case, that your situation with regard to parole and imposition of this sen-

(Testimony of Army A. Seijas.)

tence, in this case, would be given more favorable consideration?

A. No, sir. There was a meeting in which my attorneys were present, Mr. Obenour was present, and it was sometime, [865] I believe, during the month of December, in which I informed the government, that is, the Department of Justice, that I was going to, that I would like to have the government dismiss the case then pending, that is, the counts against me and Mr. Forman, and I would drop my appeal, and the government attorneys told me that they were not interested in whether I would drop my appeal or not and that they were going to proceed with this case.

Q. Is it not a fact, Mr. Seijas, that the subject matter of that conference was the dismissal of the counts which were pending against you individually, but had not been brought on for trial, other than the 15th count, which involved Mr. Forman?

A. Mr. Mead, you are incorrect. The purpose, my purpose, in asking the attorneys to meet with my attorneys was to try and get the entire business of this case wiped out, and I would go to the penitentiary and dismiss my, make a motion in the Circuit Court of Appeals to dismiss my appeal.

Q. Is it not a fact, Mr. Seijas, that subsequent to that conference and upon representations made by the government's attorney and your attorney that all the counts which remained against you which had not been brought on for trial, other than the

(Testimony of Army A. Seijas.)

15th count, which involved Mr. [866] Forman, were dismissed?

A. Those counts were dismissed sometime this spring. I can't tell you when because I don't know. My information is that they were dismissed sometime this spring.

Q. Now, would you please——

A. (Interrupting) All of the counts were dismissed, pardon me, except the one involving Mr. Forman and myself.

Q. And of course we know that one hasn't been dismissed? A. Yes, sir.

Q. And all the other counts which were then pending against you but had not been brought on for trial were dismissed? A. Yes, sir.

Mr. Mead: Would you please hand the witness Plaintiff's Exhibits 1, 2 and 3.

Q. (By Mr. Mead): What are those exhibits, Mr. Seijas?

A. Plaintiff's Exhibit 1 is a joint return for the year of 1944 for my wife and myself.

Plaintiff's Exhibit 2 is a joint return—no, it is a single return—of myself for the year '45.

Plaintiff's Exhibit 3 is a single return of my wife for the year 1945.

Q. Now, Mr. Seijas, by whom were those returns prepared, or if they were prepared by more than one person would you please indicate who prepared each return.

A. There is nothing on them to indicate who

(Testimony of Army A. Seijas.)

prepared the [867] returns, Mr. Mead. I would say that it would have been the bookkeeper.

Q. And you would say that it would be your opinion that the bookkeeper prepared those returns?

A. Yes, sir.

Q. And who was the bookkeeper? Who was the bookkeeper at that time?

A. In 1945 I think it was Mr. Renstrom.

Q. In 1946 who was the bookkeeper?

A. I think Mr. Renstrom was then, too.

Q. In 1944? A. I think Mr. Renstrom.

Q. So then it would be your opinion that Exhibit 1, which is your federal income tax return for 1944, was prepared by Mr. Renstrom?

A. I think so.

Q. And also that would be your response to Exhibits 2 and 3, your wife's return for the year '45?

A. Yes.

Q. With regard to the returns for the year 1942 and 1943, which I believe are Exhibits 77, 76, 78 and 79——

Mr. Mead: Could we have a look at those?

The Clerk: Those are the diaries.

Mr. Mead: Oh, those are the diaries, aren't they. No, we want the returns. I guess they are [868] 4 and 5.

Would you hand those to the witness, please, Mr. Bailiff?

The Witness: What is your question, Mr. Mead?

Q. (By Mr. Mead): Identify the exhibits by number, please.

(Testimony of Army A. Seijas.)

A. No. 4 is the income tax return for 1946 of Army Seijas and it says it's prepared by Derold A. Jacobson on June 13, 1947.

And No. 5 is the income tax return for the year 1946, and there's—of my wife—and there is no indication as to who made it or prepared it, but my testimony would be that the same person who prepared the one prepared the other.

Q. And that would be Mr. Jacobson for those years? A. Yes, sir.

Q. Was Mr. Renstrom still employed by you at that time? A. Yes, sir.

Q. There were some copies of returns which were produced by you, I believe, Mr. Seijas, for the years 1942, '43, were there not?

A. I don't recall. You mean in this trial or the other one?

Q. In this case.

Mr. Mead: Would you hand the witness Nos. [869] 87, and 88, please.

Q. (By Mr. Mead): Nos. 87 and 88 are what, Mr. Seijas?

A. These are copies of my income tax return for the year 1942, of A. A. Seijas, and a copy of—I am still speaking of 87—and a copy of the 1943 return of Betty Seijas, the 1943 return of Army Seijas.

Q. Before passing on, this is Exhibit No. what, sir? A. No. 87.

Q. Is that a typed copy or a handwritten copy?

(Testimony of Army A. Seijas.)

A. It's a handwritten copy in somebody's handwriting, whom I do not recognize.

Q. You don't recognize the handwriting on 87?

A. I do not.

Q. And that is a copy of your return for '42 and your wife's return for '43 and your return for '43, is that right?

A. Well, it's purported to be a copy. I don't know whether it is or is not.

Q. A purported copy. You wouldn't be in a position to state, then, whether this is a true copy or not?

A. I wouldn't be in a position to state, Mr. Mead.

Q. Are all those three returns or copies of purported returns, as you have described them, which comprise Exhibit 87, are they in handwriting or are some of them typed? If so, which one is typed?

A. 87-A is in ink.

Q. And that is what return, please?

A. 1942 return of A. A. Seijas.

Q. And you are not able to state in whose handwriting that is?

A. No, sir. I don't recall of ever seeing that handwriting before.

Q. Do you have any idea whose handwriting it might be? A. I haven't the slightest idea.

Q. All right, sir. The next return.

A. The next return is—the next two returns are the individual returns of myself and my wife and they are written in pencil.

(Testimony of Army A. Seijas.)

Q. Is that in your handwriting or that of your wife? A. No, sir.

Q. Do you recognize the handwriting?

A. No, sir. But I notice some initials down at the bottom right now that I didn't notice before.

Q. What initials are those, what initials do you notice there?

A. "E. J. O.", and "5/25/53." And "E. J. O." would mean Edward J. O'Leary, the agent sitting at the table there.

Q. Those returns are not in Mr. O'Leary's handwriting, are they?

A. I don't know what Mr. O'Leary's handwriting is like, Mr. [871] Mead.

Q. And you are not able to state whose handwriting they are in?

A. I can't tell you, because I do not know.

Q. You don't recognize the handwriting?

A. I do not.

Q. So you are not able to state that those are accurate copies of the original returns which were filed?

A. I am not able to identify them in any way, Mr. Mead.

Q. All right, sir. Now, with regard to the next exhibit, which I believe is 88, that you have, would you please state first what Exhibit 88 is.

A. Exhibit 88 is the grouping-together of four exhibits, starting out with the Bremerton Amusement Company for the year 1942, that is, a partnership return.

(Testimony of Army A. Seijas.)

The next one is a partnership return for Bremerton Amusement Company for 1942.

The Court: Those two have not been admitted in evidence.

Mr. Mead: I see. When you say "those two," you mean Exhibit 88, your Honor?

The Court: I mean Exhibit 88 as it pertains to the return of Bremerton Amusement Company for 1942.

Mr. Mead: I see. [872]

Q. (By Mr. Mead): What is that exhibit? You might tell us what that exhibit is.

A. With your permission and the Court's permission, I will identify this as 88-A, B, C, and D.

Q. So there are four documents in that exhibit?

The Court: There are two for 1942, one for '43 and one for '44.

Q. (By Mr. Mead): Are any of those documents copies of personal returns of yours or copies of purported personal returns? A. No, sir.

Q. Or your wife's? A. No, sir.

Q. Do you know who prepared any of those documents which go to make up Exhibit 88?

A. I have an idea who prepared 88-C and D.

Q. And 88-C and D, please, are what? What do they purport to be?

A. 88-C is the partnership return of income for the Bremerton Amusement Company for the year 1943.

88-D is the partnership return of income for the year 1944 for the Bremerton Amusement Company.

(Testimony of Army A. Seijas.)

Q. What is your idea as to who may have prepared those?

A. I know they were prepared in our office, because it looks like the type of work and the typewriter we used [873] in our office. I also see the initials "F. E. O." in Mr. Renstrom's handwriting, and he was our bookkeeper.

Q. Thank you. Now, I don't believe that you stated, or I don't recall that I asked you, whether you recall or whether you know who prepared your income tax returns for the years 1942 and 1943. I am referring, of course, to your individual returns for those years and your wife's returns.

A. I think I testified to that, that I didn't.

Q. You did not know?

A. No. Possibly the bookkeeper, but I am not sure.

Q. Mr. Seijas, I think that you stated that you had had about 10 years of law practice by the time you met Mr. Forman and went into these various ventures. Is that correct? A. Yes, sir.

Q. I think you stated also that you were associated with the firm of Sullivan, was it, and someone else? A. Yes, sir.

Q. What was the name of the other attorney in that firm? A. John F. Dore.

Q. Did your practice, Mr. Seijas, for that period of time consist of some criminal practice during that 10-year period?

A. Some criminal practice; yes, sir. [874]

(Testimony of Amy A. Seijas.)

Q. Did Mr. Sullivan's practice consist of some criminal practice during that period of time?

A. Yes, sir.

Q. As a matter of fact, a substantial portion of that practice was a criminal practice during that period of time, was it not?

A. Not Mr. Sullivan's.

Q. Was a substantial portion of your practice for that 10-year period a criminal practice?

A. No, sir. Most of the practice had to do with personal injury cases.

Q. Mr. Seijas, referring to Mr. Renstrom and the partnership return for the year, 1946, for the balance of the year after the sale to Mr. Morin, I will ask you whether or not you instructed Mr. Renstrom to set up a new depreciation schedule for the equipment which was the property of that company, of that partnership. **A.** I did.

Q. Did you also have Mr. Renstrom set up new capital accounts for that partnership?

A. I don't know about that. I am very well familiar and acquainted with what happened with regard to depreciation.

Q. And the partnership returns that were prepared for the balance of that year and for the subsequent year were [875] made available to you by Mr. Renstrom, of course, and were signed by either you or Mr. Morin, were they not, sir?

A. Yes, sir.

Mr. Mead: That is all.

Thank you, your Honor. [876]

(Testimony of Army A. Seijas.)

The Court: Any redirect?

Mr. Obenour: Yes, sir.

The Court: Go ahead.

Redirect Examination

Q. (By Mr. Obenour): Is Mr. Forman left or righthanded?

A. You mean does he write left or right?

Q. Yes, sir. A. He writes lefthanded.

Q. Were any of the entries in the diaries made at any other time than the time within which the—within a day or so of the time noted for the respective entries, Exhibits 76, 77, 78 and 79?

A. I don't understand your question.

The Court: Were any of the entries in the diaries made at any different time than within a day or two of the day they purported to?

The Witness: That appear in the diary?

The Court: Yes.

The Witness: No, sir. They were made the date that appears there or maybe the next day.

Q. (By Mr. Obenour): Did Mr. Forman pay any expenses at all of the office after Mr. Morin came in there, and the expenses were paid by the amusement company? [877]

A. My mind is not clear on that. I notice that we have an exhibit in this case indicating that office expense——

Mr. Mead: I beg your pardon, your Honor. There were two exhibits that I would like to have identified by Mr. Seijas.

(Testimony of Army A. Seijas.)

The Court: Yes. Let's just conclude this thought here, and then we will come back to it. Are you referring to this exhibit that the witness refers to now.

Mr. Obenour: Pardon?

The Court: Are you going to——

Mr. Obenour: I wanted to note the one that he had reference to.

The Court: I thought you were looking for it. Let's conclude that thought, Mr. Mead, and then we will come back to your matter.

Mr. Mead: I just thought that I should take it up with counsel before he gets too far.

The Court: Yes.

Mr. Obenour: We offer Exhibit 110.

The Court: These are the papers that the witness identified as the work papers for his 1946 tax return, I believe, is that right?

Mr. Obenour: Yes, sir.

The Court: Hand it to Counsel if he has [878] not already seen it.

Mr. Mead: May I inquire further about this exhibit, your Honor.

The Court: Yes, you may.

Mr. Mead: Would you hand the exhibit to the witness, Mr. Grant?

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Seijas, this document which has been marked Plaintiff's Exhibit 110 for identification appears to be several sheets of work

(Testimony of Army A. Seijas.)

papers or yellow accounting papers. What are those papers?

A. These papers are work papers of the bookkeeper with regard to the overhead of the office for the year 1946.

Q. For the year 1946? A. Yes, sir.

Q. And are they a part of the work papers for your 1946 income tax return?

A. Are they part of my 1946——

Q. Are they part of the work papers which went to make up your income tax return for the year 1946? A. I would think so, yes.

Q. And in whose handwriting are they?

A. These are all in Mr. Renstrom's handwriting, indicating [879] that he was the one who prepared the 1946 returns. These are his work papers.

Q. Is all the writing on these papers, the four pages, in Mr. Renstrom's hand?

A. My testimony would have to be yes.

Q. Where did these documents come from? Where did you obtain them?

A. These documents came from my files at home.

Q. Were these files that your brother had taken from your office and taken home, or had you taken them home prior to the time your brother removed the records from your office?

A. I don't remember.

Q. You don't recall?

A. You see, these are ten years old, and I don't remember whether I took them home, or he took them home when he closed out the office.

(Testimony of Army A. Seijas.)

Mr. Mead: These records appear, your Honor, as work sheets for the 1946 income tax return with respect to which there is no issue, and we object to them on the basis of the fact that they are incompetent and immaterial as to any issue, and have no bearing upon Mr. Seijas' income tax returns for the years '42 to '45, inclusive, which are the subject matter of this case. [880]

The Court: Under the present state of the record, I will have to reserve ruling on this.

Does that conclude that particular subject then? If it does, Mr. Mead has a couple of matters that he has overlooked.

Mr. Obenour: I would like to go into further identification.

The Court: Undoubtedly, you can provide further identification, and under those circumstances, this exhibit may be admitted, but under the present circumstances, I think not.

Now, Mr. Mead, did you overlook something?

Mr. Mead: I would like these two documents marked.

The Clerk: Defendant's Exhibit 502 and 503 are marked for identification. I misspoke myself this morning, your Honor.

The Court: All right.

Cross Examination—(Resuming)

Q. (By Mr. Mead): What are the numbers of the two exhibits that you have in your hand, Mr. Seijas?

(Testimony of Army A. Seijas.)

A. (No response.)

The Court: Did you hear Mr. Mead, Mr. Seijas?

The Witness: Yes, I did.

The Court: All right, go ahead.

The Witness: These are the original?

The Court: No, he wanted the numbers. I thought you didn't hear the last question.

The Witness: Oh, the numbers, 502 and 503, your Honor.

Q. (By Mr. Mead): And 502 is what?

A. It appears to be a carbon copy of a letter written by you to me on or about August 1, 1955.

Q. Did you receive the original of that letter on or about the date that the carbon copy bears?

A. Yes.

Q. And the other exhibit is what, sir?

A. What?

Q. And the number 503 is what, sir?

A. Is a letter that I wrote to Mr. Forman on August 17, 1955.

Q. Was that letter to Mr. Forman in reply to the other exhibit, 502? A. Yes, yes.

Mr. Mead: We offer the exhibits in evidence, your Honor.

Mr. Obenour: No objection.

The Court: They may be admitted. [882]

(Whereupon, Defendant's Exhibits Nos. 502 and 503 for identification were received in evidence.)

Mr. Mead: I would like to call the jury's attention to Exhibit 501.

(Testimony of Army A. Seijas.)

The Court: Would you like to read it to them?

Mr. Mead: Yes, if I may.

The Court: You may do so.

Mr. Mead: Exhibit 501 has been identified as a stipulation entered into between Mr. Seijas and his attorney and the government, Mr. Obenour, in connection with his case, and I would like to call to the——

The Court: You mean in connection with Mr. Seijas' case, the former trial?

Mr. Mead: The trial last year, and I would like to call to the jury's attention, your Honor, the second page of this document which was signed on July 6, 1955, by Mr. Seijas and Mr. Sager and by Mr. John Obenour, Assistant United States Attorney, in which it was represented to the Court and to the Jury in that case that there was a liability due to Mr. W. R. Forman from Mr. Army Seijas at the end of the year 1946 of $15,000. I would like to read to the Jury a letter which has been identified as Defendant's [883] Exhibit 502 for identification which is the letter dated August 1, 1955, directed to Mr. Seijas, and reads as follows: "Mr. Army A. Seijas, Smith Tower, Seattle, Washington. Dear Army: Bill Forman has advised me that you contacted his home in Los Angeles by telephone and advised his wife that it was imperative that he have a meeting with you in the near future. I have advised him that if any meeting is to be had with you, that in view of the situation of which you are well aware, such meeting should be held only in the presence of

(Testimony of Army A. Seijas.)

your attorney, Harry Sager, and either myself or one of the other attorneys representing Bill Forman.

Accordingly, if you care to have Harry Sager contact me to arrange a meeting, I shall endeavor to fix a time which will be convenient to all parties concerned.

Very truly yours," and signed by myself.

Exhibit 503 is a letter from Army Seijas to William R. Forman dated August 17, 1955.

"Mr. William R. Forman, 151 South Robertson Boulevard, Los Angeles, California. Dear Bill:

In view of our long friendship and the matters involved, I was surprised and shocked to [884] a letter from George Mead which obviously was at your request. Very truly yours, Army Seijas."

Thank you, your Honor.

The Court: Have you concluded now?

Mr. Mead: Yes, thank you, your Honor.

The Court: You may resume, then.

By the way, while in your examination, unless it has some bearing on it, it would seem to me that [illegible] the admission of 87 at the present time, had ought to be withdrawn, unless you, the defendant, does not desire that. I can't immediately recall whether objection was withdrawn to 87 or not. I merely call it to your attention. You will have time to think about it during the recess.

Gentlemen, if you would like a little further time, it is not too far from the recess time.

Mr. Obenour: If you please, your Honor.

(Testimony of Army A. Seijas.)

The Court: I am sorry to keep you, ladies and gentlemen. I thought it was going to be just a moment or two and it turned out to be a little bit longer. So we will have a little extra bonus recess on this occasion.

(Thereupon, the jury withdrew from the [885] courtroom.)

The Court: With respect to this 87, it has been admitted in evidence. I am frank to confess, I don't have the circumstances. I have a note that you objected. Whether you later withdrew that objection, you have in some instances done that, and I have made a note of it when you have, but if you still stand on your objection here, as far as I recall, there is no identification at all of this exhibit as it now stands, and it has not been exhibited to the jury or otherwise used up to this moment, so I am now going to withdraw the admission of 87, pending further identification or something that will validate it, unless you don't desire that.

Mr. Mead: We objected to it, your Honor, and whether we withdrew our objection or not, I don't recall now, without referring to my notes.

The Court: I am sure you couldn't, and it is possible I didn't, usually I am rather careful about that, but in this instance I have no note of your withdrawing it, and I think in this circumstance you will have to provide further proof before it is admitted.

I think you will all agree it has not been [886] exhibited to the jury up to this time, so there has

(Testimony of Army A. Seijas.)

been no harm done by its having been inadvertently admitted. I can't at the moment recall why I allowed it to go in without proper identification, but in any case the admission of 87 is now withdrawn and ruling on it is reserved. Is that satisfactory now to everyone on that phase of the matter?

Mr. Obenour: Yes, sir.

The Court: At least you understand what the ruling is.

(Plaintiff's Exhibit No. 87 was withdrawn from evidence.)

The Court: We will have the recess, as long as we have gotten to this point. [887]

The Court: I am sorry we were detained longer than we expected.

Go ahead.

Redirect Examination—(Resumed)

Q. (By Mr. Obenour): Do you recall when you stated that you had an interview with the agents concerning a question of a third party then being conducted?

The Court: You will have to speak louder. I have a little difficulty hearing myself. We have the window open.

Mr. Obenour: Yes, sir.

Q. (By Mr. Obenour): Do you recall either just prior to or approximately the same time the investigation began of your tax affairs, Mr. Seijas, you were interviewed concerning tax affairs of a third party? I believe you stated Mr. Cohen?

(Testimony of Army A. Seijas.)

A. Oh, yes.

Q. But at the same time do you recall whether Mr. Forman was interviewed?

A. Not at the same time.

Q. Well, in comparatively the same time on the same matter, not necessarily on the same date.

Mr. Mead: This is objected to as improper [888] redirect, your Honor. There is no cross examination on this subject at all.

The Court: Well, I think it could be. I will have to hear a little more about it. Go ahead.

The Witness: My recollection is that he was interviewed by the same person.

Q. (By Mr. Obenour): And during this period of investigation that the internal revenue was conducting, both into your affairs and into the affairs of Mr. Cohen, do you recall what conversations you had with Mr. Forman as to the information being supplied by you to the government?

Mr. Mead: Same objection, your Honor, as improper.

The Court: Overruled.

The Witness: I don't recall the contents. I recall that we discussed the conversations.

Q. (By Mr. Obenour): What was your best recollection of the gist of the conversations you had with Mr. Forman concerning the information being supplied by the government?

Mr. Mead: Objected to, your Honor, as for the same reasons, and for the further reason, he just

(Testimony of Army A. Seijas.)

stated he did not recall the contents of [889] the conversation, but he just recalled that he had one. It would be improper.

The Court: I believe that was his answer.

Q. (By Mr. Obenour): Do you have any recollection at all about what was discussed between you and Mr. Forman?

Mr. Mead: That is improper, your Honor. He testified that he had no recollection of the contents of the conversation.

The Court: Well, it might have been the manner of speaking that was involved. I am not sure. Overruled.

The Witness: Well, I don't remember any particular conversation. Don't forget Mr. Forman and I were in the same office and saw each other every day, but I don't remember the contents of any conversation that he and I may have had about Mr. Cohen or do you follow me?

Q. (By Mr. Obenour): Yes, sir. Did you discuss with Mr. Forman what you told the agents?

A. Yes, I discussed with Mr. Forman what I told the agents.

Q. And did Mr. Forman discuss with you what he had told the agents?

A. He discussed with me what he told me he had said to the agents.

Mr. Mead: Same objection to all this line [890] of questioning, your Honor.

The Court: Very well, go ahead.

Q. (By Mr. Obenour): During the course of

(Testimony of Army A. Scijas.)

investigation into your tax affairs, Mr. Scijas, you made some records available to the agents, did you not? A. Yes.

Q. Did you tell Mr. Forman what records you were making available at this time, that is during the actual time of the investigation?

Mr. Mead: Same objection, your Honor, as to being improper redirect.

The Court: Overruled.

The Witness: Yes, sir.

Q. (By Mr. Obenour): Did Mr. Forman ever object to any information you were supplying to the agents?

A. Well, do you have some particular thing in mind?

Q. No, any of the information that was supplied to the agents during the investigation of your tax affairs, did Mr. Forman ever object?

A. The only thing I can recall that Mr. Forman objected to was the diaries.

Q. And when did he object?

A. The same day I showed them to Mr. Paine and Mr. Whittle.

Q. What did he say?

A. Well, I don't recall what he said except to tell me that he [891] objected to my showing those to the government.

Q. Did Mr. Forman ever say anything to you during the course of the investigation as to whether he would or would not be available during a requested interview by the agents?

(Testimony of Army A. Seijas.)

Mr. Mead: That is objected to, your Honor, as being a leading question in addition to the other objections.

The Court: I think not. Overruled.

The Witness: Well, I don't have any particular conference in mind. For instance, I would have a conference with them or a meeting in the building, and they would ask me if Mr. Forman was available, or he wasn't available, or if he was in town or wasn't in town, and I would tell them, and I would report to Mr. Forman whatever conversation I had with the agents with regard to a conference, or a casual conversation or anything that transpired. Does that answer your question?

Q. (By Mr. Obenour): All right, sir, did Mr. Forman ever make any statement to you as to an attempt to keep him out of it or as to limit the investigation to you alone?

Mr. Mead: Objected to, your Honor, on the ground it is a leading question in addition to the other objection.

The Court: Overruled.

The Witness: Yes, we discussed that.

Q. (By Mr. Obenour): What did he say?

Mr. Mead: Could we have a time and place, your Honor?

The Court: Yes, give the time and place as near as you can.

The Witness: Well, I can't give you the time and place because it's so far back, and we had some conversations. I can't pinpoint any particular con-

(Testimony of Army A. Seijas.)

versations or any particular date. I can tell you generally that on or about the time I showed the—no, I am wrong. It seems to me that sometime in January or February of 1953, and before the indictment, I had gone to Central America on a case and between being in California and being in Central America, approximately two months expired in the year of '53, and when I came back, it was about income tax time, and I know that we were trying to delay the matter until after the income tax time that year, which would outlaw some of these matters that were then pending. It would give us another year to work on, and I do recall that I stalled the agents until after income tax [893] time before I disclosed to them these diaries.

Mr. Mead: I move to strike that answer, your Honor. It's a conclusion.

The Court: It doesn't seem to answer the question.

Mr. Mead: I move to strike it.

The Court: Yes, I think so.

Q. (By Mr. Obenour): Did you have any conversation with Mr. Forman concerning an attempt to forestall the investigation?

Mr. Mead: That is objected to as leading, too, your Honor.

The Court: No, I think not. Overruled. Go ahead.

The Witness: Well, the purpose of my stalling, as I have mentioned, was to try to help out and get the statute of limitations to work in behalf of Mr.

(Testimony of Army A. Seijas.)

Forman, because he had filed his income tax on time, and I had not.

Mr. Mead: That is objected to, your Honor, as not responsive.

The Court: The point is—I presume you are getting at it, but the question is what Forman had to do with it. That is the question.

The Witness: That is not my understanding [891] of the question, your Honor. My understanding is what we both had to do with it.

The Court: That may well be, but the question calls for what, if anything, Mr. Forman did with you or by himself with respect to forestalling investigation?

Mr. Mead: May we have a ruling on my motion that it is not responsive and should be stricken?

The Court: Yes, I think the answers have not been strictly responsive. They are stricken, ladies and gentlemen.

You understand that when I so indicate, you don't need a formal lengthy statement, do you?

You understand that, do you?

Are you satisfied with that admonition?

Mr. Mead: Yes, your Honor.

Q. (By Mr. Obenour): What did Mr. Forman say to you as to an attempt to forestall the investigation either completely or as to him?

Mr. Mead: Objected to as leading, your Honor, and he is not fixing a time and place, and in addition to it being improper redirect examination.

(Testimony of Army A. Seijas.)

The Court: Well, let's get the time and place first. [895]

Q. (By Mr. Obenour): Did you have conversation with Mr. Forman, concerning an attempt to forestall investigation either altogether or as to Mr. Forman?

The Court: That is just yes or not.

The Witness: Yes.

Q. (By Mr. Obenour): What is your best recollection as to when and where these conversations took place?

Mr. Mead: I assume, your Honor, we have a continuing objection to this line of inquiry on the grounds that it's improper redirect.

The Court: You do.

Now, just think it through yourself, Mr. Seijas, and just try to answer the specific question. You may have to think about various things in order to reach an answer, but do that silently. Then I think we will get out of this difficulty arrived at.

The Witness: My recollection is that we had discussed sometime in May or June of 1952 at the time that I give the government—or caused to be given to the government the money without knowing what the amount was, and the second time would be—the second time that I can remember was on or about the time of the diaries.

Q. (By Mr. Obenour): What was said? [896]

A. Well, at the first conversation after I had given them to the government, the purpose, as we determined, was to first——

(Testimony of Army A. Seijas.)

Mr. Mead: May we have the continuing objection and for the reason that the witness' answers are conclusions.

The Court: The question is what was said at that time. If you would give us that, and then the explanatory matter secondary, I think we would avoid the difficulty.

The Witness: Well, obviously, I don't recall what was said. We talked about paying the government, giving money to the government.

Mr. Mead: Now, he has testified he does not recall.

The Court: Are you speaking of yourself——

Mr. Mead (interrupting): If he does not recall what was said, we object to his testifying about it, and on the further ground——

The Court: He doesn't have to recall the exact language, Mr. Mead. If he can recall the substance of the discussion, that is——

Mr. Mead: He stated he did not recall what was said.

The Court: I didn't understand his answer, [897] and it may be that I am right or you are right and I am wrong, but the Jury will have to be the ultimate judge of that.

The Witness: And we also discussed whether or not the government was serious in pressing its claim for criminal prosecution or civil liabilities only. I cannot recall any more of the substance of this particular conversation. That is the one in about May or June of '52 when the money was paid to

(Testimony of Army A. Seijas.)

the government, and the second conversation had to do with the showing of the diaries to the officers in Mr. Whittle's office. I explained to Mr. Forman how that had been brought about by the request of corroborating evidence, explained to him that I thought it was all right because the Statute of Limitations had, at least, expired as to him, and that the entire matter was outlawed. As I recall it, he told me that he didn't think it was a good policy to show them to the government, but that he could understand the position that I found myself when the attorney had asked me to produce corroborating evidence in support of my contention regarding the $86,000.

Q. (By Mr. Obenour): Did you ever attempt to forestall the investigation as to Mr. Forman personally? [898]

Mr. Mead: That is objected to as leading and immaterial and a conclusion—calls for a conclusion.

The Court: Well, we will have an answer to this. The objection is overruled. This will be just yes or no, and he can go into the matter of what it was, if anything.

The Witness: What was the question?

Q. (By Mr. Obenour): Did you ever attempt to forestall the investigation as to Mr. Forman personally?

The Court: Same objection and same ruling. Go ahead, yes or no.

The Witness: I am just trying to think. Offhand, I don't recall of trying to forestall the investi-

(Testimony of Army A. Seijas.)

gation of Mr. Forman personally except insofar as I tried to forestall mine which would forestall his.

Q. (By Mr. Obenour): Were the agents ever told that Mr. Forman was out in Portland or elsewhere when, in fact, he was in the office.

Mr. Mead: Let's have a time fixed for this.

The Court: Yes. The witness will give the time if the answer is in the affirmative.

The Witness: The answer to that is yes. The time I cannot fix. [899]

Mr. Mead: I move that it be stricken, your Honor, as not a proper answer when he is not able to fix the time.

The Court: Overruled. That is a matter of weight and not admissibility as I view it. Go ahead.

Q. (By Mr. Obenour): What is your best recollection as to the circumstances when the agents were so advised? [900]

Mr. Mead: May we have a time fixed?

The Court: Yes.

The Witness: I don't recall the time, probably during 1952. I would say during the year 1952 on many occasions—well, I wouldn't say, but on occasions when the agents would come in they would spread out and then come in to see me and I would put them in my private office and Mr. Forman would leave, and then the agents would be advised that he wasn't around, that he was out of town, and I would talk to the agents myself.

Q. (By Mr. Obenour): Did you ever have any

(Testimony of Army A. Seijas.)

conversation with Mr. Forman as to how he might leave in the manner that you have described?

Mr. Mead: May we have a time fixed, your Honor?

The Witness: I don't recall of any.

The Court: He said he doesn't recall of any.

The Witness: I don't recall any.

Q. (By Mr. Obenour): Do you recall any time that the agents were told records were not available when in fact they were in the office there?

A. I wouldn't say that it didn't happen, but I don't recall [901] any specific incidence at the time.

Q. You say that you had a conversation with Mr. Forman about money you gave the Government. What do you mean, Mr. Seijas?

A. Well, my recollection is that in 1952 I had caused to be given to the Government seventy-five and later more money, to try and have the income—my income tax liability, whatever it might have been called, compromised with the Government on the civil basis——

The Court: That is the same matter that was covered on direct, I think, where you made a deposit of $75,000 and then you added another $25,000 for a total of $100,000. Wasn't that covered?

The Witness: Yes, sir.

The Court: Yes, that was covered on direct.

Q. (By Mr. Obenour): You stated you have never received a bill from the Government. Do you know, or have you been told of the Government pol-

(Testimony of Army A. Seijas.)

icy of settlement of these civil liabilities during the pendency of a criminal charge?

Mr. Mead: That has been testified to on the direct case, your Honor.

The Court: Yes, he has mentioned it, but perhaps he didn't state it as fully as counsel [902] would desire. He can elaborate slightly on it, if you wish.

The Witness: It was decided that—strike that. I had paid the money to the Government hoping that they would not press the criminal charges. After they decided to press the criminal charges, and after I had been convicted, I was hoping that the matter could be eliminated entirely, but the Government's policy is not to settle civilly, that is, for money damages, until all of the criminal aspects of a case are determined.

Mr. Mead: That is objected to as not being responsive, his statement as to what the Government policy is.

The Court: Do you mean to say that is what you were informed the policy was.

The Witness: Yes, sir.

The Court: In that form it is responsive.

Q. (By Mr. Obenour): Concerning the diaries, did Mr. Oftedal ever have the diaries at any time?

A. Do you mean did he have them under his control?

Q. Yes, sir. A. No, sir, he did not.

Q. Concerning your taxes claimed to the Government as to [903] transactions with Mr. McCusker,

(Testimony of Army A. Seijas.)

are you aware of the situation the Government claimed as to withholding taxes pertaining to the taverns operated by Mr. McCusker in which you had a half interest?

A. I was aware that the Government had a claim for—were supposed to have a claim for withholding taxes that Mr. McCusker had not paid.

Q. Can you recall to which tavern that pertained?

A. That particularly applied to the White Elephant Tavern, and also to the tavern in Pasco.

Q. On the occasion that you loaned a hundred thousand dollars to the Forman Theater interest in California, do you recall——

A. Yes, sir.

Q. How many times did you loan Mr. Forman money? A. Well, I don't know.

Q. How many, do you recall? I am referring now to any appreciable amount for a business venture.

A. Well, the reason that I answered I don't know is because sometimes I would use his money and sometimes he would use my money, and, as far as I know, they were all for business ventures.

Q. What were the occasions in which you used money?

A. Offhand, I can recall of being in California with him and buying some stock, and I didn't have any money, [904] but he bought—he advanced me $2,000, I think it was, and when he got home, why I

(Testimony of Army A. Seijas.)

gave him a check for the $2,000, and that is the only time I can remember.

Mr. Mead: Can we have a continuing objection as improper redirect examination, your Honor?

The Court: You may, Mr. Mead. Go ahead.

Q. (By Mr. Obenour): When you say you didn't have the money, do you mean down there at that time in California or at all, or what?

A. I had the money all right, but I didn't have it on me.

Q. Well——

A. ——or it wasn't available to me except through Mr. Forman.

Q. On the occasion of the loan of $100,000, what were you told as to Mr. Forman's financial position?

The Court: Do you mean by Mr. Forman——

Q. (By Mr. Obenour): What were you told by Mr. Forman as to his financial condition in relation to the requirement of the loan?

A. He told me that he did not have the money, that his associates didn't have the money, and that he wasn't sure but that he might need the money and would I loan the money if as and when it was determined that it would be required.

Q. Did he make any statement to you as to the necessity [905] for the money, if such it be? In other words, what was actually the necessity for the money if the loan were required?

A. As time went on and the pressure became greater, he advised me he was going to need the

(Testimony of Army A. Seijas.)

money because he had these theater projects pending, without which—that without my money that they could not be completed and liens might be filed and foreclosed against this project.

Q. What money was it that you were to loan?

A. I was to loan him sufficient amounts of money to tide them over so that they could get the theaters open so they could start producing more money to pay off their construction loans.

Q. Where were you to get this money that you were to loan, Mr. Seijas?

The Court: Do you mean what was said about it, Mr. Obenour?

Mr. Obenour: Yes, sir.

The Witness: I don't recall offhand any particular thing at the present time.

Q. (By Mr. Obenour): What conversation did you have with Mr. Forman as to his agreement, if you made this loan?

A. That was not until the latter part of our negotiations that we had a conversation as to first, whether I would loan it, and, second, what the method of [906] repayment was going to be or of security.

Q. All right. What was the conversation, first?

A. Well, just prior to the time of making the loan after I had told him I was going to loan him the money in two separate amounts, I told him that I was making the loan to him and I was looking forward to him to repaying it, that there was no security on this loan; second, that he knew where

(Testimony of Army A. Seijas.)

the money came from and consequently I was looking to him to save me harmless from any loss or liability for that money.

Q. What loss or liability was specified in your conversation?

A. We were talking about taxes not the loss of principal, but the payment of taxes.

Q. How would a loan to Mr. Seijas—rather, Mr. Forman by you, result in any tax consequences?

Mr. Mead: I object to any conclusions, your Honor, and questions which call for conclusions, and this is a good example of one, and if there are conversations to be testified to, it should be what was said and not questions which develop conclusions.

The Court: Well, I think a reasonable explanation of what the conversation was about is permissible. Overruled.

The Witness: May I have the question again?

The Court: What tax liability was involved in this matter that you have just referred to?

The Witness: We knew that that money was unreported income.

Mr. Mead: That is objected to, your Honor, and I move to strike it.

The Court: Yes. Did you mention that to Forman or did he mention it to you, rather?

The Witness: We both discussed it, and his answer was that the Government was only interested in the payment of taxes, so I told him, I said, I am looking forward to him to save me harmless from any loss or any obligation in connection with that

(Testimony of Army A. Seijas.)

loan. He told me he hated to do it and hated to ask me to loan the money to him, but that he would not ask me unless he needed the money, and I told him I wouldn't loan it to him unless he were my friend.

Q. (By Mr. Obenour): At that time did you have any knowledge of the practice of the banks in making reports of sizable currency deposits?

Mr. Mead: That is objected to as leading, your Honor.

The Court: No, I think not. Overruled.

The Witness: I don't—— [908]

The Court: At that time.

The Witness: No, I don't know what he means.

The Court: You didn't know anything about it at that time?

The Witness: I don't know whether I did or did not at that time. See what I mean?

The Court: Yes.

The Witness: This is now 1948 that he is talking about.

The Court: I understand your answer. Go ahead.

Q. (By Mr. Obenour): Did you have any conversation as to how the Government would be interested in a loan you would make to Mr. Forman?

A. Well, I don't know now and didn't know then how the Government operates.

The Court: The question is, did you have any conversation with Forman as to how the Government might become interested in it?

The Witness: No, not at that time that I recall.

Q. (By Mr. Obenour): What did Mr. Forman

(Testimony of Army A. Seijas.)

say as to your requirement that he save you harmless? A. Mr. Forman agreed on it.

Q. How was Mr. Forman paid this money? What was the form [909] the money was paid to him?

A. I think he was paid in cashiers checks.

Q. How were the cashiers checks obtained?

A. They would be obtained at the bank by depositing -- this is my recollection, I don't know whether it is right or wrong, but——

Mr. Mead: That is objected to, your Honor. Certainly if he doesn't know whether it is right or wrong, he shouldn't be testifying to it.

The Court: He can give his recollection of it. He has indicated that it is a recollection, and he may do that. Go ahead.

The Witness: It seems to me that he took the money to the bank in currency and had the bank make out cashier's checks.

Q. (By Mr. Obenour): What conversations did you subsequently have with Mr. Forman as to requiring additional funds in November of 1954?

A. November of 1954?

Q. Yes, sir.

A. I don't recall anything offhand.

Q. Do your recall a meeting with—I believe on cross-examination you stated that you had a meeting with Mr. Mead at his home?

A. Was that in November? [910]

Q. In December, December 9, 1954.

A. Was that in November, 1954?

(Testimony of Army A. Scijas.)

Q. I don't know.

The Court: Whenever it was, relate it to that. Go ahead.

Q. (By Mr. Obenour): Did you have a conversation immediately preceding your meeting with Mr. Mead? Did you have a meeting with Mr. Forman in which any discussion related of your needing additional funds for the payment of taxes?

A. Not for the payment of taxes.

Q. What was the conversation?

A. If we had any conversation it would have been about the payment of fees or for trips back to Washington.

Q. Do you know now what your civil tax liability is? A. I do not.

Q. Did you attempt to borrow any additional sums from Mr. Morin on or about November or December of 1954?

A. Did I attempt to borrow?

Q. Yes, sir. A. Not that I recall.

Q. Did you attempt to get any money from Mr. Forman at all at that time?

A. Not that I recall. We were sharing the expenses of the bookkeeper—not the bookkeeper, but the CPA. [911]

Q. Who was that? A. Mr. Whittle.

Q. And was this during the period of which your affairs were under investigation? A. Yes, sir.

Q. And at this time when Mr. Whittle was employed, half of the expenses were paid by Mr. Forman?

(Testimony of Army A. Seijas.)

A. I wouldn't say half, but whenever we paid a payment to him, for a while he would get contributions from Mr. Forman.

The Court: Is that in connection with the services for this net worth statement you are speaking of?

The Witness: Yes, sir.

Q. (By Mr. Obenour): Did Mr. Forman know what information you were supplying Mr. Whittle?

A. Well, whenever Mr. Whittle and I had any conference, why Mr. Forman and I would discuss it.

Mr. Mead: This is objected to on the grounds that it is incompetent and immaterial and is improper redirect examination.

The Court: Overruled.

Q. (By Mr. Obenour): Did you receive any other contribution from Mr. Forman concerning the investigation or trial of your own case? [912]

A. Well, I made several trips back to Washington, D. C., and in June of '53——

Mr. Mead: Same objection, your Honor.

The Court: Same ruling. Go ahead.

The Witness: In June of 1953 I received some money from Mr. Forman in connection with the trip to Washington.

Q. (By Mr. Obenour): What is a transcript of a trial, Mr. Seijas?

A. A transcript of a trial is the writing or typewriting of the words that are testified to by the witnesses from the witness stand, and is represented by the stack of books there on Mr. Mead's desk. I take

(Testimony of Army A. Seijas.)

it that would be the books of all of the words uttered from the witness stand.

Q. Now, are you aware of the proceedings that were undergone preparatory to your trial, the court proceedings that anticipated your trial, Mr. Seijas?

A. Do you have reference to Commissioner's hearings?

Q. No, sir. I refer to the preliminary steps under which a case proceeds through the District Court from the indictment on.

A. I am afraid I don't understand your question.

Q. All right. The original indictment called for how many counts, Mr. Seijas? [913]

A. 15 counts.

Q. And you were involved in how many?

A. 15 counts.

Q. Mr. Forman was involved in how many?

A. One.

Q. What were the preliminary motions that were heard prior to your trial by either you or Mr. Forman?

Mr. Mead: This is all objected to as immaterial and irrelevant, what legal motions were made.

The Court: It doesn't readily appear what the relevancy of that would be.

Mr. Mead: And it is improper.

Mr. Obenour: I believe it would, your Honor, to that point or the requesting the Clerk to read the notes of the various motions which resulted in a separate trial for this defendant and the manner in

(Testimony of Army A. Seijas.)

which it was separated from the trial of the defendant, and the manner which it was severed as to counts 1 through 8, 9 through 13, 14 and 15, and subsequent result of the court's ruling which resulted in the present trial of count 15 alone.

Mr. Mead: What motions were filed and what your Honor may have ruled with respect to [914] motions certainly is incompetent here, and highly improper.

The Court: At the most, it seems to me—I can see what you have in mind and I think that the value, if any, is remote.

Mr. Obenour: I would ask to be heard.

The Court: You may be heard at the recess. Go ahead. Unless there is something involved with Forman or Seijas——

Mr. Obenour: Yes.

The Court: I am not concerned about the state of the record. If there was anything done that was in concert or alleged to have been in concert, in that connection the witness can refer to that, but I don't want to go into all of the details of the motions, and what not, or anything about it. If it was done in concert, I will permit you to show that.

Q. (By Mr. Obenour): Your trial was based on what counts, Mr. Seijas?

A. Do you mean the number in the indictment?

Q. Yes, sir. A. I don't remember.

Q. What years? A. '46, '7, and '8. [915]

Q. How many counts were there?

A. Five counts.

(Testimony of Army A. Seijas.)

Q. And you were sentenced, were you not?

A. I was sentenced on the verdict of the Jury, yes.

Q. And what is the maximum sentence which can be imposed for tax evasion?

A. Five years, and I think $10,000 fine.

Q. What did you receive?

A. Five years and a $10,000 fine.

Q. And after that, what action was taken by the Government as to your remaining counts?

Mr. Mead: That is objected to.

Mr. Obenour: That has been gone into on cross, your Honor.

The Court: Yes, it has. You did bring it out, Mr. Mead.

Mr. Mead: That is all right.

The Court: Go ahead.

The Witness: I don't know what counts they were, but whatever they were, they were all dismissed except this count involving Mr. Forman and myself.

Q. (By Mr. Obenour): What were you told, if anything, by the Government as a condition of the Government's dismissing the remaining counts left except 15? [916]

A. I wasn't told anything.

Q. Were there any conditions made upon that dismissal upon your testimony now or any other time? A. No, sir.

Q. Were you given any consideration by the Government now or any other time as to your ap-

(Testimony of Army A. Seijas.)

pearance here in this trial and giving any testimony whatsoever? A. No, sir.

Q. I believe you were asked what interviews you had after incarceration, with the Government? Do you recall? A. Yes, sir.

Q. And what is your recollection of the conferences or interviews you had after the incarceration?

A. My recollection is that about three or four months ago Mr. O'Leary and Mr. Keeney called on me in the penitentiary in the presence of an employee of the penitentiary, and asked what records I had and the obtaining of certain records.

Q. Do you recall——

A. ——that I told them that I would see what records I had, and I made a list of them, a list of the records that they wanted, and I have since lost the list.

Q. Do you recall—if I understand you correctly, you have referred to a meeting at which I was present with [917] you and Mr. Sager and Mr. Griffin?

A. That was last year.

Q. That was last year, yes, sir. Did you apprise the Government represented by any persons present or otherwise, as to your intentions on the remaining count 15? A. Yes, sir.

Q. Now, were you given any promise or statement of consideration at all as to whether you did or did not enter a plea on count 15?

A. Yes, sir.

Q. What were you told?

(Testimony of Army A. Seijas.)

A. That you—when I say "you" I mean you or Mr. Moriarty, didn't care what I did.

Q. In addition to the conference with Mr. O'Leary and Mr. Keeney, do you recall a second visit you had with them in the last two or three months at the island at which I was present?

A. You?

Q. Yes, sir.

A. I don't remember you being present. Was that about the same time as Mr. O'Leary——

Q. Within a month or so thereafter.

A. I probably was suffering from shock at the penitentiary, Mr. Obenour. [918]

Mr. Mead: That last answer I move to have stricken, your Honor.

The Court: Well, unless he means it seriously. Do you mean that?

The Witness: I am not fooling.

The Court: If he means it seriously, it may stand. [919]

Q. Do you have any communications from your attorney as to a request for information from the government as to what you proposed to do concerning your own case and the question of the preparation of your case for trial? A. No, sir.

Q. Do you recall an inquiry being made to you personally at the institution as to whether you proposed to go to trial upon the remaining count against yourself or not? A. By whom?

Q. By either me or by any other representative of the government for the reason that the prepara-

(Testimony of Army A. Seijas.)

tion of such trial should be negotiated if you intend to pursue a trial—negotiated or prepared, rather?

A. I don't remember anything like that, Mr. Obenour.

Q. Did you furnish any documents to the government prior to taking the stand other than the documents that have been interjected into your own trial?

A. Well, that is hard for me to answer, because I don't remember what documents were introduced in my trial except that all of them have been withdrawn by my attorney, Mr. Sager, and they have been turned over to me by Mr. Sager. I can't recall of any others—pardon me, I am wrong—except some of these documents with regard to Mr. Forman's continuing in the venture in the pinball venture after 1946, and some of the old contracts that have been introduced in evidence here [920] that were brought to my home from my office.

Q. When were you given the subpoena to appear and produce records? A. July 27, 1956.

Q. When was that in relation to your entry of a plea of guilty?

A. I think it was the same day.

Q. Before or after?

A. I was given the subpoena after I pled guilty.

Q. At that time was a request made upon you as to what documents you had available of the matters of which you had testified in your own trial?

A. Yes, sir.

Q. And what was your answer at that time?

(Testimony of Army A. Seijas.)

A. I told you that the documents were all in Mr. Sager's office, and you could look at them and help yourself, whatever you wanted to do with them.

Q. What did you state as to the documents which were not in Mr. Sager's office for which a request was made?

A. I knew that many of these matters as shown in my subpoena were not in Mr. Sager's office, and I said that they were possibly—all had been down at my office down in the Smith Tower in Seattle, which has since been closed, and, consequently, those documents or many of them would be at my home, and that you or anybody else [921] could go out and look at them or search for them if you wanted to.

Q. You also——

A. (Interrupting): When I say "You," I don't mean you personally, but the government, the plaintiff.

Q. Did you also state a preference that you had as to who should examine those documents as between the government or its representatives and your brother?

A. I don't understand your question.

Q. Was the government ever given permission to go out there and examine any of the documents or records that you had in your own home?

A. Not unless I was present.

Q. You have made reference to an introduction of a document that you didn't intend should be introduced. What was that again?

(Testimony of Army A. Seijas.)

The Court: Do you mean introduced in the first trial?

Mr. Obenour: Yes.

The Witness: Let's have the checkstubs, please.

Q. (By Mr. Obenour): Who introduced that exhibit, Mr. Seijas, that exhibit number what?

A. This is exhibit 106 in this particular case. It's my personal bank account at Pacific National Bank of Seattle [922] from a period of June 16, 1945, to September 10, 1949.

Q. When was the first time any member of the government saw that book?

A. During my trial the first time.

Q. What part of the trial was that interjected into the case, Mr. Seijas?

A. Do you mean as to whether it was first, the beginning, or the end?

Q. Yes, sir.

A. I think it was during the end of the trial.

Q. What was the purpose for which you introduced that document into your trial?

Mr. Mead: That is objected to as immaterial, your Honor.

The Court: Overruled.

The Witness: This document was introduced by my attorney. What its purpose was, I don't know. He probably thought he was helping me.

Q. (By Mr. Obenour): Did you have any intention of it?

Mr. Mead: I object to that last voluntary remark.

(Testimony of Army A. Seijas.)

The Court: The last remark will be stricken. Go ahead.

Q. (By Mr. Obenour): Was it introduced before or after you had testified? [923]

A. My recollection is that it was introduced after I had testified.

Q. After you had testified? A. Yes, sir.

Q. And it was used by Mr. Rankin, a man you have referred to as a CPA you hired to appear in your behalf at the last trial?

A. Yes, sir, that is my recollection, if he used it.

Q. And was that not the first time which the government had ever seen that document at all?

A. Yes, sir.

Q. What was the manner in which the government became aware, as you brought out in your trial, of the existence of any sort of an agreement between you and Mr. Forman of a continuation of your interest in the pinball companies after September 1, 1946?

Mr. Mead: That is objected to as improper redirect examination.

The Court: Overruled.

The Witness: It was developed by you in the cross-examination of my CPA, Mr. Rankin.

Q. (By Mr. Obenour): And what was the only way in which the government learned all, that there was any agreement between you and Mr. Forman to continue your interest in the pinball business?

Mr. Mead: That calls for a conclusion.

(Testimony of Army A. Seijas.)

The Court: As far as the witness knows, of course.

Mr. Obenour: Yes, sir.

The Court: As far as you know, Mr. Seijas, what was the manner in which the government learned of this?

The Witness: By the notes and the checkstubs explaining the checks that I was giving Mr. Forman in payment of one half of the net proceeds or draws from the pinball company.

Q. (By Mr. Obenour): Was the government agents or anyone connected with the government told that by anyone until Mr. Rankin testified under cross-examination?

A. I don't know what the agents were told, but I know I never told them.

Q. Would you please refer to the notation in the exhibit before you showing the transaction of the capital gains tax?

The Court: Do you remember the date? Help him with the date if you have it.

The Witness: The date, your Honor, it was March 17, 1947. Check dated number 57 dated March 17, 1947.

Q. (By Mr. Obenour): Will you please [925] show the Jury the only notation of all your records which the government has seen which refers to the agreements between you and Mr. Forman were a continuation of your interests after September 1, 1946?

(Testimony of Army A. Seijas.)

The Court: Do you mean a continuation of whose interests?

Mr. Obenour: Mr. Forman's and Mr. Seijas'.

The Court: All right, go ahead.

The Witness: The check number is 57, and it's written in my secretary's handwriting, but I wrote out the stub, and over here in my handwriting is twenty-two hundred eight-seven dollars and fourteen cents, and my handwriting afterwards it says, "capital gain." Then underneath it is $1,000, and in my handwriting, "Bremerton dividend," and I started to add it up, but I didn't finish adding it up, and I put down over here (indicating) "$3,287.14, William R. Forman, drawing."

Q. (By Mr. Obenour): Now, do you recall what date that was when the Government learned of that, Mr. Seijas? A. Yes.

Q. What was the date the government learned of that?

A. Well, it was towards the end of the trial, and the trial—I would venture to say it was sometime in the last [926] week of July, 1955.

Q. And handing you Exhibit 501 dated the 6th of July, 1955, and signed by the attorney, by Tracy Griffin, and Harry Singer, attorneys for yourself and by yourself. At that time on July 6, 1955, what had you represented to the government's agents was the facts of the transactions with Mr. Morin?

The Court: I presume as far as any interest——

Mr. Obenour: Forman.

Mr. Mead: This is objected to as improper re-

(Testimony of Army A. Seijas.)

direct examination, and on the further grounds, it's an attempt to collaterally impeach a judicial omission.

The Court: Overruled.

The Witness: At the time this stipulation was entered into, the government had no way of knowing that the liability of William R. Forman or liability to William R. Forman was as represented in this stipulation.

Mr. Mead: I object to that as a conclusion and move to strike it.

The Court: The answer is not responsive. Strike the answer.

The Witness: Let me have the question [927] again, please? May I have the question again?

The Court: The question is, at the date of the stipulation which I understand to be June 6——

Mr. Obenour: July 6.

The Court: Excuse me, July 6, 1955, what representation, if any, was made concerning the relationship of Forman and yourself in this pinball business after Morin bought it?

The Witness: That I owed Mr. William R. Forman $15,000 as of December 31, 1946.

Q. (By Mr. Obenour): Was that fact true?

A. No, sir.

Q. At that time did the government know that it was not?

Mr. Mead: I object to his calling for a conclusion.

(Testimony of Army A. Seijas.)

The Court: What the government knew, the witness wouldn't be competent to answer.

Q. (By Mr. Obenour): To your knowledge, was there any basis which the government would know that was not true?

Mr. Mead: Objection——

The Court: Sustained.

Q. (By Mr. Obenour): To your knowledge, was any representation ever made to the government that such fact was not true? [928]

Mr. Mead: I object to that, your Honor. He can testify as to what he knows, but——

The Court: The question is correct, but it's a little confused in statement, but the question is, to your knowledge was the government or anyone connected with the government apprised of the fact that your statement or representation at the time of the stipulation was not true? Do you follow that?

The Witness: It's a double negative.

The Court: Yes it is.

The Witness: No, sir.

Q. (By Mr. Obenour): What was the purpose of the stipulation?

Mr. Mead: That calls for a conclusion, your Honor. It is another attempt to impeach by collateral matter a judicial omission.

The Court: Overruled.

The Witness: The purpose of the stipulation was to admit in evidence all of these figures as follows without having to necessitate bringing people in to testify as to these figures.

(Testimony of Army A. Seijas.)

The Court: Can we conclude with this witness? I would like to conclude this week. Do you think we can do so within a reasonable time? [929]

Mr. Mead: There may be some surrebuttal, and I wouldn't like to be limited in view of the length of time that Counsel has taken.

The Court: No, I don't want to limit you, and that is the reason I asked, because if you thought it might be of any length, I think we will have to suspend.

Mr. Obenour: I have only three questions.

The Court: You put them to him, and then we will have nothing but surrebuttal or recross is a better word to use.

Mr. Mead: That is right, your Honor.

The Court: Go ahead.

Q. (By Mr. Obenour): At the time you introduced your checkbook that you have before you or Exhibit 107, I believe it is? A. 106.

Q. Did you in any way intend to further implicate Mr. Forman? A. I did not.

Q. Have you introduced anything in this trial in the way of documentation which was not subject to a subpoena served upon you after your plea of guilty to the charge of conspiracy?

The Court: In other words have you [930] volunteered anything beyond what you were called for by the subpoena?

The Witness: No, sir.

(Testimony of Army A. Seijas.)

Mr. Mead: If the Court please, I object to the question. The question asked the witness whether he has introduced anything.

The Court: I rephrased it, Mr. Mead, and I asked him if he had volunteered anything beyond what was called for in the subpoena. I corrected the question in the hope that we could conclude rather promptly. I am sorry if I interrupted, but that seemed to be a better form of question. Go ahead.

The Witness: I answered.

The Court: Yes, I know you did.

Mr. Obenour: That is all.

The Court: We are going to suspend now, ladies and gentlemen, for the day and resume tomorrow morning at 9:30.

Have a pleasant evening, and don't forget my admonition.

(Whereupon, at 4:30 o'clock, p.m., Monday, August 6, 1956, the court was recessed until 9:30 o'clock, a.m., Tuesday, August 7, 1956.)

(Whereupon, on the 7th day of August, 1956, at the hour of 9:30 a.m. the following further proceedings were had:)

The Court: Good morning, Ladies and Gentlemen.

Mr. Mead: Good morning, Your Honor. We have no further questions of this witness.

The Court: Very well. Call another witness, please.

JOHN A. TINGLE

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: John A. Tingle, T-i-n-g-l-e.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Tingle?

A. 2961 Haddington Drive, Los Angeles, California.

Q. What is your occupation?

A. I am retired.

Q. And what was youtr business before you refired?

A. I was in the drive-in theater business, and I was Secretary-Treasurer of several companies in connection [932] with the Pacific Drive-in Theaters.

Q. And what was Pacific Drive-in Theaters?

A. Well, it was a company that owned and operated, I think, four theaters, and had an interest in some other companies.

Q. And where were the theaters located?

A. In Los Angeles.

Q. With whom were you associated in this drive-in theater business?

A. Well, I was with Mr. Cavelero, Mr. Forman, and Mr. Diamond. The four of us were the principal stockholders.

Q. Were there other stockholders?

(Testimony of John A. Tingle.)

A. We had some minority stockholders in a couple of the companies.

Q. When did you become acquainted with Mr. Forman?

A. I think it was in 1946, along about that time.

Q. How did you become acquainted with him?

A. He and Mr. Diamond started to build a drive-in theater in Los Angeles and Mr. Cavelero and I became acquainted with him at that time and approached them with the idea of our consolidating our interest in one company.

Q. At that time did you and Mr. Cavelero have drive-ins different and apart from the one in which Mr. Diamond and Mr. Forman had an interest?

A. Oh, yes. We had several theaters we were interested in. [933]

Q. You had several of them? A. Yes.

Q. And what took place at this time as between the four of you people?

A. Well, the deal was made whereby we consolidated one of the theaters that we had just completed with the one that was being constructed, and the company was formed with various entries in it. That was the basis of it.

Q. How much was invested by each of you at this time?

A. Well, I wouldn't know how much Mr. Diamond or Mr. Forman had already invested in the theater that was partially completed, but as we completed that theater I think we all put in the money that was required to complete it and also to com-

(Testimony of John A. Tingle.)

plete another one that we were working on at that time.

Q. In addition to money invested, did the two pairs of associates contribute or associate an interest in the theaters they already owned?

A. Would you please repeat that?

Q. What did you do in regard to the interest in your respective theaters?

A. We retained our interest.

Q. And was this interest in your respective theaters joined with the other or was that retained separately? A. That was retained separately.

Q. How long did you continue to operate these respective theaters in your mutual association of the four of you people?

A. Well, from that time up until a little over a year ago when I sold my interest.

Q. How many different companies did you have in connection with your drive-in theaters?

A. Well, we had Pacific Drive-in Theaters which had four theaters, and we had the California Drive-in Theaters which had three, and the Southland had one, the Coast had one, and United States Drive-in Theaters that had two, Skyline Drive-in Theaters had one, and that is all that I recall at the moment.

Q. That was twelve theaters?

A. Actually, we had thirteen. You left one out.

Q. I must have miscounted. Did you know Mr. Seijas? A. Yes.

Q. And when did you meet him?

A. Early in 1948.

Q. How did you meet him?

(Testimony of John A. Tingle.)

A. I met him through Mr. Forman.

Q. What was the manner in which you became acquainted with Mr. Seijas through Mr. Forman?

A. Mr. Forman —I think Mr. Seijas was Mr. Forman's attorney at that time, and the first contact with Mr. Seijas [935] was in connection with some legal work that was—he did for us.

Q. And did you have any business transactions other than legal work?

A. Yes. He formed one corporation for us and I think it was the Coast, and he came in as a stockholder in that company, made an investment in that company. That was the first transaction, I think, and then he also negotiated and handled for us, an RFC loan that we were working on.

Q. Did any of you other than Mr. Forman originally know Mr. Seijas?

A. I believe Mr. Diamond did—I know that Mr. Cavelero and I did not.

Q. What was this RFC loan that he handled for you?

A. Well, we had made an application for a loan in connection with the completion of the drive-in theaters that was being built by Coast, and he carried on the negotiations and so forth.

Q. Where did he have to go in connection with the handling of this loan?

A. Mostly in Los Angeles in the RFC office, and I think he made one trip back to Washington to complete it.

Q. Did he receive an RFC loan for the Coast Drive-in? A. He did, yes. [936]

(Testimony of John A. Tingle.)

Q. And how much was that loan?

A. $220,000.

Q. Had you made any loans from Mr. Seijas personally?

A. Whether it was before or after the RFC loan, I think it was after, we had the Whittier Theater which was being built by the Southland Drive-in Theaters Company. The partner that we had there was unable to continue and Coast Drive-in Theaters bought out his interest, that is his stock interest, but we had put up jointly a $100,000 government bond as collateral for a loan through the Bank of America, and half of that was owned by Mr. Fischman. When Mr. Fischman could not continue, he asked us to purchase his interest and at that time Seijas loaned personally to Mr. Cavelero and Mr. Diamond and Mr. Forman and myself $50,000, $12,500 apiece, with interest at five per cent, and that money was used to purchase Mr. Fischman's interest in the collateral which he had with the bank.

Q. In addition to Mr. Fischman was there another associate that withdrew his support?

A. Yes. That was in connection with the Skyline Drive-in. He was unable to continue his financial responsibility in completing that theater and he withdrew.

Q. And his name was what?

A. Well, there were two of them, Mr. Mann and Mr. Guteman. [937]

Q. Now, at the time you received the loan from

(Testimony of John A. Tingle.)

Mr. Seijas, the first one, what was the financial condition of the association of you, Mr. Cavelero, Mr. Diamond, and Mr. Forman?

A. Well, we were a little pressed at the time to continue the program that we started, but we were not financially embarrassed, if that is what you mean.

Q. Were you able to proceed without additional loans?

A. We could have proceeded with one theater. We would have had to withhold or stop the other one.

Q. And were you subject to any type of labor liens at the time you were in the stage of construction at that area? A. No, absolutely not.

Q. How was the loan with Mr. Seijas handled?

A. Well, it was a joint note——

Q. First of all, who handled the loan?

A. Who do you mean?

Q. With whom did Mr. Seijas converse regarding this loan? A. Well, all of us.

Q. And you brought with you certain documents, did you not, pertaining to these transactions?

A. I did.

Mr. Obenour: I ask this be marked.

The Clerk: Plaintiff's Exhibit 118 has been marked for identification. [938]

Mr. Obenour: Mark this please.

The Clerk: Plaintiff's Exhibit 119 has been marked for identification.

(Testimony of John A. Tingle.)

Q. (By Mr. Obenour): Handing you Exhibits 118 and 119, can you identify those please, sir?

A. These are the original notes that were given to Mr. Seijas at the time the loan was made.

Mr. Obenour: I offer 118 and 119.

Mr. Mead: We have no objection.

The Court: Admitted.

(Thereupon, Plaintiff's Exhibits 118 and 119 for identification were admitted into evidence.)

Q. (By Mr. Obenour): Referring to Exhibit 118, Mr. Tingle, would you please explain just how the first $50,000 loan was handled in the regard to security?

A. Well, we put up our stock which we owned in the Southland.

Q. We being whom?

A. Cavelero, Forman, Diamond, and myself.

Q. All right, sir.

A. We put that up as security and we signed the notes personally.

Q. And how many notes were there, Mr. Tingle?

A. There were three notes on the first loan.

Q. Three notes on the first loan? [939]

A. Yes.

Q. And the dates and the amounts were what?

The Witness: Pardon?

The Court: Dates and amounts.

The Witness: November 15, 1948, $21,186.11.

Q. (By Mr. Obenour): Why was the odd amount of $21,000?

A. The odd amount represented interest until

(Testimony of John A. Tingle.)

maturity and that is the way Mr. Seijas wanted the note made out.

Q. And you actually received?

A. $20,000.

Q. And the odd amount included the interest at maturity?

A. At five years. Well, it says six per cent here. It must have been six. It is six. I had an idea it was five. I am sorry.

Q. All right, sir. And the maturity date was what? A. January 15, 1950.

Q. And the second note was what?

A. The second note was dated November 15, 1948, for $22,200, and it was due January 15, 1951, at six per cent interest which was added to the principal amount of $20,000.

Q. All right, sir.

A. The third note is dated November 15, 1948, for $11,600, and it was due January 15, 1952, likewise with six [940] per cent interest to the date of maturity to $10,000 principal.

Q. Now, the first two notes were for $20,000 with the six per cent interest added to maturity, and the last note was for $10,000 with six per cent added to that at maturity, and each note was signed by whom?

A. William R. Forman, J. H. Tingle; Gus Diamond and Mr. Cavelero.

Q. In other words, all four of you signed individually each of the notes to Seijas? A. Yes.

(Testimony of John A. Tingle.)

Q. Would you refer to the first note to something that is attached there? A. Yes.

Q. What was the purpose of that, Mr. Tingle?

A. When the RFC loan was granted, the Coast Drive-in Theater, Coast being a 50 per cent owner of Southland, required that any indebtedness to the officers or directors be subordinated to their loan, and they also required that the stock of Coast be escrowed by them. This was in addition to our personal guarantee of the RFC loan, and consequently, Seijas was required to deposit these notes and his stock along with our stock. That is for the security.

Q. Now, referring to that, I will ask you [943] again which loan was first, the RFC loan or the Seijas loan?

A. The RFC loan was November 15, 1949, which was a year later.

Q. A year later? A. A year later.

Q. And is this correct, Mr. Tingle, Seijas made his first loan November 15, 1948, and, then, subordinated his security and interest in the company——

Mr. Mead: That is a leading question, Your Honor.

The Court: Yes, it is leading.

Mr. Obenour: Yes, sir.

Mr. Mead: That is objected to, Your Honor.

Mr. Obenour: I attempted to facilitate, Your Honor.

The Court: Yes, I understand, but in the face of the objection you must proceed the other way.

(Testimony of John A. Tingle.)

Q. (By Mr. Obenour): The date of the Scijas loan was what, then, again, sir?

A. November 15, 1948.

Q. Now, Exhibit 119, what is that?

A. That is a series of three notes all of which are dated April 25, 1949.

Q. All right, sir. [942]

A. The first note is in the amount of $11,322.89 and is due January 15, 1952.

Q. What is the date of that, now?

A. April 25, 1949.

Q. How much was that? **A.** $11,322.89.

Q. All right, sir. And did that similarly—what was the money actually loaned?

A. $10,000, and the interest was added to the date of maturity.

Q. And the next?

A. April 25, 1949, $23,645.78, due January 15, 1953. The principal amount was $20,000, and the interest at six per cent to the date of maturity was added.

Q. Next?

A. Dated April 25, 1949, $24,649.78, due January 15, 1954. The principal amount of this note was also $20,000 and the interest date of maturity at the rate of six per cent was added.

Q. By April 25, 1949, then, how much money did Mr. Scijas loan to the California Drive-in Theater interest, total?

A. $100,000, $25,000 to each of four stockholders.

(Testimony of John A. Tingle.)

Q. He had the signatures of the four individually? A. Yes, sir.

Q. And you had put up your stock for security?

A. That is right.

Q. In the drive-in which was receiving the loan?

A. Yes.

Q. And what is Exhibit 120?

A. Exhibit 120 is a note from Coast Drive-in Theater covering a loan of $17,500 made by Army Seijas as trustee to Coast Drive-in Theaters.

Q. And what is the date of the note?

A. November 15, 1951.

Q. And what are the other documents attached to it?

A. Attached is a copy of a letter written by me to the Intelligence Division of the Bureau of Internal Revenue.

Q. And the first two cards in front of the note?

A. Simply office records showing the date due and so forth.

Mr. Obenour: All right. Offer 120.

Mr. Mead: If the Court please, we object to Exhibit 120 for the reason that it is apparently a loan made as trustee by Mr. Seijas at a later time, and is incompetent and immaterial, for the further reason that it has attachments to it which are copies of communications from the witness to a government agent with respect to which he can testify.

The Court: Clearly the attachments should be [914] withdrawn.

(Testimony of John A. Tingle.)

Mr. Obenour: They are withdrawn at this time, your Honor.

The Court: Yes, do that now. Otherwise the objection is overruled. The exhibit is admitted.

(Thereupon, Plaintiff's Exhibit 120 for identification was received in evidence.)

Q. (By Mr. Obenour): When was the loan made to the Skyline Drive-in Theater, Mr. Tingle?

A. Whatever date appears on the note would be it.

Q. I will ask you, sir, if there weren't two loans made previously which were incorporated by the actual documents of the note dated November 15, 1949, referring to your office cards in Exhibit 120?

A. Yes, sir. On October 26, 1949, Seijas made a loan of $10,000 to Skyline and then in January 19, 1950, he made a loan of $7,500. These notes were assumed by Coast Drive-in Theaters on November 15, 1951, and that is the reason for that.

Q. What was the date you received the loan from RFC? A. November 15, 1949.

Q. And by November 15, 1949, how much money had Mr. Seijas loaned to the four of you associated in these drive-in theaters?

A. He had loaned us $100,000. [945]

Q. $100,000. And does that include the $10,000 loaned in October of 1949?

A. No. That was not loaned to us. That was loaned directly to the corporation.

Q. Who constituted the corporation?

A. Well, Skyline at that time, we had several

(Testimony of John A. Tingle.)

stockholders and each stockholder had been asked to loan a certain amount of money to complete the theater, and we all put in money at that time.

Q. And Mr. Seijas had loaned a total then of how much?

A. Well, he loaned up to October, '49, $10,000.

Q. And that was loaned to the——

A. Skyline.

Q. The Skyline Corporation itself distinguished from the four of you individually? A. Right.

Q. But he had loaned a total of how much money by November 15, 1949? A. $110,000.

Q. And when the RFC loan was made, what did Mr. Seijas then do concerning his security which he had held on his loan?

A. He deposited it with RFC.

Q. What did he do concerning the seniority of his claim for payment and security in order that the RFC loan could be made? [946]

A. Well, he had subordinated it to the payment of the RFC loan and as the notes became due, we paid directly to RFC instead of directly to Seijas, and then, the corporation assumed the liability, and upon the completion of the loans, the repayment of the loan to RFC which was within, shortly within two years of the time the actual loan was made, then, those notes were paid by the corporation to Seijas.

Q. All right, sir. RFC was paid in how long?

A. I think it was just under two years.

Q. And was Mr. Seijas paid? A. Yes.

(Testimony of John A. Tingle.)

Q. And has Mr. Seijas been paid all of his loans?

A. Oh, yes.

Q. And when was he paid? A. When?

Q. Yes, sir. Does it show on the face of the notes themselves, Exhibits 118, 119, and 120?

A. No, it doesn't, but I have a memoranda here. The note was due January 15, 1950, and that was paid on that date to RFC. The note that was due January 15, 1951, was paid on that date to RFC. The note that was due January 15, 1952, was paid on that date, and, I believe, directly to Seijas. The note that was due January 15—or, there were two notes due January 15, 1952, two [947] $10,000 notes. They were both paid on January 15, 1952. The note that was due January 15, 1953, and the note that was due January 15, 1954, were paid directly to Mr. Seijas on May 28, 1952.

Q. And the $17,500 note was paid when?

A. Paid May 6, 1952.

Q. All right, sir. Mr. Seijas, did he have stock in these corporations as well as the loans?

A. He did.

Q. When did he purchase his stock?

A. Of course, the stock book would show the exact date, but Coast Drive-in was incorporated March 10, 1949, and I assume it was shortly thereafter that he purchased his stock.

Q. How much did he purchase?

A. With Coast I think it was 300 shares. I can't be sure of that. I have a memorandum that shows

(Testimony of John A. Tingle.)

in one place $200 and in another place it shows $300, and I am uncertain about the exact figure.

Q. How much was paid for the stock?

A. At the rate of $10 a share.

Q. Either $2,000 or $3,000?

A. Whichever it is.

Q. And did he have any other investments?

A. He had 200 shares of Southland which we paid for and [948] gave it to him as a bonus, you might say, on the loan.

Q. Did Mr. Seijas still have his stock?

A. Does he still?

Q. Yes, sir. A. He does not.

Q. When did he sell it?

A. It was in 1953, but the exact date I couldn't give you without referring to the corporation records.

Q. Who bought the stock?

A. It was bought by an outdoor investment company which was a partnership consisting of Mr. Cavelgis, Mr. Forman, Mr. Diamond, and myself, and we had in that partnership investments outside of our theater interests.

Q. And in addition to the monies received from the stock and the repayment of the loans, did Mr. Seijas receive fees for his legal services performed for the corporation or your different companies?

A. My recollection is that if he did they didn't amount to a great deal, but I couldn't tell you what or when without referring to the corporation notes.

(Testimony of John A. Tingle.)

Q. Did he continue to perform legal services for your companies for the first corporation?

A. Yes, sir.

Q. You sold out your interest, I believe you stated?

A. Well, I sold out a little over a year ago, and for about [949] a year and a half prior to that I was not active although I had still my stock interest. I was not active in the company.

Q. Yes, sir. What interest did you have in the company? A. It varied in the corporations.

Q. To whom did you sell?

A. In some instances I sold my stock in one corporation to another corporation that was buying up an interest in that particular theater, and I sold to Mr. Blumberg——

Q. To whom?

A. Mr. Blumberg. And I sold a small amount of stock to Mr. Forman, but mostly it was to the other corporations.

Q. Who made up the corporations?

A. The men themselves, but I wouldn't know.

Q. Did Mr. Forman continue to have his interest in these businesses? A. As far as I know.

Q. And Mr. Cavelero? A. No.

Q. When did he sell?

A. At the same time I did.

Q. Mr. Diamond?

A. He still has his interest so far as I know.

Q. So the remaining persons having their interest are Forman and Diamond, to your knowledge,

(Testimony of John A. Tingle.)

and you and [950] Cavelero are out? A. Yes.

Q. How about the minority stockholders?

A. They had sold out previously.

Q. And have you received your payments for your interest yet?

A. No, I have not. It is over a period of five years.

Q. You still have how much coming, then?

A. Well, it will be about three and a half years before I will be paid.

Mr. Obenour: Thank you, Mr. Tingle. That is all.

Cross Examination

Q. (By Mr. Mead): Mr. Tingle, I think you said that the first loan which Mr. Seijas made to your group in Los Angeles which was made on November 15, 1948, I believe you said, is that correct? A. That is correct.

Q. To whom was that loan made?

A. It was made to the four individuals.

Q. And that is indicated by the notes which have been marked and introduced in evidence, I believe?

A. Mr. Seijas wanted one note, a joint note, although the [951] loans were made individually.

Q. And at that time how long had you been acquainted with Mr. Seijas? I think you stated you had met him in 1948 and this was in November, 1948. How long had you been acquainted?

A. Six months or more.

(Testimony of John A. Tingle.)

Q. And was Mr. Cavelero acquainted with Mr. Seijas for approximately the same period of time?

A. He was.

Q. And I think you stated that Mr. Diamond had known him previously?

A. Yes—I am not positive, but it is my belief that he had, but I do not know.

Q. Now, at that time, Mr. Tingle, when I say "at that time" I mean November 15, 1948, when this first loan was made, were your interests to whom the loan was made threatened by foreclosure in any way? A. Not at all.

Q. At the time the second loan of $50,000 was made, and I believe you stated that that was the following year, 1949, April of 1949, is that correct?

A. April of '49, yes.

Q. Were any of your interests to whom the loan was made threatened by foreclosure?

A. Absolutely not. [952]

Q. Were you threatened by lien foreclosures?

A. Absolutely not.

Q. What was the sole purpose of that loan?

A. The sole purpose of that loan was to complete the construction of that theater that spring. We didn't want to put it off another year which we could have had we had to.

Q. Now, Mr. Tingle, I think you have stated that you have withdrawn or sold out your interests in these partnership ventures and in these corporations with which you associated. What was the reason for your selling out, sir?

(Testimony of John A. Tingle.)

A. Primarily because of health. I am 66 years of age and I felt it was time I took things a little bit easier. Those were the two reasons.

Q. And I think you stated that for a year or so prior to the time you had sold out, your health had been poor and you were not actively engaged in this business?

A. I underwent two serious operations and I had to take things very easy at that time.

Q. Now, in which corporations was Mr. Seijas a stockholder?

A. He was a stockholder in Coast and Southland and for a short period of time he held some stock in the Griffith Drive-in Theater, but that was in the name of, I think he had that in the name of Army Seijas as agent [253] for Betty Lou Seijas and Army Seijas as agent for Gloria Seijas.

Q. In other words, that investment was as trustee for, apparently, some relative?

A. Yes. It was a small investment.

Q. Now, I think you stated that his investment in the Coast Drive-in Theater was some two to three thousand dollars, this capital investment in stock, is that right? A. That is right.

Q. And his investment in the Southland Drive-in Theater was by way of a bonus given him for making this loan? A. That is right.

Q. Do you recall how much stock he received in that corporation? A. Two hundred shares.

Q. Now, I think you stated that these loans that he made were made to at least some of the corpora-

(Testimony of John A. Tingle.)

stions in which he was a stockholder, is that correct?

A. Yes.

Q. Or for that purpose?

A. Yes, but—yes, all loans were made to Coast of which he was a stockholder.

Q. Now, all of the loans you stated were repaid to Mr. Seijas with interest on the dates that you have specified? [954] A. That is correct.

Q. Do you recall when his stock in the Coast Drive-in Theater which he had invested, two to three thousand dollars, was purchased or sold by Mr. Seijas?

A. I have a memorandum here that I made up over a year ago when I testified previously, and very frankly, it is not quite clear to me now, but there was quite a bit of transferring around of the stock which he held.

Q. Do you know what his purchase price was, what he received for that stock?

A. He received $20,000 for his interest in the two companies.

Q. So, he received, then, for his stock in the Coast Drive-in Company and in the Southland Company, for which he had paid two to three thousand dollars total, having received the other as a loans, $20,000?

A. That is correct. When he sold it, he sold it on the basis of the book value.

Q. And that was about $20,000 at the time of the sale? A. Yes.

Q. Do you recall, Mr. Tingle, at the time of the

(Testimony of John A. Tingle.)

sale of Mr. Seijas' stock, what percentage of the total stock of these corporations did his capital investment represent, percentagewise?

A. Well, in the Southland it was a fifth because there were [955] only a thousand shares issued.

Q. It was about a fifth interest?

A. About a fifth interest. In the Coast I am not certain whether it was two or three hundred shares, but it was at least a fifth interest in that company too.

Q. So, it was at least approximately a fifth interest in these companies to which he was making these loans? A. That is right.

Mr. Mead: That is all.

Redirect Examination

Q. (By Mr. Obenour): You say a fifth interest when he invested $20,000. That was the fifth of the total amount originally invested by all of you?

A. It was a fifth of the stock that was issued.

Q. Was all of the stock issued purchased at the same basis of $10 a share? A. That is right.

Q. And he paid in one-fifth of the total investment made up of the rest of the four of you?

A. That's right.

Q. And when you say he sold at book value, what do you mean?

A. Well, the theater had been in operation for a couple years and started out with a lot of debts and made money. [956] and naturally the stock was

(Testimony of John A. Tingle.)

worth a lot more at the time he sold than when it was purchased.

Q. So all he got in that regard was his share of the then value of the corporation?

A. That is right.

Q. There was no bonus connected with that?

A. No bonus.

Q. And the $20,000 also included the book value of the bonus of 200 shares in Skyline? A. Yes.

Q. Why did you give him a bonus of these shares? A. Originally?

Q. Yes, sir.

A. Well, it was part of the deal that was made at that time. He would get 200 shares of stock and advance so much money.

Q. And which loan was this that he received the bonus for? A. On the first $50,000.

Q. Now, was there any period, Mr. Tingle, when the banks were not loaning money on this business venture?

A. Yes. Drive-in theaters have never been easy to borrow money on.

Q. So at the time you got the loan from Mr. Seijas you were unable to make the normal loans that businesses require from banks, is that right?

A. Through the bank, yes.

Q. And that was the reason of the bonus or the bonus given to him?

A. I would say so, yes, sir.

Q. And at the time he sold, was that share also then just the book value of the shares of the rest

(Testimony of John A. Tingle.)

of you? A. That is right.

Q. And when you sold out were you paid in the same book value?

A. Well, the book value had increased.

Mr. Obenour: That is all.

Recross Examination

Q. (By Mr. Mead): Mr. Tingle, you were asked if ordinary bank financing was available to you. Was other financing available to you besides Mr. Seijas?

A. Yes. We had others that were interested in coming into our companies.

Q. So other private financing was available?

A. Private financing was available at that time.

Mr. Mead: Thank you, sir.

The Court: That is all, Mr. Tingle, and you may leave whenever you wish.

(Witness excused.) [958]

ROBERT THOMAS CRAWFORD

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Robert Thomas Crawford.

The Clerk: Spell your last name.

The Witness: Spell it?

The Clerk: Yes.

The Witness: C-r-a-w-f-o-r-d.

(Testimony of Robert Thomas Crawford.)

Direct Examination

Q. (By Mr. Obenour): Where you live, Mr. Crawford?

A. 1008 High, Bremerton, Washington.

Q. And your occupation?

A. Automobile dealer.

Q. And how long have you been so engaged?

A. I have been in the City of Bremerton since 1923.

Q. Since 1923? A. Off and on.

Q. In Bremerton? A. Yes, sir.

Q. Did you continue to operate an automobile agency in 1941 through 1945? A. Yes, sir. [959]

Q. Did you go into any other business venture at that time? A. Went into the pinballs.

Q. Do you know Mr. Forman? A. Yes, sir.

Q. And Mr. Seijas? A. Yes, sir.

Q. Who did you know first? A. Mr. Seijas.

Q. How did you become acquainted with him?

A. I become acquainted for putting in a license for operation of a route of pinballs in the City of Bremerton.

Q. What was the circumstances under which you became acquainted with him?

A. Well, the City of Bremerton was wanting some revenue, and Mr. Ken Crawford and myself come up with the idea that the pinballs might help them out in revenue, and that is how we got started, and Mr. Ken Crawford brought Army Seijas to me and introduced him to me.

Q. Did you know any of the members of the

(Testimony of Robert Thomas Crawford.)

City Council? A. Yes, sir.

Q. Who? A. Mr. Broom the mayor.

Q. Mr. Broom the mayor? A. Yes, sir.

Q. And at that time did they have pinballs in Bremerton? A. No, sir.

Q. And who was opposing the installation of pinballs?

Mr. Mead: That is objected to as a leading question and calls for a conclusion.

The Court: I don't think it is leading. He asked him who was opposing it.

Mr. Mead: There has been no testimony that anybody was opposing it.

The Court: Perhaps in that sense, yes, but that is a pretty fine point. You can put the general question, was there opposition?

Q. (By Mr. Obenour): Was there opposition to the installation of pinballs in Bremerton prior to this time?

A. What do you mean, was anybody opposing them?

The Court: Was there any opposition?

The Witness: No.

Q. (By Mr. Obenour): And what was Mr. Broom's position concerning bringing pinballs into Bremerton? A. Well, he was the mayor.

Q. Yes, sir. And how did he feel about bringing pinballs into the City of Bremerton?

A. Well, he was —

Mr. Mead: That is objected to.

The Court: Well, the choice of words is bad.

(Testimony of Robert Thomas Crawford.)

Q. (By Mr. Obenour): Did you have any conversation with Mr. Broom concerning the beginning of pinball operations in Bremerton?

Mr. Mead: That is objected to as being immaterial to the issues, your Honor, what conversations he had with the mayor or someone else.

The Court: Overruled. Go ahead.

Q. (By Mr. Obenour): Did you have such conversations? **A.** Yes, sir.

Q. Did the City Council take action to permit the operation of pinballs in Bremerton?

A. Yes, sir.

Q. Who received licenses?

A. Myself and K. R. Crawford are the only two I know at that time.

Q. How did you happen to get a license?

A. Well, Mr. Seijas told me if I would help get the license for the pinball operation that he would put one license, one route in my name and one route in Ken Crawford's name.

Q. What were you to receive as an interest in the operation? **A.** $50 a week salary.

Q. And was there any reason why the route would be in your name?

A. Well, if I was going to go and set the operation up, I [962] should have an agreement.

Q. Why didn't Mr. Seijas take it out in his own name?

A. Well, they wanted a pinball business operated in a hometown boy, I should say.

Q. Who did? **A.** Mr. Seijas.

(Testimony of Robert Thomas Crawford.)

Q. Handing you Exhibit 83, can you identify that, please?

A. Yes, sir, that is my signature.

Q. What is that?

A. It is an agreement between Mr. Forman and I.

Q. And what was the occasion that you entered into that agreement?

A. Well, I imagine Mr. Forman wanted to protect me on any salary.

Q. At any time was there any talk of a partnership existing between you and Mr. Forman and Mr. Seijas?

A. I think I had an agreement with Mr. Seijas which I couldn't find, as a partnership.

Q. What was that partnership?

A. It was——

Mr. Mead: That is objected to. Now he is testifying to other partnerships and to agreements which are not in evidence and which we are not able to meet, and that is objected to as incompetent and immaterial in addition thereto. [963]

The Court: You better explore more fully this agreement, if there was one.

Q. (By Mr. Obear): Do you recall whether there was a written or an oral agreement as to a partnership? A. I don't remember.

Q. Did you attempt to find a copy of the written agreement, if there was one?

A. Yes, Mr. Wallace, my lawyer, had it. He must have misplaced it.

(Testimony of Robert Thomas Crawford.)

Q. What was the statement made to you concerning your interest in the partnership in the pinball route?

The Court: By whom?

Q. (By Mr. Obenour): By either Mr. Seijas or Mr. Forman?

A. Well, just as is here, that I was supposed to——

Q. No, sir, other than that as to partnerships.

A. Well, I wasn't supposed to be a partner. I was supposed to be the manager of my route.

Q. Who put up the money?

A. Mr. Seijas, as far as I know. I never did see him pay it.

Q. Who paid for it?

Mr. Mead: I move to strike the answer as he doesn't know who put it up.

The Court: That is right.

Q. (By Mr. Obenour): Were you issued a license, Mr. Crawford? [964]

A. I never did have the license in my possession.

Q. Was there a license issued in your name?

A. According to the City Clerk.

Q. And was that master license?

A. Yes, sir.

Q. How many pinball machines could be operated under that master license?

A. I think 35 was the limit.

Q. Did you put up any money for the purchase of a license in your name? A. No, sir.

(Testimony of Robert Thomas Crawford.)

Q. Were machines operated under your name?

A. Yes, sir.

Q. Did you put up any money for the machines?

A. No, sir.

Q. Did you put up any money at all for this route? A. No, sir.

Q. What did you receive in payment?

A. $50 a week.

Q. Did the license continue to be in your name?

A. No, sir.

Q. What happened?

A. I went fishing in June and our license came due on July 1st, if I am right, and when I came back from fishing I went down to the City Hall and, I am not [965] positive, but I think Mr. McCall's daughter was handling this affair.

Q. Who is she?

A. Well, she was acting as his assistant.

Q. Who was Mr. McCall?

The Court: A clerk or what?

The Witness: I asked her about my license and she said, "You don't have any license," and I said, "How come?" and she said, "Well, Mr. Seijas changed the license to the American Amusement Company."

Mr. Mead: That is objected to, your Honor, as being a conversation of other people.

The Court: Yes, of course. You should have objected a little sooner, but nevertheless, that is a hearsay statement and is stricken.

Q. (By Mr. Obenour): Did you thereafter have

(Testimony of Robert Thomas Crawford.)

any license in your name? A. No, sir.

Q. Did you talk to anyone, either Mr. Seijas or Mr. Forman, about the change in the license from your name? A. I talked to Mr. Seijas.

Q. And when was that?

A. I imagine it was about four months later.

Q. Where? [966]

A. The office of Ted Pruitt.

Q. And what was said then?

A. I asked Mr. Seijas why he had taken the license out of my name.

Q. What did he say?

A. He said Mr. Forman instructed him to.

Q. What did you say?

A. Well, I said I thought that was kind of a poor way to do business.

Q. What did you do after that?

A. I called Mr. Forman up on the phone and made an appointment with him.

Q. What did you do?

A. Well, I went up to his office and Mr. Forman said, "I hear that you are going to sue me," and I said, "Well, I thought about it," and so we talked around there a little bit, and I don't know what all was said, but Mr. Forman said, "Well, you better sign this release," and he took me up and bought me a suit of clothes.

Q. Release for what?

A. To clear my interest out of the pinball business.

(Testimony of Robert Thomas Crawford.)

Q. And why did you talk to Mr. Forman about your interest in the pinball business?

A. On account of Mr. Seijas put the blame on Bill.

Q. And what did Mr. Forman tell you about his interest in [967] the pinball business?

A. He didn't tell me anything.

Q. Did you get a copy of this release?

A. I think my lawyer has it. I am not sure. I am not positive.

Q. And did you get a suit of clothes?

A. Pardon?

Q. Did you get a suit of clothes?

A. Yes, sir.

Q. That was from whom? A. Mr. Forman.

Mr. Obenour: That is all.

Cross Examination

Q. (By Mr. Mead): Mr. Crawford, the agreement which you have just referred to, you said the occasion of that agreement was that Mr. Forman wanted to protect you on this management salary that you had coming; is that right? That was the reason for signing that agreement?

A. Well, I imagine Mr. Forman thought I should have something to show for my duties.

Q. And so he had that agreement prepared?

A. Yes.

Q. And that provides for $50 a week that you were to receive? [968] A. Yes, sir.

Q. And what is the date of that agreement?

(Testimony of Robert Thomas Crawford.)

A. Pardon?

Q. What is the date of that agreement?

A. The date, the 11th day of April, 1942.

Q. And was that about the start of these routes?

A. Pretty close.

Q. And you talked about the time that you went fishing in June or July and Mr. Seijas terminated your license or had it transferred.

Mr. Obenour: Objection, if your Honor please. That was the testimony that was stricken.

The Court: That testimony was stricken at your instance.

Mr. Mead: I guess you are right, your Honor. I beg your pardon.

Q. (By Mr. Mead): You testified that you went fishing in June or July, and you didn't specify what year. What year was it?

A. I think it was '43.

Q. So that would be a year and several months, then, after this agreement was entered into?

A. Yes, sir.

Q. Then, did you receive $50 a week during the entire period from the time that the licenses were issued up [969] to the time of the June or July date when you went fishing?

A. Well, I received $50 a week until sometime in '45.

Q. Until sometime in '45?

A. Yes. It went on until '45.

Q. So that actually, then, past the July date, 1943, when you went fishing, you were continuing

(Testimony of Robert Thomas Crawford.)

to receive the $50 per week? A. Yes, sir.

Q. That you got formerly, is that right?

A. Yes.

Q. And you continued to receive that until what time, Mr. Crawford?

A. Sometime in '45. I don't know what date.

Q. Until 1945? A. Yes, sir.

Q. Now, you stated that you went up to the office to see Mr. Bill Forman because Seijas put the blame on Bill, is that right? A. That is right.

Q. And that was the reason that you went to see him?

A. Well, if you have an agreement with a gentleman, you would like to straighten it out, wouldn't you?

Q. And Mr. Forman bought a suit of clothes for you and you continued to receive the $50 per week that you had [970] received before up until 1945 sometime?

A. When I signed that—my $50 a week allowance was cut off before I went over to see Mr. Forman.

Q. But after you went to see Mr. Forman you continued to receive it until 1945?

A. Well, I seen Mr. Forman later than '45.

Q. No. My question, Mr. Crawford, might have been confusing. After you had the visit with Mr. Forman and Seijas put the blame on him, as you say, you testified that about three or four months after the fishing trip in June or July of 1943, you went over to see Mr. Forman, is that correct, sir?

(Testimony of Robert Thomas Crawford.)

A. I will have to retract that testimony because —can I correct it, your Honor?

The Court: Certainly.

The Witness: Well, there is a misunderstanding there. After Mr. Forman came to Bremerton and told me that business was so bad he would have to take me off of the payroll, that is when I went up to my lawyer and went over and seen Mr. Forman later.

Q. (By Mr. Mead): All right. Now, when was this, Mr. Crawford?

A. Well, that must have been in '45.

Q. Now, this was, then, a development that occurred in 1945? [971]

A. That's right.

Q. When did you go up to see Mr. Forman because Seijas put the blame on him, as you said, and he bought you a suit of clothes? When did that occur?

A. That might have been six or eight months in between there.

Q. In between where, sir?

A. In between the time that Army had taken the license out of my name.

Q. And that was in June or July, 1943, is that right?

A. Well, Army had taken the license out of my name, I think, in '43. I think it run a year.

Q. So, then, after your conversation with Mr. Forman and his having bought you a suit of clothes, you continued to receive the $50 a week until 1945,

(Testimony of Robert Thomas Crawford.)

am I in error on that? A. Yes, sir.

Q. In what respect?

A. In 1945 I went over and seen Mr. Forman after he stopped my pay and he bought me a suit of clothes, and I signed the release.

Q. Well, let's come back to the meeting with Mr. Forman that you have described, in 1943, Mr. Crawford, after the fishing trip when he bought the suit of clothes.

A. Mr. Seijas met me after '43 after he changed the license. [972] I met Mr. Forman in '45.

Q. So you had no contact, then, with Mr. Forman until 1945 with respect to the situation?

A. That's right.

Q. Is that right?

A. To the best of my knowledge.

Q. To the best of your knowledge?

A. Yes.

The Court: Do you mean that generally or with respect to this particular——

Mr. Mead: With respect to this matter, your Honor.

The Court: Yes.

Mr. Mead: That is fine. Thank you very much, Mr. Crawford.

Redirect Examination

Q. (By Mr. Obenour): Mr. Crawford, pinball licenses were first taken out in the spring of '42, is that correct? A. '42 was the first issue.

Q. The date of this Exhibit 83 is April 12, 1942.

(Testimony of Robert Thomas Crawford.)

Would that be about when pinball routes began?

A. Just about, I imagine. [973]

Q. And it was taken out in your name at that time? A. Yes.

Q. And when were the licenses renewed?

A. July 1st.

Q. And was it renewed in '42 for the year, July 1, '42 to July 1, '43? A. In my name?

Q. In your name. A. Yes.

Q. And during that period you received payment? A. Yes, sir.

Q. And how much? A. $50 a week.

Q. And what did you do for that money?

A. Well, I was interested in getting the pinballs started.

Q. And for that you received $50 a week until July 1, 1943, is that right?

A. Well, yes, I drawed a salary right along.

Q. After the license was changed from your name, was your payment of $50 a week terminated for a period?

A. No. Sometimes I wouldn't get the $50 a week and then maybe they would give me a $200 check.

The Court: Do you mean, you didn't get it regularly but you always got the total eventually?

The Witness: When Army would come over he [974] would bring me a check.

Q. (By Mr. Obenour): And when did you cease to receive your $50? A. Pardon?

Q. When did you cease to receive your $50?

A. Sometime in '45.

(Testimony of **Robert Thomas Crawford.**)

Q. Did you see Mr. Forman after the license was changed from your name? **A. In 1945.**

Q. You did not see anyone other than Mr. Seijas from 1943 until, when the license was changed, until 1945?

A. That is the best of my knowledge.

Q. What was the purpose of seeing Mr. Forman in '45?

A. Mr. Forman drove over to my place of business one day and he said that business was so rough they would have to take me off of the payroll.

Q. When was that?

A. Sometime in the early part of '45.

Q. What happened then?

A. Well, we didn't do much about it.

Q. How did you happen to see Mr. Forman in his office?

A. Well, I called up and wanted to talk to him about it.

Q. What were you seeing him about then?

A. I wanted to clear myself out of the pinballs. If they would take me out of the payroll, I didn't want nothing [975] to do with it.

Q. What were you having to do with other than being on the payroll?

A. I was acting as manager for my route.

Q. You were acting as manager for your route?

A. Yes.

Q. What were you doing? A. Pardon?

Q. What were you doing?

(Testimony of Robert Thomas Crawford.)

A. Well, not very much.

Q. Did you make a statement, Mr. Crawford, on March 7, 1952, to Mr. Keeney and Mr. Oftedal?

A. I met with the gentlemen. I don't know what time it was.

Q. I will ask you to refer to page four of this for the purpose of refreshing your recollection——

Mr. Mead: May I suggest, sir, he has handed the witness a statement of some kind and we would like the opportunity of reading it, and since it is now a quarter to 11, this might be a good time for recess.

The Court: I was hoping we could conclude with this witness before we recess.

Mr. Obenour: This is a matter for refreshing his recollection, your Honor. [976]

The Court: Show it to counsel when he is finished. When you have concluded put a question to the witness.

Q. (By Mr. Obenour): What is your recollection as to the purpose of which you saw Mr. Forman?

Mr. Mead: Can he fix the time?

The Court: Is this the same time you saw Mr. Forman following which you got the suit of clothes?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Obenour): When was that time?

A. I don't recollect.

Q. And the purpose?

A. Well, there is no date——

(Testimony of Robert Thomas Crawford.)

The Court: No. The question is now, to your independent recollection now.

Q. (By Mr. Obenour): What is your best recollection as to the purpose?

A. Well, it would be in '45.

The Court: We are not talking about the time any more. The question is, what was your purpose in seeing Mr. Forman?

The Witness: Oh, I went over there to talk to Mr. Forman about taking the license out of my name. [977]

Mr. Obenour: All right. That is all. Will you show it to counsel?

Mr. Mead: We would like a chance to examine it, your Honor.

The Court: All right. You can remain in attendance, Mr. Crawford, in case there is something further remaining after recess. Before we conclude, however, is this suit of clothes all that you got in consideration of your signing this release that you gave to Mr. Forman?

The Witness: Yes.

(Witness excused.)

The Court: All right. We will recess for 15 minutes.

(Thereupon, a short recess was taken.)

The Court: Was there anything further desired of this witness?

Mr. Mead: No, your Honor.

The Court: Very well, call another witness.

Mr. Obenour: Call Mr. Ken Crawford. [978]

KENNETH R. CRAWFORD

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: My name is Kenneth R. Crawford.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Crawford?

A. Bremerton, Washington.

Q. And are you any relation to Robert Crawford who appeared before you here? A. None.

Q. And what is your business?

A. I am a real estate broker.

Q. How long have you been so engaged?

A. Approximately nine years.

Q. And do you know Army Seijas?

A. Yes.

Q. And do you know Bill Forman?

A. Yes.

Q. When did you first meet either of these gentlemen? A. I believe it was early in 1942.

Q. Who did you meet first?

A. Mr. Forman. [979]

Q. And how did you meet Mr. Forman?

A. I received a telephone call from Mr. Sullivan who owned and operated a tavern in Bremerton that he would like to have me come down and meet a friend of his.

Q. And did you do that? A. Yes.

(Testimony of Kenneth R. Crawford.)

Q. And who was the friend?

A. Mr. Forman.

Q. What took place at that meeting?

Mr. Mead: If the Court please, I would like to make an objection to that as to the materiality. The only issue involved in this case is the one of the income from these partnerships and the testimony with regard to what happened in the organization of the partnerships, and the like, are immaterial to any issue involved in this case.

The Court: Overruled.

Mr. Mead: May we have a general continuing objection?

The Court: Yes, you may have a general objection to that effect.

Q. (By Mr. Obenour): What took place at that meeting, Mr. Crawford?

A. Mr. Sullivan explained to Mr. Forman that I was in the business of operating automatic coin operated phonographs [980] and it looked very much like the City of Bremerton and Kitsap County was going to open up the pinball business and that I would be the man best qualified to handle the business.

Q. What were you told by either Mr. Sullivan or by Mr. Forman as to Mr. Forman's interest in any forthcoming pinball operation?

Mr. Mead: We object on the further ground that what he was told by Mr. Sullivan——

The Court: In the presence of Mr. Forman?

Mr. Obenour: At this time, yes, sir.

(Testimony of Kenneth R. Crawford.)

The Court: Overruled.

The Witness: Well, I was advised that Mr. Forman was in a position to get delivery of mechanically operated pinball equipment, and at that time it was a well-known fact they were hard to acquire, and he thought that probably his connections would enable him to deliver such equipment to open the city and county to pinball operations if such ordinances as were required were passed.

Q. (By Mr. Obenour): Was any possible business association discussed at that meeting between you and Mr. Forman? A. Yes.

Q. What was the discussion? [981]

A. He offered me a job to handle the end of training personnel to service the equipment and the installation at a salary of $75 a week beginning that date.

Q. And what was your knowledge or training that would enable you to perform such services on pinball equipment?

A. Well, I am an electronics engineer and I was operating similar equipment in novelty and phonograph equipment.

Q. Did you go to work at that time?

A. Not for a few weeks. I went on the payroll at that time but there wasn't much to do other than contact work.

The Court: Excuse me. What was the date of this conference that you have just referred to?

The Witness: Well, it would be early in 1942, as

(Testimony of Kenneth R. Crawford.)

close as I could pin it down. I would say sometime in February or March.

Q. (By Mr. Obenour): And this meeting took place where?

A. At a particular location known as Sullivan's Tavern.

Q. When did you meet Mr. Seijas?

A. Well, at that time Mr. Forman advised me that Mr. Seijas would be the man that would be contacting me and would probably see me within a week or ten days, and I believe about four days later was the first time I met Mr. Seijas.

Q. Where? [982]

A. At a tavern outside the City of Bremerton known as The Peedle Weeser.

Q. What took place at this meeting?

A. Well, there had been some equipment previously installed in the Peedle Weeser Tavern with the thought of running a test case in the county as to the legality of its operation.

Q. What type of equipment? A. Pinballs.

Q. All right, sir.

A. He asked me if I was capable of repairing those machines. He was waiting there for me. They were both inoperative at the time.

Q. Both machines?

A. Yes, both machines.

Q. And what took place then?

A. Well, I immediately tore into the equipment and repaired it and then he, as I recall, he asked that I meet him again the following week to discuss

(Testimony of Kenneth R. Crawford.)

Q. How long did the license continue in your name? A. Not very long.

Q. What happened?

A. Well, I just don't recall the occasion that I had to be in the City Hall, but I was advised by one of the girls in the collection office that——

The Court: Just a moment, Mr. Crawford, that would be hearsay. Go ahead.

Q. (By Mr. Obenour): Did you determine whether or not the license was thereafter in your name? A. Yes.

Q. Was it? A. No. [999]

Q. In whose name was the license?

A. United Amusement Company.

Q. And at any period during this time had you been out of the city?

A. I had taken a week's vacation on a fishing trip.

Q. When was that?

A. Early in 1943 right after the fishing season opened up. I believe it would be in May.

Q. When did you learn that the license was no longer in your name?

A. I believe sometime during the month of May, 1943.

Q. Did you have any conversation with either Mr. Seijas or Mr. Forman concerning the change in the license from your name?

A. Yes, sir, I did.

Q. And with whom? A. With Mr. Seijas.

Q. What was this conversation?

(Testimony of Kenneth R. Crawford.)

some of the legal parlance of a proposed ordinance being drawn by the county to install pinball equipment throughout the county.

Q. Did that meeting take place? A. Yes.

Q. When was the next meeting you had with either Forman [983] or Seijas?

A. Well, with Mr. Seijas it was quite frequently. He was over most every day thereafter for a good many months, I would say for the next four or five months. He was over at least once or twice a week and sometimes four or five times a week.

Q. Mr. Forman?

A. No. I didn't see Mr. Forman very often, perhaps four months after that time before I saw him back again.

Q. At that time what were you told concerning Mr. Seijas' interest in this business?

A. Well, no one told me much. I was under the impression that Mr. Seijas was the legal counsel of the firm, and that was about as much as I knew about it.

Q. What were you told as to the personnel constituting the proposed business interests that would take over the pinballs?

A. Well, it was——

The Court: I presume you mean Seijas and Forman?

Mr. Obenour: Yes, sir.

The Witness: Well, I wasn't told very much. It was in quite a turmoil. There was arguments pro and con as to whether there was going to be part-

(Testimony of Kenneth R. Crawford.)

A. I went to check it at the City Hall by whose authority the license had been changed, and at whose request, and I was advised by the City Clerk that my attorney, Mr. Seijas, as far as he knew, and as far as I know, I never engaged Mr. Seijas as my attorney, and I so advised him and objected very strenuously to transferring the license without my consent, but I didn't get anywhere [1000] with it. It seemed to be satisfactory with the Mayor of Bremerton and the City Councilmen that the license had been changed to United Amusement Company, so I immediately made it known at that time that I wanted nothing to do with the operation and had no responsibility of any nature other than in—other than from a mechanic's standpoint of view.

Q. To whom did you tell this?

A. Mr. Seijas.

Q. What did Mr. Seijas tell you concerning the change from your name to United Amusement?

A. He told me if I didn't like it I knew what I could do.

Q. Was this United Amusement Company or United of Bremerton, do you know?

A. I believe it was the United Amusement Company of Bremerton, and later, probably, changed it to United Amusement.

Q. After the license was changed, did you continue to work for the pinball company?

A. Yes, I did.

Q. Was there any change in the services you performed?

(Testimony of **Kenneth R. Crawford.**)

nerships set up with competing interests or [984] whether it would continue under operation between Mr. Forman and Mr. Seijas representing him, and Heberling Brothers in Seattle. There was perhaps 15 different competing firms trying to acquire the only license that was to be available, particularly in the City of Bremerton.

Q. (By Mr. Obenour): Did you have any conversation with either Mr. Seijas or Forman concerning the acquisition of a pinball license in your own name? A. Yes, I did.

Q. With whom did you have this conversation?

A. To start with, that was with Mr. Seijas in my own home. After discussing it with the mayor and the councilmen they preferred to have local people entirely in its operation. They understood that local people couldn't get equipment.

Q. Who was that?

A. The city fathers. The City Councilmen and the Mayor and also the county commissioners agreed that the control of the thing should be with local people and wanted it that way, and for that reason I was requested——

Q. By whom?

A. By the Mayor and Councilmen, was requested to apply for a license in my own name.

Q. What was the purpose of your conversation with Mr. Seijas [985] at this time?

A. Well, he discovered at that time, I guess, that I should play an important role relative to the licenses, and just about that time——

(Testimony of Kenneth R. Crawford.)

The Court: You better not turn that way, Mr. Crawford. You are turned with your back partially to the Jury.

The Witness: Thank you, your Honor.

The Court: That is perfectly all right, sir.

The Witness: Mr. Seijas, as I recall it, suggested that I should receive more money if I had to have the responsibility of the license, and the following week my salary was raised from $75 a week to $100 a week, and I did apply for a license.

Q. (By Mr. Obenour): Was there conversation between either you or Mr. Forman and Mr. Seijas and yourself concerning your interest in this license that you were to obtain?

A. Well, I can't say that there was ever any specific agreement other than that I was to draw a certain salary, but by innuendo I was expecting or was half way promised an interest in the business at a future date.

Q. Who was to put up the money for the license?

A. Well, that I never could determine. I know that Mr. [986] Seijas delivered a check to me for $1500 payable to the Kitsap County Treasurer. I do not recall who that check was signed by, and I don't believe it was either Mr. Seijas or Forman, and he himself personally presented the check to the City Council for the master license.

Q. And the license was taken out in whose name?

A. Well, by that time it had become apparent

(Testimony of **Kenneth R. Crawford.**)

that there was going to be more than one license, but as far as I was concerned, the license to operate some 35 machines was taken out in my name.

Q. Now, at this time did you have any locations or spots to contribute towards the installation of these machines?

A. I just don't exactly understand what you mean by "contribute." Do you mean did I control any of the spots that I had any connections with?

Q. Yes, sir.

A. Yes, sir. I did. I had some 26 spots that I was operating in that was eligible for pinball installations.

The Court: Were these other devices of yours?

The Witness: Correct. I was well acquainted with all of the merchants of Kitsap County, having been a resident of some 25 or 30 years, so I encountered no difficulty in placing all of the [987] machines licensed under my name.

Q. (By Mr. Obenour): And was there any conversation in anticipation of your acquiring this license between you and Forman or Seijas concerning your contribution of your connections or contacts at these locations for such installations?

A. Well, I was always promised by Seijas that matter would be taken care of, that he would arrange for me to have a vacation back east and probably purchase a new car and I could drive the new car back.

Q. Who was to put up the money for the machines?

(Testimony of Kenneth R. Crawford.)

A. Well, I never was given any specific information on that. I was just notified that the money was still available.

Q. At this time was there any conversation between you and Mr. Seijas or Mr. Forman as to what interest would be developed after the machines had been paid for?

A. Well, I was promised an interest in the business after the machines and all the expenses pertaining thereto was satisfied, and I was to receive an interest in the business.

Q. And what was to be your interest?

A. Well, there was no specific portion ever decided upon or agreed upon.

The Court: Who made that representation to you, Mr. Crawford? [988]

The Witness: Mr. Seijas.

Q. (By Mr. Obenour): Did you have any other conversations with Mr. Forman at this time?

A. Well, not too many. I don't believe I talked to Mr. Forman over three or four times in two years or more.

Q. Now, at the time was there a meeting of the City Council in which persons were making appearances for the purpose of obtaining passing of an ordinance?

A. Yes. It was almost a continuous affair for two or three months ordinances would be drawn and passed and rejected and rescinded, new modified ordinances would be introduced, and on one particular occasion when it looked like it was a final deci-

(Testimony of Kenneth R. Crawford.)

sion to be reached for an ordinance that would stand, Mr. Forman was over that particular time and I met him out in front of the City Hall and talked to him for some ten or fifteen minutes, and he left there and told me at least that he was going to the lobby of the Enetai.

Q. What is the Enetai?

A. A local hotel located approximately four hundred feet from the City Hall, and should something develop that we needed him, he would be there.

Q. Who is we?

A. Mr. Seijas and myself. We were appearing before the City Council along with other prospective operators. [989]

Q. Who was appearing in the City for your interest? A. Mr. Seijas.

Q. And what happened then?

A. Well, he seemed to have developed a terrific familiarity with all the councilmen and the mayor.

Q. Who is "he"?

A. Mr. Seijas. And at the end of about ten minutes I was asked to leave the room, and I did, and I sat in the lobby for an hour and a half, and he came out and said, "Well, it's all set."

Q. Were you asked at any time to contact Mr. Forman during this meeting? A. No.

Q. At any other meeting were you asked to contact Mr. Forman at the Enetai?

A. To the best of my knowledge, no.

Q. And did you obtain a license? A. Yes.

(Testimony of Kenneth R. Crawford.)

Q. When?

A. It would be sometime during the year of 1942.

Q. It would be just the first half of '42 or the last half?

A. Well, this is rough, but I would say approximately June the 1st.

Q. At this time how many routes or licenses did you people have? [990]

A. Three in the City of Bremerton.

Q. And were there any others? A. Yes.

Q. Where? A. There was two more.

Q. And who owned those?

A. A man I was introduced to as a Mr. Parrot formerly employed by the Tax Commission, and Mr. McGill, two brothers, John and Harry McGill, local residents of Bremerton.

Q. Was there any other interest or route that you people had?

A. We had routes in the county.

Q. Out in the county? A. Yes.

Q. Were you performing services for your $100 a week at this time? A. Oh, yes.

Q. What were you doing?

A. Repairing and installing and maintaining the equipment and breaking in a new crew, trying to acquire personnel of any type.

Q. Were you performing these services in the county prior to the time you began operations in the city? A. Yes. [991]

Q. Did you know Bob Crawford? A. Yes.

(Testimony of Kenneth R. Crawford.)

Q. And did he obtain a license? A. Yes.

Q. Were you present at any conversations between Bob Crawford and either Mr. Seijas or Mr. Forman concerning the conditions under which he would attempt to secure a license?

A. Possibly once. Yes, I am sure I was.

Q. Where was that? A. At my home.

Q. And what conversation took place on that occasion? First of all, who was there?

A. Mr. Seijas, myself, and Bob Crawford.

Q. What conversation took place at that time as to Mr. Bob Crawford's proposed interest in a route?

A. It was quite an involved conversation. Bob Crawford was an officer of the Automobile Dealers' Association, and, as you know, they couldn't get cars to sell during those days and they was having a rough struggle getting by, so someone on the City Council suggested that this license be opened to the Automobile Dealers' Association and that is where Mr. Bob Crawford came in. He is a Nash dealer in Bremerton. He couldn't buy any equipment and Mr. Seijas so informed him that [992] he had access to the equipment, and if he wanted to be a figure head and take the license out in his name, he didn't have to be actively engaged or didn't have to do any work or perform any mission. He would pay him $50 a week for the use of his name and license.

Q. Was there any conversation concerning Mr. Bob Crawford at that time developing an interest in a subsequent time?

ers was counting the money and filling out any pa-

(Testimony of Kenneth R. Crawford.)

it was a rather risky deal and that nothing solid about it at all and could blow up at any time, but in the event that everything did come through and the machines and equipment, and everything, was paid for, then he would be offered an interest in the business.

Q. Did he get a license? A. Yes.

Q. Thereafter were machines installed on—how many licenses did you have in the city?

A. At that time we just had two.

Q. And those were whose?

A. Mine and his.

Q. Did you then proceed to install machines on locations under these two licenses? A. Yes.

Q. And where were the machines from? [993]

A. Well, they was delivered mostly by truck from Bremerton, I have no knowledge of who they were purchased from or where they came from. They just came over in crates and we uncrated them and installed them in the location.

Q. Did you perform services on the city routes?

A. Yes.

Q. And what were they?

A. The same as in the county, servicing and installation.

Q. And how many men did you have working for you doing the same service?

A. Well, the one time we had as many as ten.

Q. How many machines did you operate under your licenses?

A. In the City Limits it had been 35. In the

(Testimony of Kenneth R. Crawford.)

county, I believe it was up to somewhere around 65.

Q. 35 per license? A. Yes.

Q. And after this did you subsequently acquire any other route in the city?

A. When you say "we," the first what you want to call it, did acquire Mr. Parrot's route.

The Court: Are you speaking of the firm or of the same people that you referred to before, Seijas and Forman?

The Witness: The same people, that's correct. At least I was given to understand I was to take [194] over the servicing and repairing and maintaining of that equipment. Mr. Parrott came down and went around with me and delivered the keys to me for the mechanical part of the machines and left for parts unknown and I haven't seen him since that particular time.

Q. (By Mr. Obenour): You say—you use the term "we" in the firm. Who did you know during this time to be the persons constituting this firm or this business interest?

A. Well, for the first two years I was under the impression that all of the financing of the ownership and everything in the firm was Mr. Forman, and Mr. Seijas was the legal brains behind the deal.

Q. And after two years?

A. Well, one day, I believe it was along in the latter part of 1944, Mr. Seijas come over without his car and I delivered him to the dock to catch the ferry, and we sat in the car waiting for the ferry, and he approached me about another deal which I

(Testimony of Kenneth R. Crawford.)

Q. Did you ever have any conversation with Mr. Heberling concerning your interest in the company?

A. No.

Q. Did you ever receive any money from anyone other than your $100 a week?

A. With the possible exception of a tank of gasoline, no.

Q. What was the occasion that you quit the pinball business?

A. Well, from the rumbles and rumors that I had, I was hearing around me, nothing that I could pin down definite, I just didn't like the way the setup was going. It looked to me like it wasn't a very dignified business and it got completely beyond the purpose that the city had set it up for, and I made up my mind early in 1943 that I was going to quit it but each time I would discuss the matter with Mr. Seijas, why he managed to influence me to continue to stay until 1946.

Q. And what was the occasion when you quit?

A. Well, no particular occasion except that I just set that as a deadline and that was going to be it. They [1004] weren't going to talk me into any longer, and I was all through and was going to quit.

Q. Did you ever have any request to fix any equipment other than the pinball equipment?

A. Well, I was requested at one time to fix a washing machine for the Prosecuting Attorney, Mr. Cohen.

Q. By whom? A. By Mr. Seijas.

Q. And to whom was this request made?

A. Directly to me.

(Testimony of Kenneth R. Crawford.)

didn't discuss any further because I wasn't interested, and he advised me at that time he was a heavy owner in the pinball business and always had been.

Q. Prior to that time had you known anyone else to have any interest other than Mr. Forman? [995]

A. No.

Q. In your work did you ever do any collecting?

A. Perhaps in isolated cases when someone was sick or early in the business before the organization had been completed, perhaps maybe, oh, six or seven day did I do some collecting.

Q. And who did the collecting for these routes?

A. Well, I would say within three weeks from the time the firm was set up, or roughly that, Mr. Jerry Meyers was sent over from Seattle and Mr. Seijas brought him over, I guess, one day and informed me that would be the man from there on that would do the collecting.

Q. Did you ever go on the route with Mr. Meyers? A. Yes, on numerous occasions.

Q. What would you do when you would accompany Mr. Meyers on the route?

A. Well, as a general rule I emptied the coin boxes into an automatic nickel counter that we had and returned the coin box to the machine, checked all the mechanical equipment, and cleaned the glass, to see if it was in good operating condition, while he was doing the checking of the money.

Q. Were you ever actually there when Mr. Meyers was counting the money and filling out any pa-

(Testimony of Kenneth R. Crawford.)

Mr. Mead: I assume that we have our continuing objection?

The Court: Yes. I think perhaps we have gone beyond what needs to be covered. It may have a remote bearing, but I think it is undesirable.

Mr. Obenour: You may examine.

Cross Examination

Q. (By Mr. Mead): Mr. Crawford, I take it that you are not related to Mr. Robert Crawford who preceded you? A. No, none whatsoever.

Q. And are you still a resident of Bremerton?

A. Yes. [1005]

Q. And I think you said you are now in the real estate business, is that right, sir?

A. Yes.

Q. And you have been in that business since the time that you left this venture? A. Yes.

Q. In July of 1946? A. Yes.

Q. You have described, I think, your connection with the business, Mr. Crawford, and stated that the first two or three years you saw Mr. Forman for only three or four occasions, is that correct, sir?

A. Yes.

Q. Was your contact during that period of time, then, mostly with Mr. Seijas as far as any of the management of the venture was concerned?

A. Yes.

Q. And how frequently did Mr. Seijas come over there or contact you?

A. Well, quite frequently. Early in the installation of the business almost every day, and thereafter from one to four times per week.

(Testimony of Kenneth R. Crawford.)

per work that was involved, Mr. Crawford? [996]

A. Maybe in some instances, some isolated cases, yes.

Q. Where were you performing these services while he was computing the collection?

A. As a general rule the machines are installed in the front of the business or somewhere out in the open, and most of the accounting was usually done in a storeroom somewhere back out of the way.

Q. Did you receive any instructions concerning the collections? A. No, I did not.

Q. What is a nickel call?

A. What is a nickel called?

Q. Yes, sir.

A. A five cent piece, I suppose.

Q. Did you ever make any nickel calls in the servicing of the machines?

A. Oh, I misunderstood your statement. Yes. Some of the larger locations at that time, particular time, during the war, lots of nickels were used. It was just impossible to get them from the bank, and it would be necessary to open the machines and count the nickels and have the location sign for them, sign an IOU so they could be re-used again.

Q. And would you make such calls?

A. Early in the game I did. [997]

Q. And after that were calls made by other members of your association?

A. By all mechanics.

Q. All mechanics?

A. Yes, to start in I was it.

(Testimony of Kenneth R. Crawford.)

Q. So, would your estimate of from one to four times a week that he came over there pertain to the first two or three years of operation after 1942?

A. Well, all during my association with the company.

Q. And so that estimate of time, then, would run from the beginning up until July of 1946?

A. Yes.

Q. And what was the purpose of Mr. Seijas' visits on most occasions during that period of time?

A. Well, most of them was I would call public relations work. We would call on the accounts, the locations, and checked with the mechanics, checked headquarters, and continually complaining about the cost of repairs and parts that they was ordering, too many parts, and stuff like that.

Q. Did you also have occasion to contact the employees of the company during that period of time? A. Yes.

Q. And did that include Mr. Meyers, the collector, as well as the servicemen who were under your supervision?

A. Oh, yes. Most of the times, as I recall, he came with Mr. Meyers.

Q. On most of the times he came over with Mr. Meyers? A. Yes.

Q. Now, Mr. Crawford, you described in a general way what sort of a place of business this venture had there in Bremerton. Did it have an office, or what was the arrangement? [1007]

A. Well, early in the business the only place available was my garage in my back yard, but im-

(Testimony of **Kenneth R. Crawford.**)

Q. And you say IOU's. How would that then be handled?

A. If I counted out fifty dollars worth of nickels we just wrote the date on there and "IOU $100" or $50 or whatever the case might be, and have the proprietor of the establishment sign it, and we dropped it back in the coin box.

Q. An IOU? A. An IOU.

Q. And in bigger locations would it be necessary to do that more than once a week?

A. Sometimes two or three times a day.

Q. Did you have any knowledge of the records that were kept of the receipts from these machines?

A. No, I do not.

Q. Do you have any knowledge of the money that was actually reported and the receipts from the collections of these machines? A. No, sir.

Q. Do you have any knowledge whether all money received from the machines was reported?

A. No, sir.

Q. Who did this work? A. Mr. Meyers.

Q. Did you continue to perform these services from June—February or June 1st, as the case may be, 1942?

A. Well, until July the 1st, 1946.

Q. And during this period, what were you paid?

A. Well, after the first raise in pay, one I was raised to $100, and it remained a hundred dollars to the day I left.

Q. A license was obtained in your name when?

A. 1942.

(Testimony of Kenneth R. Crawford.)

mediately after the license was obtained and everything, it was moved on the corner of Fourth and Naval in Bremerton. They had a warehouse, a storage plant, workshop, tools and equipment for handling the servicing of the pinball machines, and there was a desk.

Q. There was sort of an office there, was there?

A. Yes.

Q. In this warehouse? A. Yes.

Q. And this was a shop, then, was it where the repair work of these machines was done?

A. Yes.

Q. What sort of equipment in the way of automotive equipment did you have at that time?

A. Well, other than a fellow's own private cars, there was just one company-owned car that I knew about. That was a pickup truck.

Q. That was used for delivering the machines to the locations and picking them up and bringing them back for repair work, is that correct, sir?

A. Yes.

Q. I think you stated that Mr. Seijas came over there with Mr. Meyers on frequent occasions that that he came there. [1008] Did he have occasion to accompany Mr. Meyers around to the various locations?

A. Well, to my knowledge, he always showed in his own car. They would usually arrive there about 9:30 from Seattle, never living in Bremerton, neither one of them, and they usually arrived there about 9:30 from Seattle by ferry, and we would

(Testimony of Kenneth R. Crawford.)

A. Yes. I performed less duties at that time. I had a crew pretty well broken in and a good dependable crew, and I was more or less to take care of the rougher jobs that the crew had trouble in solving the difficulties.

Q. Did you have anything to do with the obtaining of the [1001] license in the county?

A. Yes.

Q. And what did you do in that regard?

A. Well, it wasn't as difficult as it was in the city. There wasn't so much wrangling that went on. I just applied for a license and received it.

Q. Whose license was the county license obtained in, whose name? A. In my name.

Q. Did it continue in your name? A. No.

Q. What happened?

A. It went out at the same time that it went out of the city; it went to the United Amusement.

Q. Did you check to determine how it happened that the license was changed?

A. Yes. The same procedure had taken place in the county that had taken place in the city. Mr. Seijas applied to the County Auditor and Sheriff's Office and got an okay on it and changed it, changed the name.

Q. Did you object to the change of the county license from your name? A. Yes.

Q. And did you accomplish anything by your objection?

A. I was told the same story, if I didn't like it I knew [1002] what I could do.

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VOLUME III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 42

WILLIAM R. FORMAN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1959
CERTIORARI GRANTED MAY 4, 1959

No. 15324

United States
Court of Appeals
for the Ninth Circuit

WILLIAM R. FORMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

(In Four Volumes)

VOLUME III.

(Pages 945 to 1424, inclusive)

Appeal from the United States District Court for the Western District of Washington.
Southern Division

(Testimony of Kenneth R. Crawford.)

Q. Did you ever obtain any other interest in other city or county routes other than the $100 a week? **A.** No.

Q. Did you work for these pinball companies how long?

A. I terminated my employment with them July 6, 1946.

Q. During your association, Mr. Crawford, did you ever put any money yourself into the business?

A. No.

Q. And to your knowledge, do you know who put up any of the money for the equipment or the license? **A.** No. I couldn't say.

Q. To your knowledge, were you ever carried on the books as holding any interest in the company?

A. Not to my knowledge.

Q. Did you ever receive any money from anyone for a share in the company? **A.** No.

Q. Did you ever have any conversation with anyone concerning the payment to you of any money for your share? **A.** No.

Q. Did you ever learn that anyone other than Mr. Seijas or Forman had an interest in the company? **A.** Yes.

Q. Who was that? [1003]

A. Mr. George Heberling.

Q. And when was that that you found out he had an interest?

A. Well, to the best of my knowledge, it would be in 1943.

Q. When? **A.** In the fore-part of the year.

(Testimony of Kenneth R. Crawford.)

meet Mr. Seijas several times during the run of the day, and he would either come in the location while we was there or would be there when we arrived. He knew the routine and days they would be called on at a certain location.

Q. When you say he would come in the location, he would be there when "we" arrived. Who have you referred to? A. Mr. Seijas.

Q. And when you say "we", who did you refer to?

A. Well, Mr. Seijas would be in the locations when Mr. Meyers and I arrived.

Q. I see. So he was there on frequent occasions, was he, sir, when you and Mr Meyers would come to the location for the purpose of inspecting the machines, is that right, sir?

A. Well, Mr. Meyers came with the purpose of checking out the machines and I came with the purpose of checking it mechanically.

Q. What did you clean, the glass, and [1009] take out the drawer and adjust the equipment? That is generally what you did?

A. That's right.

Q. Would Mr. Seijas, then, on frequent occasions be present when you and Mr. Meyers were there and Mr. Meyers were counting out the money?

A. Oh, yes. That happened almost constantly.

Q. Now, during the first two to three years of the operations, I think you stated that you had occasion to see or contact Mr. Forman only on three or four occasions, or thereabouts. During the bal-

(Testimony of Kenneth R. Crawford.)

ance of the time up to July 1, 1946, when you left, on how many occasions did you have to contact him? What would your estimate up to the time you left be?

A. Oh, five times at the most, perhaps four.

Q. I beg your pardon?

A. Five times at the most and maybe four.

Q. During the entire period? A. Yes.

Q. I take it, then, that your contact was with Mr. Seijas mostly up to the time you left?

A. That's correct.

Q. Do you recall, Mr. Crawford, a Mr. Merin?

A. No, sir. I never knew that gentleman. I only heard of him. I never knew him. [1010]

Mr. Mead: That is all. Thank you.

Redirect Examination

Q. (By Mr. Obenour): You say for the first six months Mr. Seijas was over there more frequently. How often was he over there during the first six months? A. Well, almost continually.

Q. And that was six months when?

A. Well, that would be in the early part of '42, say, up until August, July or August of '42.

Q. The six months preceding July or August of '42? A. Yes.

Q. And after that time he was over there?

A. Two or three times a week, maybe sometimes four.

Q. And how many times a week would Mr. Meyers collect, Mr. Crawford?

(Testimony of Kenneth R. Crawford.)

A. Well, the days that I knew particularly about would be on Tuesday, Wednesday, Thursday, and Friday.

Q. And you would go with him on those occasions? A. Yes.

Q. Was Mr. Seijas accompanying you?

A. No. He always had his own car. He drove a Buick, and he would show up all day long during the day. We would meet [1011] him in Port Orchard or Poulsbo or somewhere in Bremerton. He would be at a location when we got there.

Q. Would he have anything to do with your work?

A. No. Mostly, as far as I could tell, it was just visiting with the locations and just general public relations work, as I guessed it.

Q. Did he have anything to do with Mr. Meyers' work? A. No, none whatsoever.

Mr Obenour: That is all.

The Court: I believe that is all, Mr. Crawford, and you are excused. You may leave whenever you wish.

(Witness excused.)

The Court: Call another witness.

ROBERT RYLANDER

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

(Testimony of Robert Rylander.)

The Witness: Robert Rylander.

The Clerk: Spell your last name.

The Witness: R-y-l-a-n-d-e-r. [1012]

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Rylander? A. Port Orchard

Q. And what is your occupation?

A. I am a restaurant operator.

Q. And is there also a tavern in connection with your restaurant? A. A cocktail lounge.

Q. And is that a single business now?

A. That is a single business now.

Q. Was it ever?

A. It would be a single business with John Myhre's estate.

Q. And when you say single business, you are the sole owner now?

A. No. Mr. Myhre is the joint owner with Myhre's estate until the probate has been had.

The Court: How do you spell Myhre?

The Witness: M-y-h-r-e.

Q. (By Mr. Obenour): When did Mr. Myhre die? A. November 10 last year.

Q. November 10 of 1955? A. Yes.

Q. And prior to his death, what was his interest in the business. [1013]

A. A half partner.

Q. And how long did you and Mr. Myhre operate this business?

A. Since February 6, 1933.

(Testimony of Robert Rylander.)

Q. And was there ever a tavern operated in connection with this business? A. Yes.

Q. Was it operated in connection with the restaurant, or separately?

A. It was connected with the restaurant, yes.

Q. The name was The Pasttime Pool and Restaurant? A. Yes.

Q. And it is now named what?

A. Myhre's Cafe.

Q. And it was known as the Pasttime Pool and Restaurant prior to that time? A. Yes.

Q. And what was it known as during the '41 to '45 era? A. Pasttime Pool and Restaurant.

Q. In connection with your business did you have pinball machines in your location?

A. Yes.

Q. When did you install them? A. In 1942.

Q. Whose machines were they that you installed?

A. United Amusement. [1014]

Q. And who did you know United Amusement Company to be?

A. William Forman and Army Seijas.

Q. When did you first meet either Mr. Seijas or Mr. Forman?

A. I think it was at a Council meeting of the Port Orchard Council meeting when they applied or was granted a license to operate pinballs in Port Orchard.

Q. And who was present at that meeting?

A. Mr. Seijas, Mr. Forman, and I.

Q. Pardon? A. And I.

(Testimony of Robert Rylander.)

Q. And was Mr. Seijas—were both Mr. Seijas and Mr. Forman actually in the meeting?

A. Mr. Forman was outside and Mr. Seijas was inside.

Q. Outside and inside what?

A. Of the council meeting.

Q. Did you see Mr. Forman outside the council meeting? A. Yes.

Q. Was a license obtained?

A. A license was obtained.

Q. And whose license was it?

A. It was the United Amusement Company.

Q. Were you contacted by either Mr. Seijas or Mr. Forman to install machines in your location?

A. Yes.

Q. Who contacted you? [1015]

A. I think Mr. Seijas.

Q. Did you ever see Mr. Forman at your location concerning the installation of machines?

A. Yes.

Q. And what was that occasion?

A. The occasion that one time—several occasions the first month we were counting the proceeds from the pinballs in our back room.

Q. Who is we?

A. Mr. Forman, Mr. Seijas, and I, and maybe another collector.

Q. How were the machine receipts counted, Mr. Rylander?

A. Well, the nickels was taken out of the machines and brought in the back room and counted.

(Testimony of Robert Rylander.)

Q. Was there any record made of the receipts?

A. The record was made, yes.

Q. What were—were all three of you persons present when the machines—the receipts were counted? A. Yes.

Q. Who counted?

A. Mr. Seijas and Mr. Forman and one of the collectors.

Q. Was a receipt made of the collections?

A. All of the collections.

Q. Was there a receipt made reflecting the money collected? A. Yes. [1016]

Q. Was all of the money taken out of the receipts and put on those receipts? A. No.

Q. What happened to the money?

A. What money do you refer to?

Q. From the machines.

A. From the machines?

Q. Yes.

A. Could I elaborate on this? For instance, I don't remember, there was quite a take the first week. Say there was $500 in the machines and we reported, say, $300, and after the taxes and the pay-out was taken off, we split the remainder plus the $200 that hadn't been reported.

Q. Plus the $200 that wasn't reported?

A. Yes.

Q. Who split it?

A. We split it, United Amusement and I and Mr. Myhre.

Q. Who was United Amusement that split the

(Testimony of Robert Rylander.)

money? A. Mr. Seijas and Forman.

Q. All right, sir. How long did this practice continue of splitting the money that was not reported on the receipts?

A. All the time they had the machines in there including the time that Mr. Schneiderman took over. [1017]

Q. And when was that?

A. I wouldn't know the exact date. It might have been '45 or '46. I wouldn't know.

Q. Pardon me?

A. I wouldn't know. It might have been '45 or '46.

Q. And when Mr. Schneiderman took over, what do you mean?

A. Apparently he bought out the United Amusement Company, or, I don't know.

Q. When you first began, who all were making the collections? A. Who all?

Q. Yes.

A. I say for the first month Mr. Forman and Mr. Seijas, and Seijas' brother, I come to think about it now, was there too.

Q. And after that time who collected?

A. Mr. Meyers.

Q. And after that time when Mr. Meyers collected, would you ever see Mr. Seijas and Mr. Forman at your location? A. No. Very seldom.

Q. Very seldom? A. Yes.

Q. Did you see Mr. Seijas thereafter?

A. Not very often—yes.

(Testimony of Robert Rylander.)

Q. Did you see Mr. Forman thereafter?

A. No. [1018]

Q. Was there a tax paid upon the receipts from the pinball machine collections, Mr. Rylander?

A. Yes.

Q. How was that tax paid?

A. The tax was paid—I think the city got 10 per cent and the state got 10 per cent which was reported on the books. Now, when we paid them the money, we paid them—let's see, we paid them the split plus the taxes and they paid the taxes out of that.

Q. You paid whom?

A. The United Amusement.

Q. What do you mean, you paid them the split?

A. Now, the books was made out, for instance, in the machine as I said, you recorded $300. If there was a pay-out, say, each was hit or something else, that was paid to us.

Q. What do you mean, pay-out?

A. Pay out. Like, some of those machines had a feature hit, a feature, and you get so much.

Q. A certain amount? A. Yes.

Q. Do you mean something special on the machine? A. Yes.

Q. That the machine does?

A. Yes. We have to pay that. [1019]

Q. Who is "we?"

A. The proprietors. Of course, they would reimburse us after they counted the nickles, and ten per cent went to the city and state and the rest

(Testimony of Robert Rylander.)

we split 50-50, plus the pay outs, plus the hold-outs.

Q. Plus the hold-outs? A. Yes.

Q. Did you receive a receipt of some form?

A. Yes.

Q. Who did you receive that from?

A. From the collector.

Q. From the collector? A. Yes.

Q. And what would be shown on the receipt which you had received from the collector?

A. It would be shown the pay out and the tax and the net amount that we split.

Q. And would there be any record on those receipts of additional hold-outs? A. No.

The Court: Do you think you could conclude with this witness, or do you wish me to call a recess now? Are you concluding?

Mr. Obenour: I was going to ask one other question, your Honor. [1020]

The Court: All right.

Q. (By Mr. Obenour): Did you pay subsequent tax on the additional amounts of these hold-outs, Mr. Rylander? A. I did, yes.

Mr. Obenour: That is all.

Mr. Mead: In view of the fact that it is a little after 12, I would prefer to go on with the examination after lunch, your Honor.

The Court: All right. We are going to recess until 1:30, Ladies and Gentlemen. Keep in mind what I have told you about not discussing the case.

Recess until 1:30 this afternoon.

(Thereupon, a noon recess was taken.)

After Recess

The Court: The Jury is here.

Mr. Mead: With respect to the last witness, there are no further questions.

(Witness excused.)

The Court: All right, Mr. Obenour, are you ready?

Mr. Obenour: Call Mr. Parrott.

CHARLES RICHARD PARROTT,

called as witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: My name is Charles Richard Parrott, P-a-r-r-o-t-t.

Direct Examination

Q. (By Mr. Billinghurst): Where do you live, Mr. Parrott? A. 5741 Maple Lane, Seattle.

Q. And where are you employed?

A. Down's Northwest Diebold.

Q. And how long have you been with the Diebold firm? A. About ten years, I guess.

Q. And what is the nature of your duties with them? [1022] A. I am a sales representative.

Q. Where were you employed in 1940 and '41?

A. State of Washington Tax Commission.

Q. In what capacity? A. Auditor.

Q. And when did you start that employment?

(Testimony of Charles Richard Parrott.)

A. It must have been around the first of the year in 1941.

Q. And how long were you with the tax commission?

A. Approximately 14 months, if I remember correctly.

Q. Where did you reside in 1940 and '41, Mr. Parrott? A. Parkland, Washington.

Q. Now, at sometime during those years, did you become acquainted with the mayor of Bremerton? A. Yes, I did.

Q. When and where did you meet him?

A. If I remember correctly, it was either at my father-in-law's house or at his house. I can't remember.

Q. Did the mayor of Bremerton at that time make any request for advice from you?

Mr. Mead: This is objected to as incompetent, irrelevant and immaterial and not related to any issues of this case.

The Court: What is the materiality?

Mr. Billinghurst: This is preliminary, [1023] your Honor, towards the establishing a connection between the City of Bremerton and the witness in connection with some of the pinball licenses.

The Court: I think you better omit the conversation and get right down to whatever it is.

Q. (By Mr. Billinghurst): I will ask you, Mr. Parrott, whether or not you made any arrangements with the mayor of Bremerton to give advice or otherwise assist in the——

(Testimony of Charles Richard Parrott.)

A. (Interrupting) Yes.

Q. Concerning what?

A. Concerning the tax to be levied on pinballs and pinball franchise in the City of Bremerton.

Q. And as a result of that arrangement, were you hired by the City of Bremerton?

A. No, I wasn't. If I remember correctly, he thought that he would give me an administrative assistant's job which in the intervening time never materialized.

Q. Did you nonetheless confer with him and give him such advice such as he asked?

A. Yes, I did.

Q. About what time did this take place?

A. As near as I can remember, it must have been either in the latter part of the winter of '41 or the spring of '42.

Q. Did you receive compensation in any form for this [1024] assistance? A. No, I didn't.

Q. Did you have any arrangement with the mayor to receive compensation either in the form of money or any other manner?

Mr. Mead: This is all objected to, your Honor, as being incompetent and immaterial and not connected to any issue.

The Court: You better lay the connection first.

Q. (By Mr. Billinghurst): Mr. Parrott, after the contact as you have described it with the mayor of Bremerton, do you know whether or not the city installed a pinball licensing and taxing system?

A. Yes, they did.

(Testimony of Charles Richard Parrott.)

Q. And I will ask you whether or not you made an application for such a license.

A. Yes, I did.

Q. At about what time?

A. It was the first part of '42, I believe. It must have been—to the best of my recollection, probably March or something in that nature.

Q. As as result of that application, did you receive a license? A. Yes, I did. [1025]

Q. Was the license fee paid? A. Yes, it was.

Q. Who paid it? A. I did.

Q. And how much was it?

A. Well, if I remember correctly, it was about 15 hundred.

Q. And what funds did you use?

A. Well, again it's a long time ago, but I think I got part of it from the mayor personally and part of it from my own funds, if I remember. It's a long time ago, but I think that is as near as I can remember. That is the way it was.

Mr. Mead: We move to strike that, your Honor, as being immaterial and not pertaining to any issue involved in this case.

The Court: Well, it will have to be stricken unless you intend to propose to relate it somehow or other to this matter. I think you ought to try and lay the connection if there be any first, and then proceed with your details if you are permitted to.

Q. (By Mr. Billinghurst): Did you have an arrangement with any other person concerning the pinball license that you received? A. Yes, I did.

(Testimony of Charles Richard Parrott.)

Q. Who was that other person?

A. Vito Cuttone.

Mr. Mead: I object to this whole line of questioning as not being material to any issue in this case, and it's difficult to anticipate, of course, the answers, but——

The Court: I am having the same difficulty you are. I would like you to show the connection in this case first if you can, and then if that be shown, we can go back and cover any details that you may think are appropriate.

Mr. Mead: Could we have a continuing objection, your Honor?

The Court: Yes, indeed, and I will instruct the Jury appropriately if it appear there be no proper connection.

Q. (By Mr. Billinghurst): How long did you have the license, Mr. Parrott?

A. Again, it's quite a long time ago, but it seems like to me two or three days.

Q. And what happened to it?

A. Well, after I got it, I wasn't particularly interested in it, and I think Vito Cuttone told me to turn it over to—or he would turn it over to a Mr. Forman and Mr. Seijas. I didn't have anything to do with that, so I [1027] don't know too much about it. I am vague about it.

Q. Now, at that time were you acquainted with Mr. Forman?

A. To my knowledge, I have never seen the man in my life.

(Testimony of Charles Richard Parrott.)

Q. And were you acquainted with Mr. Seijas?

A. No, I wasn't.

Q. What did happen to the license?

A. There again I think it went to Mr. Forman and Mr. Seijas.

Q. Did you make any objection to such a transfer? A. Oh, no.

Q. Did you receive any compensation for that transfer?

A. If my memory is correct, I got the money back out of the license.

Q. Did you receive any other compensation?

A. I can't remember. There may have been some money that I spent traveling back and forth from Tacoma to Bremerton or something but I can't remember for sure.

Q. From whom did you receive the money you mentioned representing what you paid for the license?

A. I can't remember whose signature was on the check. I think I got it in check form periodically or something, but I can't remember whose signature was on it, on the check, but it seemed like it was maybe United Amusement Company or some signature on it. It's hard for me to remember who.

Q. Over how long a period of time did you receive these checks?

A. Well, until I got my money back which, I think, was some 15 hundred or something like that, I think, and I believe—I can't say for sure how long it was.

(Testimony of Charles Richard Parrott.)

Q. Now, prior to the time of the issuing of the license to you, did you have any kind of an arrangement concerning the operation of the route represented by the license? A. Yes, I did.

Q. And with whom?

A. With Vito Cuttone.

Q. And what was that arrangement?

A. He was to operate the route, and I was to obtain the license.

Q. And how were the proceeds or the profits, if any, to be divided?

A. Well, there never was any profits because we never operated, but I was supposed to share a percentage of the net profit.

Q. Was this an oral or a written agreement?

A. This was oral.

Q. Have you ever met Mr. Forman?

A. Yes, I have.

Q. When and where? [1029]

A. If my memory serves me correctly, the first time I met Mr. Forman was either in our office at Diebold, Incorporated or in his office in the Smith Tower.

Q. Have you ever met Mr. Seijas.

A. Yes, I have.

Q. Pardon me, before you go on with that, when did this meeting with Mr. Forman take place?

A. Well, it must have been—to the best of my knowledge—1948 or 1949, someplace in there, I would imagine.

Q. And how about Mr. Seijas, have you ever

(Testimony of Charles Richard Parrott.)

met him? A. Yes, I have.

Q. When and where?

A. We belong to the same Republican club in Seattle, Young Men's Republican Club in Seattle.

Q. About when?

A. I suppose in the last five or six years.

Q. Well, now, assuming that six years ago was the time you met him there, did you ever prior to that time have any association with him or meeting with him?

The Court: With Forman or Seijas?

Mr. Billinghurst: Seijas.

The Witness: I just can't remember that I ever did.

Q. (By Mr. Billinghurst): Now, how about Mr. Forman?

A. I don't think I ever met Mr. Forman before that time. [1030]

Q. And about what year was that?

A. It must have been in 1947 or '48. The reason that I kind of think it was that time, it seemed like we were still in the Central Building office.

Q. Who do you mean by "we?"

A. Diebold, Incorporated.

Q. Did your meeting at that time with Mr. Forman have any relation with the pinball license to which you previously testified?

A. Oh, no. I tried to—see, I owed Mr. Forman some money in the Chester Drive-in Theatres.

The Court: It had no connection with the pinball operation?

(Testimony of Charles Richard Parrott.)

The Witness: No.

Q. (By Mr. Billinghurst): I believe you mentioned that you may have received some expense money in connection with the relinquishing of your license. Can you describe what that expense money was for?

A. Well, I am not too sure about it, but I had to buy gasoline to go up to Bremerton from Parkland, and I think that I, as I remember, spent some money running back and forth, and they thought it was no more than fair that I got paid for it.

Q. And who do you mean by "they?"

A. Well, the arrangement, as I remember, was made by [1031] Mr. Cuttone.

Q. Well, do you know who paid you?

A. Well, as far as I remember, it was United Amusement Company, but I can't remember who signed the checks.

Mr. Billinghurst: You may question.

Mr. Mead: I move all this testimony, your Honor, be stricken and the Jury instructed to disregard it as it has no materiality or bearing upon the issues in this case.

The Court: As far as the matter stands at the present time, the motion would be granted. However, I assume there is to be a disproof offered in this connection, is there?

Mr. Obenour: Yes, your Honor.

The Court: Yes, so the testimony of this gentleman in general will be reserved for consideration until later in the case.

(Testimony of Charles Richard Parrott.)

quest that you hold it back with the understanding that I will instruct you whether or not to give any attention to it. Is that clear to all of you, that ruling?

Mr. Mead: No questions, your Honor.

The Court: There is nothing further, Mr. Parrott.

(Witness excused.) [1032]

W. A. ROCKWELL

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: W. A. Rockwell, R-o-c-k-w-e-l-l.

Direct Examination

Q. (By Mr. Billinghurst): Where is your residence, Mr. Rockwell?

A. Bremerton, Washington.

Q. What is your occupation?

A. Licensed public accountant.

Q. How long have you been in that occupation?

A. Oh, since about 1928.

Q. How long have you been practicing in Bremerton? A. Since 1932.

Q. Are you acquainted with Mr. William Forman?

A. Well, I am not acquainted with him. I have met him.

(Testimony of W. A. Rockwell.)

A. In the Dock Concessions in Bremerton.

Q. Are you acquainted with Mr. Army Seijas?

A. Yes.

Q. When and where did you meet him?

A. I had met him at the same place. [1033]

Q. And at what time did you meet Mr. Forman?

A. Well, specifically, I couldn't say. It was sometime during the time that I was taking care of the accounts of that firm.

Q. And during what time did you take care of the accounts of that firm?

A. That was sometime in 1942, I believe, that I started with them, and I kept them continuously up until right after Mr. Goldstein, one of the members of the firm, died.

Q. And when did he die?

A. I believe it was in 1950.

Q. When did you meet Mr. Seijas?

A. Well, I don't know as to when. It was sometime during that period, in the early period when I first started taking care of the accounts for them.

The Court: The firm you are speaking of is Dock Concessions?

The Witness: Dock Concessions, yes, sir.

Q. (By Mr. Billinghurst) What was this firm of Dock Concessions, Mr. Rockwell?

A. Well, it was a soft drink, notions or magazines, tobaccos, cigars and cigarets—general kind of establishment they have on these docks.

Q. Who were the operators? [1034]

(Testimony of W. A. Rockwell.)

A. Mr. Goldstein, and when I first took it over, Mr. Goldstein and Mr. Forman and Mr. Esfeld.

Q. What was the nature——

Mr. Mead: I am wondering if we could have an objection on the grounds of materiality to any inquiry concerning the subject of Dock Concessions as not being a matter involved in this proceedings.

The Court: What do you concede to be the materiality of this?

Mr. Billinghurst: There has been prior testimony concerning the existence of the various partnerships and the continuing relationship from 1942 throughout a number of years between Mr. Forman and Mr. Scijas with reference to the overt acts as alleged in the indictment.

The Court: All right, go ahead. Overruled. You may have a continuing objection.

Q. (By Mr. Billinghurst): Go ahead, Mr. Rockwell, who were involved in the partnership when you started working—— ?

A. Well, in the first firm, the partners, as information was given to me when I set up the books, was Mr. Goldstein, Mr. Forman and Mr. Esfeld.

Q. What type of work were you doing for the firm at that time? [1035]

A. I wrote up the books for the firm.

Q. And the books consisted of what?

A. Well, they furnished me with daily sheets, daily cash sheets of the sales and payouts and check register which was all the checks entered in to, and then furnished it to me to write up the books.

(Testimony of W. A. Rockwell.)

Q. Did you do any tax accounting for the firm?

A. Yes, I prepared the tax returns.

Q. Now, I am going to ask you whether or not you recall a change in the partnership structure in the firm? A. Yes, there was a change.

Q. And when did it take place?

A. I believe that was in 1944.

Q. What was that change?

A. One partner was out, and another partner came in.

Q. Who was the partner who went out?

A. A Mr. Esfeld.

Q. And who was the partner who came in?

A. Mr. Seijas.

Q. Did you do any accounting work in connection with that change? A. Yes.

The Clerk: Plaintiff's Exhibit 121 has been marked for identification.

Q. (By Mr. Billinghurst): Handing you Exhibit 121, Mr. Rockwell, can you state what [1036] it is?

A. Well, this is a capital accounting showing the capital of the partners on the ending of the firm in 1944, and the capital account was opened on July 1, 1944.

Q. And during what additional years, if any, are the capital accounts indicated there?

A. Well, here in this schedule the capital account has been carried forward with the amounts of the earnings for the years and the amounts of the deductions drawing for the year '44 ending De-

(Testimony of W. A. Rockwell.)

cember '44, and for the full year of 1945, calendar year 1946, calendar year 1947 and 1948.

Q. Now, who prepared this accounting?

A. I prepared this statement.

Q. Is it in your handwriting?

A. Yes, sir.

Mr. Billinghurst: At this time, your Honor, we will offer 121.

The Court: When did you prepare it, at the time it purports?

The Witness: This was taken off records sometime a year ago or such.

Mr. Mead: This is objected to on the grounds of materiality previously stated, and for the further reason that it is taken from records that are [1037] not available to us and is not therefore the best evidence.

The Court: Yes. The exhibit as such, it seems to me, has not been sufficiently identified or shown to be admissible.

Q. (By Mr. Billinghurst): Do you have the records from which this accounting was made?

A. I do, but I haven't them here.

Q. This transcript was——

Mr. Billinghurst: I am going to renew the offer, your Honor, on the basis that the records from which this transcript made are available, and that the transcript was made by the witness in order to make it unnecessary to produce these records.

The Court: That may be when the original records are here and available to all concerned. It

(Testimony of W. A. Rockwell.)

might be that a transcript then could be admitted, but the transcript rule requires that.

Mr. Billinghurst: All right, your Honor.

The Court: Do you want to withdraw the witness until that time? It's agreeable to me, or you may do as you please, of course.

Mr. Billinghurst: I have some other questions.

The Court: All right, go ahead. [1038]

Q. (By Mr. Billinghurst): How long did this Dock Concessions business operate, if you know, Mr. Rockwell?

A. Well, it continued to operate up until after Mr. Goldstein, one of the partners, passed away.

Q. Did you do any accounting work in connection with dissolution of the firm?

A. For the final?

Q. Yes. A. Yes.

Q. And do you recall who at that time were the partners in the firm?

A. Well, the final was an individual operation, was by the one individual himself.

Q. Well, when was the partnership dissolved, if you know?

A. I believe in 1948, as near as I can recollect, I believe, about 1948 is when the partnership was formed and the individual took it over.

The Court: When it was formed or terminated?

The Witness: When it was terminated, pardon me.

Q. (By Mr. Billinghurst): Now, in connection

(Testimony of W. A. Rockwell.)

with the tax accounting, what records did you prepare for this firm?

A. I wrote up all the records in my office, and I prepared all tax returns for the firm both state and federal.

Q. And what were those records? [1039]

A. I don't quite understand what you mean.

Q. Well, what specifically, what accounting records did you prepare in connection with the taxes?

A. Well, ledger and journals and statements. I prepared statements and furnished once each month, a statement of conditions of the business for the previous month and statements at the end of the year and closings for that year and the income tax returns at the end of the year.

Q. And what type of income tax returns were they? A. Partnership returns.

Q. All right, sir. I am handing you Government's Exhibits 11 through 15. Will you identify them, please?

A. They were the returns that were prepared for the years '45, '46, '47, '48 and '49, and I prepared the returns.

Q. Can you refer to No. 11? What year is that?

A. 1945.

Q. And No. 12? A. 1946.

Q. And 13? A. 1947.

Q. 14 and 15? A. '48 and '49.

Q. And how were those returns distributed?

A. On each one of them? [1040]

Q. Just generally.

(Testimony of W. A. Rockwell.)

A. Well, to Mr. Goldstein and Mr. Forman and Mr. Seijas, all of these were the same distribution.

The Court: Do you mean copies were given to each of them, or what do you mean by this distribution?

The Witness: Distribution of profits you were talking about?

Q. (By Mr. Billinghurst): I am talking about the returns themselves.

A. The copies was made, and each individual member of the partnership was furnished a copy of each return for each year.

Q. Whose signature appears as having prepared those specific returns? A. My signature.

Mr. Billinghurst: You may question.

Mr. Mead: I move, your Honor, that all of the testimony of this witness be stricken as not being material or having any relevancy to the issues involved in this case.

The Court: Motion is denied.

Mr. Mead: And for the further reason that the time factor with regard to each one of the returns [1041] with the exception of Exhibit 11 is out, following and after any of the dates involved in this proceeding.

The Court: Motion is denied.

Mr. Billinghurst: We have no further questions as of now. I would like to ask the permission of the Court to recall Mr. Rockwell.

The Court: On that one subject. All right, that permission is granted.

(Testimony of W. A. Rockwell.)

Do you have any cross now?

Mr. Mead: No cross, your Honor.

The Court: That is all, Mr. Rockwell.

(Witness excused.)

The Court: Call another witness, please.

SOL ESFELD

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: My name is Sol Esfeld, E-s-f-e-l-d.

Direct Examination

Q. (By Mr. Billinghurst): Where do you live, Mr. Esfeld? [1042]

A. 509 Wall Street in Seattle.

Q. What is your occupation?

A. I am with the American Discount Corporation.

Q. And what is your capacity with that firm?

A. I am the president of the concern.

Q. How long have you been with the firm?

A. Since 1930.

Q. What kind of a business is the American Discount Company?

A. They buy conditional sales contracts on commodities that are sold on a time payment plan.

Q. Are you acquainted with Mr. William Forman? A. I am.

Q. How long have you known him?

(Testimony of Sol Esfeld.)

A. Oh, approximately 20 years.

Q. How did you meet him?

A. I don't remember exactly, but I used to handle his insurance business for him and probably met him in that manner.

Q. Are you acquainted with Mr. Army Seijas?

A. Yes, I am.

Q. And how long have you known him?

A. Oh, approximately the same length of time.

Q. And how did you happen to meet him?

A. His offices were in the same building as I [1013] am, in the Smith Tower in Seattle.

Q. I am going to ask you whether or not, Mr. Esfeld, in connection with your business, the American Discount Corporation, you have had any account with the United Amusement Company?

A. Yes, sir, we did.

Q. And what was the nature of those accounts?

A. They were contracts for the purchase of pinball machines.

Q. During what period of time?

A. From 1942 to approximately 1945.

Q. Do you know how many accounts there were?

A. I have the records here.

Q. Before referring to the records, do you know offhand how many accounts there were?

A. Oh, approximately 15 or 20.

Q. And the same question with respect to the United Amusement Company of Bremerton, have you had any accounts with that company?

A. What was the first company?

(Testimony of Sol Esfeld.)

Q. United Amusement Company was the first company, and now I am asking you whether you had any business with the United Amusement Company of Bremerton.

A. Well, I wouldn't remember unless I referred to these records.

Q. In connection with United Amusement Company accounts, [1044] what did those accounts involve, what kind of purchases?

A. Purchase of pinball machines.

Q. Do you recall who negotiated with you concerning the business you did with United Amusement Company as it was involved in these pinball machines?

A. I am not positive whether it was Forman and Mr. Seijas, but my recollection is that it was Mr. Forman.

Q. What arrangements did you make with Mr. Forman?

A. Well, I didn't really make any arrangements. We merely bought the contracts from the distributors where the purchases were made.

Q. Was that pursuant to his request?

A. No. We had done business with those same distributors prior to that time.

Q. What records do you have of these accounts, Mr. Esfeld?

A. Well, United Amusement Company of Bremerton, we have one, two, three, four, five, six, seven, eight, nine—we have nine different contracts on the United Amusement Company and one of them

(Testimony of Sol Esfeld.)

marked "United Amusement Company of Bremerton," and the other just "United Amusement Company."

Q. Can you identify the documents that you are now examining and referring to? A. Yes, sir.

Q. What are they? [1045]

A. Well, the first is our ledger sheets, customer's ledger sheet.

Q. And what is a ledger sheet?

A. A ledger sheet is a record of the transactions showing the balance of the contracts as it was taken over by us from the distributor and a list of the payments made.

Q. And is the name of the purchaser indicated?

A. Yes, sir.

Q. And what is the name of the purchaser?

A. The first one is United Amusement Company of Bremerton.

Q. And what is the date of the second sheet?

A. March 29, 1943.

Q. And what is the next one, first the name of the purchaser?

A. Next one, United Amusement Company, and the date is March 23, 1942.

Q. Next one.

A. Next one is United Amusement Company, November 8, 1941.

Q. And the next one?

A. Another one here, United Amusement Company dated January 21, 1942.

Q. And the next one?

(Testimony of Sol Esfeld.)

A. United Amusement Company contract dated January 23, 1942.

Q. And the next one?

A. United Amusement Company dated April 27, 1942. [1045A]

Q. Are there any more United Amusement?

A. Yes, United Amusement Company dated May 9, 1942, and another one for the same concern dated September 24, 1942, and here's one, United Amusement Company dated January 29, 1941.

Q. Now, attached to each one of these ledger—contract ledger sheets, are there any other documents?

A. Yes, sir, there is a copy of the contract.

Q. What kind of a contract is that?

A. Conditional sales contract between the buyers and the seller.

Q. Are the names of the buyers and sellers indicated on the contract? A. Yes, sir.

Q. Are the contracts signed by the buyers and sellers? A. Yes, sir.

Q. Going through the conditional sales contracts attached to these ledgers, can you name the buyers and sellers? Can you read the names of the buyers and sellers as they appear in the contract?

A. Yes. The first one is—the seller is Farwest Novelty Company signed by A. W. Paulson, and the buyer is United Amusement Company of Bremerton signed by W. R. Forman.

Q. And the next one?

A. Next one is a contract from the American

(Testimony of Sol Esfeld.)

Discount [1046] Corporation signed by Sol Esfeld as the seller, and United Amusement Company by W. R. Forman as the buyer.

Q. Do you know whether or not the purchaser's name is the same on all of those contracts?

A. If I can refer to them——

The Court: Do you recall the same signature as United Amusement by Forman?

Mr. Billinghurst: That is right.

The Witness: Yes, sir, they are all the same.

Q. (By Mr. Billinghurst): Do any of the contracts relate to the purchase of items other than pinball machines? A. No, they do not.

Q. Connected with the contracts, are there any other documents?

A. Oh, on one of them it has some correspondence between the distributor and the company.

Q. I will ask you whether or not there are assignments attached to any of those contracts?

A. Yes. The reverse side of the conditional sales contract has the assignment from the seller to the American Discount Corporation.

Q. And are the assignments executed by the purchasers or the sellers? A. By the sellers.

Q. Now, in connection with the contract ledger dated May 9, 1942—— A. Yes, sir.

Q. Is there a contract contained in your file connected with that ledger?

A. That one there is on a chattel mortgage form.

Q. Is there any other documents connected with this transaction in your file?

(Testimony of Sol Esfeld.)

A. There is also a bill of sale from Vito Cuttone to United Amusement Company.

Q. And what is the date?

A. The date of that is May 11, 1942.

Q. And what is the subject of the bill of sale? In other words, what property does it relate to?

A. It relates to 18 pinball machines.

The Court: What was that date again?

The Witness: May 11, 1942.

Q. (By Mr. Billinghurst): Who were the parties to the chattel mortgage?

A. Parties to the chattel mortgage is United Amusement Company, a mortgager.

Q. And did anyone sign in behalf of the United Amusement Company?

A. Yes, signed by William R. Forman.

Q. Mr. Esfeld, from where did you obtain these records [1048] which you have examined and to which you have testified?

A. From the files of the American Discount Company.

Q. When did you obtain them?

A. Oh, approximately June 28, 1956.

Q. Are these files the business records of the American Discount Company? A. They are.

Q. And are you the custodian of the property and files of the American Discount Corporation?

A. Yes, sir—well, not necessarily, all members of the firm—these are part of the records of the company.

(Testimony of Sol Esfeld.)

Q. These are part of the records of the company, and you are in what capacity in the company?

A. I am president of the company.

Q. And the files are maintained under your direction, is that correct?

A. Yes. Well, not necessarily. The files are filed by the office clerks.

The Court: You are in general supervision and control of the company, aren't you?

The Witness: Yes, sir.

The Clerk: Plaintiff's Exhibit 122 has been marked for identification.

Mr. Billinghurst: At this time we will offer 122, your Honor. [1049]

The Court: Is 122 the whole file or just a particular——

Mr. Billinghurst: This is a chattel mortgage as distinguished from the conditional sales contract. I would like to incorporate the conditional sales contract into one exhibit.

The Court: All right. Let's put them in a folder or something of that kind and make them a separate exhibit.

The Clerk: Plaintiff's Exhibit 123 has been marked for identification.

Mr. Billinghurst: I might say that if there are any other extraneous documents in these files that haven't been covered, I would request that they be removed by the Clerk.

The Court: You will have to take your time to

(Testimony of Sol Esfeld.)

check those at another time. We won't take the time now.

Mr. Billinghurst: We will offer 123 at this time.

The Court: No. 122 is the single item containing the bill of sale that the witness referred to dated May 11, 1942, is it?

Mr. Mead: We have no objection to it except for the correspondence between the American [1050] Discount Corporation and the Farwest Novelty Company.

The Court: Do you wish to have that deleted? It wouldn't be admissible, of course, that correspondence.

Mr. Mead: I think it should be deleted.

The Court: Very well, let it be deleted. Let Mr. Esfeld attend to it. They belong to him. Delete the part of it, Mr. Esfeld, that contains the correspondence. Just leave the original documents.

Exhibit 122 is admitted in evidence. Go ahead.

(Whereupon, Plaintiff's Exhibit No. 122 for identification was received in evidence.)

Q. (By Mr. Billinghurst): Now, Mr. Esfeld——

The Court: Are you offering 123 now which comprises all the others?

Mr. Billinghurst: Yes, we are. May I have the contract ledger and sales contract relating to United Amusement Company of Bremerton, please? United Amusement Company of Bremerton as distinguished from United Amusement Company.

The Witness: They are all in together there.

(Testimony of Sol Esfeld.)

Mr. Billinghurst: We will incorporate that into our offers of Exhibit 123.

The Court: It will take a little time for Counsel to look at it maybe.

Mr. Mead: We have no objection to 123, your Honor.

The Court: Exhibit 123 is admitted.

(Whereupon, Plaintiff's Exhibit No. 123 for identification was received in evidence.)

The Court: You may retain those documents that were attached there if you want. I know that you want to keep your office records. Just put them in your pocket and you can take those away with you.

All right, go ahead.

The Witness: These here I can take back?

The Court: No, not the ones that are tagged, but the ones detached.

Q. (By Mr. Billinghurst): Can you describe to the Jury the mechanics of the financing used in this method with respect to what part your company played in providing funds for the United Amusement Company of Bremerton and United Amusement Company?

The Court: In purchasing machines, I suppose?

Q. (By Mr. Billinghurst): That's right, in purchasing the machines.

A. Well, the machines are purchased from one of the distributors.

Q. By whom?

(Testimony of Sol Esfeld.)

A. By the purchaser, and the distributor makes out a contract and agrees to the terms and price, and then has the contract executed and makes an assignment of the contract to us and generally mails them to us or delivers them to us, and we buy them from the distributor.

Q. And what arrangements are made for your reimbursement?

A. We notify the purchaser that we have taken over the contract from the distributor and authorize him to make payments to us on a weekly or monthly basis.

Q. Now, Mr. Esfeld, if you will refer to Exhibit 123, does the contract relating to the contract ledger dated March 29, 1943, indicate the number of machines and the price of those machines?

A. March 29?

Q. The date of the contract is March 29.

A. That is Exhibit 122, sir, as I have it here.

Q. Very well, go ahead.

A. Yes, this shows 9, 10—11 machines.

Q. And from whom were they purchased? [1053]

A. From the Farwest Novelty Company.

Q. And what was the price?

A. The cash price was 52 hundred and the time price was 57 hundred 20 dollars.

Q. And what was the term of the contract? When did it expire?

A. The contract expired September 6, 1943.

Q. And what arrangements were made for paying the 57 hundred 20 dollars?

(Testimony of Sol Esfeld.)

A. That was repaid in 20 weekly installments of $286 a week.

Q. And was the contract paid off on time?

A. The final payment according to this ledger sheet was made on September 13, 1943.

Q. Can you take a look at the contracts dated March 23, 1942? A. Yes, sir.

Q. And what machines are designated as being purchased there?

A. Twenty machines altogether.

Q. What was the contract price?

A. The cash price was 51 hundred and 50 dollars, and the time price, 56 hundred and 65 dollars.

Q. And when was that sum paid?

A. The final payment was made August 17, 1942.

Q. And the contract dated September 24——

A. October 30?

Q. Yes.

A. No, sir, I don't have any dated October 30 in this file.

Q. Do you have a contract dated the 11th of November—November 8, 1941? A. Yes.

Q. And what machines were described there?

A. Nineteen machines.

Q. And the contract price was what?

A. Cash price on that was 22 hundred 99 dollars and 48 cents.

Q. When was it paid off?

A. Final payment was made March 31, 1942.

Q. And the contract dated February 9—January 21, 1942?

(Testimony of Sol Esfeld.)

A. Yes, that covered six machines, cash price, 15 hundred 91 dollars and 35 cents.

Q. And it was paid off when?

A. It was paid off June 22, 1942.

Q. And the contract dated January 23, 1942?

A. That covered ten machines for a cash price of 26 hundred 93 dollars and 45 cents.

Q. And it was paid off when?

A. It was paid off June 22, 1942.

Q. Now, did you do anything on behalf of the United [1055] Amusement Company or United Amusement Company of Bremerton other than arrange this financing? A. No, sir. I did not.

Q. Do you recall whether or not you ever directed either Mr. Forman or Mr. Seijas or either one of them to the possible sources of sellers of machines? A. Well, that is quite possible.

Q. Do you actually recall any instance in which you have done that?

A. No, I don't recall any specific instance, but it's quite likely that I did direct them to the source where the machines could be purchased.

Q. At that time were you working with firms in that type of business of financing these deals?

A. Yes, sir.

Q. Did you have any other business relations with Mr. Forman and Mr. Seijas, or either of them?

A. Yes. I have a contract here for Bremerton Amusement Company.

Q. Bremerton Amusement Company?

A. Yes.

(Testimony of Sol Esfeld.)

Q. What was the nature of that transaction?

A. That was for the purchase of five machines.

Q. What documentation do you have of it? Just identify it. [1056]

A. We have a conditional sales contract and a ledger sheet.

Q. I see. What is the date of the contract?

A. The date of that contract is October 30, 1942.

Q. And who signed it as seller?

A. The seller was American Discount Corporation.

Q. And who signed it as the purchaser?

A. And the purchaser was Bremerton Amusement Company.

Q. And does that file consist of a contract ledger and contract form? A. Yes, sir.

Q. And who signed the contract on behalf of the purchaser? A. W. R. Forman.

Q. May I have the exhibit, please? This file is from the files which you previously described, the files from the American Discount Corporation?

A. Yes, sir.

The Clerk: Plaintiff's Exhibit 124 has been marked for identification.

Mr. Billinghurst: At this time we offer 124, your Honor.

The Court: Go ahead. If there is some additional, let's get it all done at one time if we can.

Q. (By Mr. Billinghurst): What other business association [1057] did you have with either Mr. Forman——

(Testimony of Sol Esfeld.)

The Court: Any objection to 124?

Mr. Mead: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 124 for identification was received in evidence.)

Q. (By Mr. Billinghurst): With either Mr. Forman or Mr. Seijas at approximately this period of time? A. I have here a ledger sheet——

The Court: Speak a little louder, Mr. Esfeld. We are having a little competition from some kind of concrete mixer today.

A. (Continuing) I have here a ledger sheet which was originally signed by Army Seijas and Wendell Arnold and then afterwards was assumed by Heberling Brothers on a place called the Beach Cafe in Bremerton.

Q. (By Mr. Billinghurst): And what was the relationship with your company to that concern?

A. It appears that we had a chattel mortgage on that place for a loan of $11,200.

Q. Who was the mortgagor? Who were the parties to the mortgage?

A. I don't see a copy of the mortgage in this file. I couldn't exactly tell who the parties were to the mortgage. [1058]

Q. And what was the name of the concern?

A. The Beach Cafe.

Q. Do you have any other business transactions with either one of them?

A. Yes. There is a record on the Palace Billiard Parlor.

(Testimony of Sol Esfeld.)

Q. What is it, the nature of the record, Mr. Esfeld?

A. It shows that a loan was made by the American Discount Corporation on various securities for $25,000, and these securities were executed for a note that was originally signed by George Heberling and William Forman.

Q. What documents are you referring to?

A. The ledger sheet.

Q. What is the date of the opening account on the ledger sheet? A. September 15, 1942.

Q. And when was the account closed?

A. The account was closed on September 14, 1943.

Q. May I have the exhibit, please?

The Clerk: Plaintiff's Exhibit 125 has been marked for identification.

Q. (By Mr. Billinghurst): Is this ledger sheet also from the files of the American Discount Company subject to the previous answer you gave?

A. Yes, sir. [1059]

Mr. Billinghurst: We offer 125, your Honor.

Mr. Mead: This exhibit is objected to, your Honor. Exhibit 125 is not material to any of the issues involved in this case. It shows on the face of it that it is an organization in which Howard Young, Sam Cohen, C. Allen Smith and Ruth Smith are partners, and it has no bearing on any transaction.

The Court: It doesn't appear on the face of it to have any relevance. If you want to pursue it——

(Testimony of Sol Esfeld.)

Mr. Billinghurst: I believe there will be additional evidence, your Honor.

The Court: Just put it aside, and I will reserve it.

Anything further in the way of identification so we don't have to call this witness back.

Mr. Mead: I will inquire on voir dire, your Honor.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Esfeld, Exhibit 125 is a contract ledger sheet labeled "Palace Billiards" with the names in parentheses, [1060] Howard Young, Samuel Cohen, C. Allen Smith and Ruth Smith, Bremerton, Washington." What does that indicate? What is that?

A. That would indicate that they were the owners of the Palace Billiards, those individuals whom you named.

Q. And are you familiar with this particular account? A. Yes, sir.

Q. Were these people the owners of this particular business? A. They were.

Mr. Mead: We object to it.

The Court: You made some mention of Mr. Forman in connection with this?

The Witness: Yes. I stated that the loan was made on some securities that were executed for a note which was originally signed by George Heberling and William Forman.

(Testimony of Sol Esfeld.)

Direct Examination—(Continued)

Q. (By Mr. Billinghurst): What was the relationship of that note by Heberling and Forman to the Palace Billiards Parlor, if you know? What did it represent?

A. Well, as I recollect, and as I see from the records, the securities weren't put up immediately at the time the loan was made. [1061]

Q. Now, which loan are you speaking about?

A. To the Palace Billiard.

Q. The loan of the American Discount Company?

A. Yes, sir, and for that reason we had as security the note of George Heberling, who was Mr. Smith's brother-in-law, Mrs. Smith's brother, and Forman as accommodation prior to the time of the securities were turned over to the American Discount Corporation.

Q. Does that indicate or does it not that Mr. Heberling and Mr. Forman were predecessors in interest to the Smiths?

A. No, sir, it does not.

Q. What, if anything, does it indicate concerning their relationship to the group, Young, Cohen and Smith?

A. Well, it would indicate that the note was given prior to the time that the securities were posted merely for the protection of the American Discount Company.

Q. Were they in the position of creditors or debtors? A. Well, neither one.

(Testimony of Sol Esfeld.)

Q. What was their position?

A. Well, the position would be that of accommodation endorser.

Q. Was the note signed by Heberling and Forman regarded as security for the advance made to the firm by the discount company? [1062]

A. Yes, sir.

Mr. Billinghurst: On that basis, I offer——

The Court: I am going to reserve it for now. If there is something further that makes it admissible, I will consider if.

Q. (By Mr. Billinghurst): What was Forman's relation, if any, to the sale?

A. To the sale of the Palace Billiards?

Q. Yes. A. None that I recollect.

Q. Now, Mr. Esfeld, not as a representative of the American Discount Company but in your own personal capacity, did you have any business relations with Mr. Forman or Mr. Seijas?

A. Yes, sir, I had a relationship with Mr. Forman in the Dock Concessions of Bremerton.

Q. Did you have an interest in that business?

A. At first I thought that I had a personal interest in it, but in checking my records I found that that interest was in the name of my son-in-law.

Q. What led you to believe you had a personal interest in it?

A. Well, that was, as closely as I could remember it, because I was acting for my son-in-law who was in the service at the time. [1063]

Q. In what way were you acting for him?

(Testimony of Sol Esfeld.)

A. Well, I was acting as his representative.

Q. And whom were you dealing with?

A. I was dealing with Mr. Forman.

Q. How did you learn about this business?

A. I believe it came to me through Mr. Forman.

Q. Did you have any conversation with him concerning purchasing an interest in the business?

A. Yes, sir.

Q. What arrangement, if any, did you make concerning buying into this business?

A. My recollection is that I took a part interest in the business.

Mr. Mead: May we have an objection to the Dock Concessions testimony?

The Court: The same objection you made to the Dock Concessions, and it's a continuing one. Go ahead.

The Witness: What was the last question, sir?

Q. (By Mr. Billinghurst): What arrangements did you make with him, if any, concerning an interest in the business?

A. The arrangements were made to purchase a one-third interest in the business. [1064]

Q. What was your understanding as to the partnership structure?

A. My understanding was that Mr. Goldstein and Mr. Forman would each have a third, and that I would have a third which was thereafter transferred to my son-in-law.

Q. What was your arrangement or understand-

(Testimony of Sol Esfeld.)

ing of the financing? How much of an investment was each of the partners to make in this concern?

A. It was 45 hundred dollars each.

Q. Do you recall how much of an investment you made in it? A. Forty-five hundred dollars.

Q. How did you pay this 45 hundred?

A. It was paid by check.

Q. Do you have any documentations of that? Do you have a check?

A. No, I do not have the check.

Q. Approximately when did you make this purchase of an interest in the business?

A. August 27, 1942.

Q. What arrangement or what was your understanding concerning arrangements to share in the profits or assume the losses of the business?

A. I presume that there was the usual share and share alike for the three partners.

Q. How long did you keep your interest in this business, [1065] Mr. Esfeld, either yours or that held on behalf of your son-in-law?

A. Until July 1, 1944.

Q. And what happened to it at that time?

A. At that time I sold my interest.

Q. To whom did you sell it?

A. That I don't know, whether it was sold to Mr. Forman. I think it was to Mr. Goldstein. I believe that the reason for selling it was because Mr. Goldstein wanted to have a larger share in the business since he was the active partner and manager.

(Testimony of Sol Esfeld.)

Q. Now, during the time you were involved as a partner in this concern, were you aware or were you given to understand, I should say, that the partnership was solely between you and Mr. Forman and Mr. Goldstein?

A. As far as I can remember, that was my understanding.

Q. And if there were any other interests, you were not aware of them, is that correct?

A. That is correct.

Q. When you sold out in 1944, Mr. Esfeld, what price did you receive for your interest?

A. $11,250.

Q. And during the time that you were a partner, do you recall approximately how much, if any, dividends you received in terms of profit? [1066]

A. Yes, I have a record from my son-in-law's income tax return which disclosed that. In 1943 we received 47 hundred 55 dollars and eighty cents. In 1944, 11 hundred 59 dollars and 71 cents.

Q. And these funds, then, were not reported on your income tax return?

A. No, they were reported on my son-in-law's income tax return.

Q. Did you advise Mr. Forman or Mr. Goldstein of your son's interest—son-in-law's interest in this partnership? A. I don't recall, sir.

Q. Do you recall whether or not a partnership agreement was formally drafted and executed at the time of the partners—when you assumed an interest in the company?

(Testimony of Sol Esfeld.)

A. No, I do not recall that.

Mr. Billinghurst: May I have Exhibit 100, please?

Q. (By Mr. Billinghurst): In the organization of the partnership, Mr. Esfeld, who was the active manager of the business if any one or more of you worked? A. Mr. Goldstein.

Q. What part of the transaction of the business did you take part in?

A. I didn't take part in any part. [1067]

Q. Did you have anything to do with the accounting? A. No, sir.

Q. Did you ever have any access to the books of the corporation? Did you have any occasion to examine them? A. Not to my recollection.

Q. Do you know the manner in which the profits of the business were established for the purpose of distributing them to the various interested partners?

A. I presume the statements were issued.

Q. Do you know whether or not this partnership received funds which weren't recorded on the books of the partnership and distributed without any record of any kind? A. No, sir, I do not.

Q. You don't know whether that happened or not, is that correct? A. I don't know.

Q. Is it possible, Mr. Esfeld, that a partnership agreement was executed and that you may have no recollection at this time?

A. Yes, I presume that is possible.

(Testimony of Sol Esfeld.)

Q. Will you examine Exhibit No. 100 and identify it, please?

The Court: Are you pretty near the end of the direct?

Mr. Billinghurst: Almost, yes.

The Witness: This is an agreement dated [1068] August 27, 1942, between Albert M. Goldstein and William R. Forman and Sol Esfeld.

Q. (By Mr. Billinghurst): What was the date again? A. August 27, 1942.

Q. Does that document relate to the transaction to which you have just testified?

A. I believe it does.

Q. And is it signed?

A. It is signed by all three.

Q. And who were the three?

A. Albert M. Goldstein, William R. Forman and Sol Esfeld.

Q. Does that refresh your recollection, Mr. Esfeld, concerning the document?

A. Well, I really don't remember the document, but this is my signature on it.

Q. Do you recall whether or not there was any arrangement made between you and the other partners in which, or pursuant to, your interest and the interest of Mr. Forman was not to be made known?

A. No, sir.

Q. Will you look at the second or third paragraph of that document, first page?

A. Yes, it says here that——

Q. Does that refresh your recollection?

(Testimony of Sol Esfeld.)

A. No, it does not. In fact, I don't remember that [1069] document at all, but, as I say, my signature is on there, yes, sir.

Mr. Billinghurst: The document is in evidence, your Honor.

The Court: Yes, I understand.

Mr. Billinghurst: May the witness read it?

Mr. Mead: Has it been, the document been introduced in evidence?

The Court: Yes, I think it has. My records show it has.

Q. (By Mr. Billinghurst): Will you read that paragraph?

A. "It is hereby agreed by and between the parties hereto that the entire purchase price of $6,000 for the said business and property shall be paid by the said Albert M. Goldstein and William R. Forman and Sol Esfeld. William Forman and Sol Esfeld as undisclosed partners hereby authorize the said Albert M. Goldstein to purchase in his own name in trust for the use of the partnership hereinafter to be created from the said Rex Bliss, the said business and property located in Bremerton, Kitsap County, State of Washington."

Q. Thank you, Mr. Esfeld. To your knowledge, Mr. Esfeld, did you ever receive any funds as earnings, dividends or any other funds from this company which were not reported on their books?

A. No, sir.

Mr. Billinghurst: I think that will be all.

The Court: Unless you could conclude just in a minute or two——

(Testimony of Sol Esfeld.)

Mr. Mead: I would like to examine the document before questioning.

The Court: I thought so. Remain in attendance, Mr. Esfeld.

We will take the afternoon recess now, ladies and gentlemen.

(Whereupon, the afternoon recess was had.)

The Court: Did you have anything else?

Mr. Billinghurst: A few more questions, your Honor.

The Court: Go ahead.

Direct Examination—(Continued)

Q. (By Mr. Billinghurst): Mr. Esfeld, how were the distributions for profits from the Dock Concessions made?

A. There were only two that I have a record of.

Q. And they are the two to which you have referred? A. Yes, sir.

Q. In connection with the income tax returns, is that correct? [1071] A. Yes, sir.

Q. And, as I understand it, those sums, then, were forthcoming at one time on each of two times, is that right? A. That is my recollection.

Q. And there were no other periodic distributions of monies or profits of any kind, is that correct?

A. That is the best of my knowledge, yes, sir.

Q. In what form did you receive the dividends?

A. I presume they were by check.

Q. Do you have any documentation of record of the form? A. No, I do not, sir.

(Testimony of Sol Esfeld.)

Q. Do you know from whom you received it?

A. No, I don't remember whether it came from Mr. Goldstein or sent in by the bookkeeper, or whether it came from Mr. Forman. I do not remember.

Q. Do you know whether or not these dividends based on any particular period of operation was for a month, week, year or what do they represent, if anything?

A. I am not sure about that, but I presume they were an annual dividend at the end of the fiscal period.

Q. How did you dispose of the funds?

A. Those were turned over to my son-in-law.

Q. In what manner?

A. I imagine by check.

Q. And he was where at that time? [1072]

A. He was in service.

Q. And were any of the funds or any part of them reported by you in your income tax?

A. No, sir.

Q. You don't recall getting any other funds of any kind at any time? A. No, I do not.

Q. I am going to ask you, Mr. Esfeld, to examine Exhibit No. 77 and that portion of which relates to December 10—pardon me, May 7.

The Court: What year?

Mr. Billinghurst: 1943.

The Court: Both of you speak quite loudly now because we are having difficulty with the noise.

Mr. Mead: I assume we have a continuing objec-

(Testimony of Sol Esfeld.)

tion into the inquiry concerning the Dock Concessions.

The Court: You have a continuing objection to any reference to Dock Concessions.

Go ahead.

Q. (By Mr. Billinghurst): There is a note there on top of that particular notation, the word "Goldie H.O.," and a sum of money one hundred seventy-five fifty followed by eighty-seven seventy-five. [1073] A. Yes, sir.

Q. Do you have any knowledge of what that legend may refer to? A. No, I do not, sir.

Q. Below there, a column of figures, three figures—$600 and under the $600, under that $400, and to the righthand of the figures figure, $600 is Sol's share. The second $600-figure is Bill's share, and opposite the $400 is Goldie's share. Do you have any recollection of ever having received that sum of $600? A. No, I do not.

Q. Do you have any recollection of any kind of a transaction in this partnership which would relate to "H.O."? Do you know what that means?

A. No, sir, I do not.

Q. Do you have any knowledge of the notation at the bottom of the note in the word of "rest. equals one-half. equals $300"?

A. No, sir, I do not.

Q. On the date of that entry or shortly thereafter or at any time approximately within the period of, we will say, a week or more thereafter, did you receive any dividend from that company?

(Testimony of Sol Esfeld.)

A. No, sir.

Mr. Mead: I would like to make the further [1074] objection that this witness is being questioned about books which are not his and with respect to which he has no knowledge and information.

The Court: Overruled.

Q. (By Mr. Billinghurst): Exhibit 76, I will refer you to December 10, the notation under that date, December 10, 1942, and first direct your attention to the notation at the top of it. Do you have the page, Mr. Esfeld? December 10.

A. December 10, yes, I have it.

The Court: Keep your voice up, gentlemen, both of you.

Mr. Mead: What year was that, Mr. Billinghurst?

Mr. Billinghurst: December 10, 1942, I believe.

Q. (By Mr. Billinghurst): The notation at the top of the page consists of the word "totaled" followed by "H.O." followed by "Dock" followed by the number "413." Do you have any knowledge which would reflect on the meaning of that notation?

A. No, I don't know what this means.

Q. Under that notation is a column of figures, three of them. First one is $155, under that one $155, and under that one $103. To the left of the top figure of [1075] $155 is the initial "S." Do you know whether or not that would refer to you?

A. I have no idea, sir.

(Testimony of Sol Esfeld.)

Q. To the left of the second figure of $155 is a "B." Do you know whether that would refer to Mr. Forman? A. I do not.

Q. And to the left of the figure $103 is the letter, capital "G." Do you know to whom that would refer? A. No, sir.

Q. On the middle figure to its right is an equal sign followed by "½" followed by "77.50" capital "A." That is the figure preceded by the letter "B." Do you know to whom, if anyone, the "A" initial might refer? A. No, I do not.

Q. Below those notations, Mr. Esfeld, is another notation with the word "Profit" followed by the sum of "$2,000." Underneath is another column of figures, first "$750"; to the lefthand of the sum of $750 is "S equals $750." Do you know to whom that might refer? A. No.

Q. The same thing under the second figure in the column, "$750," on the lefthand side of it in the capital "B" and the third figure in the amount of $500 has the same situation except that the letter is a capital "G." Do you know what those references mean? [1076] A. No, sir, I do not.

Q. Was there any distribution of any of the profits of the Dock Concessions in the amount specifically of $155 or $750 ever forwarded to you in those specific amounts?

A. No, unless they were part of the figure which I gave you before in which I don't know whether they came all at one time or whether it was for the

(Testimony of Sol Esfeld.)

entire year, in sums during the year, but that was the amount that was declared.

Q. Did you ever receive an accounting from the firm's bookkeeper concerning the divisions of the property?

A. I presume I did, but I don't remember.

Q. Did you ever recall having interested yourself sufficiently in this thing to ask for such an accounting? A. Not too much, no.

Q. Did you ever make a personal investigation of it? A. No, I did not.

Q. Do you know whether or not the funds that you received included the amounts indicated in these two items, the item of May 7 and the item of December 10 opposite the terms H.O. in the first one, May 7, one in the amount of $175.50, and in the December 10 entry in the amount of $413?

A. No, unless they were included in the total that I have [1077] for the year.

Q. Well, do you know whether or not they were included? A. I do not, sir.

Q. Do you know whether or not the $600 item labeled "Sol's share" on the May 7 entry was included in the earnings as received by you?

A. No, I do not know.

Q. Do you know whether or not the $155 item on December 10 notation labeled "S" was received by

(Testimony of Sol Esfeld.)

you as part of this dividend you have previously described? A. No, sir, I don't.

Q. Do you know whether or not the items labeled "H.O." in both of these cases were carried on the partnership books for tax or any other purpose?

A. I don't know what that "H.O." would refer to.

Q. Do you know whether or not Mr. Seijas had an interest in this partnership during the time when you were a member of it?

A. Not to my knowledge.

Q. Has Mr. Seijas ever indicated to you that he may have been?

A. Not that I recollect.

Mr. Billinghurst: That is all.

The Court: Cross. [1078]

Cross Examination

Q. (By Mr. Mead): Mr. Esfeld, you were asked whether or not you ever made a personal investigation into the affairs of this venture known as Dock Concessions, and I believe you said that you did not. Why did you not make an investigation? Why did you not inquire into the venture or into the affair?

A. Well, I only had a minority interest in it, and I had confidence in Mr. Forman who was one of the partners that my interest would be looked out for.

Q. So you never had any occasion to inquire into the affairs or anything to do with the actual operating of the business, is that right?

A. No, sir. That is correct, I never did.

(Testimony of Sol Esfeld.)

Mr. Mead: Will you please hand Exhibit 100 to the witness?

Q. (By Mr. Mead): I believe you testified, Mr. Esfeld, that you had contributed in behalf of your son-in-law a certain amount of capital to this venture, some $4,000 plus, is that right?

A. Forty-five hundred is the amount.

Q. Forty-five hundred. I notice that by that agreement the purchase price of this business from Mr. Bliss from whom the Dock Concessions was purchased was $6,000. If your [1079] interest was one third, and the purchase price was $6,000, why was your capital consideration 45 hundred? Do you know the reason as to that?

A. Well, I presumed that this covered only the purchase of the business as it was at that time, and there was further capital needed for merchandise and for operating expense.

Q. What capital would be required for merchandise in a business venture of this kind?

A. Well, I would say quite considerable. It had magazines and tobacco and books and food.

Q. Various supplies?

A. Various supplies, novelties, and also it required quite a little cash on hand for making change and so forth.

Q. Now, to that exhibit, Mr. Esfeld, is appended a yellow slip. What is on that yellow slip?

A. This yellow slip states "Sol Esfeld's copy."

Q. Do you know whose handwriting that is in?

A. No, sir, I do not.

(Testimony of Sol Esfeld.)

Q. Do you know from whose files that exhibit was obtained? A. No, sir, I do not.

Q. Was that exhibit obtained from your files?

A. Not to my knowledge.

Q. Is that the first time you have seen that exhibit or a [1080] duplicate of it since the date apparently that it was signed in 1942? A. It is.

Q. And I think you stated that you had no independent recollection of even *every* signing it, is that right? A. That is right.

Q. But that is your signature?

A. But that is my signature.

Q. Was any revenue or dividends or profits or distributions turned over to you in behalf of yourself or your son-in-law other than those that you have reported that you received which, I think, you stated was 47 hundred 55 dollars in 1943 and 11 hundred and 59 dollars and 71 cents in '44, is that right?

A. That was all that was ever turned over.

Q. Was there any dividend or any distribution that you received for the partial year of 1942?

A. Evidently not. I have no record of it.

Q. And you believe, you stated, that upon sale of this business you received on behalf of your son-in-law $11,250? A. That is correct.

Q. So, then, you received, and when I say "you," I refer to both you and your son-in-law in whose behalf you invested the money, 47 hundred 55 dollars and 11 hundred [1081] 59 dollars and some odd

(Testimony of Sol Esfeld.)

cents dividends or distribution and $11,250 upon the final sale of the business?

A. That is correct, sir.

Q. And this all resulted from a 45-hundred dollar investment? A. Yes, sir.

Q. And you have no time or efforts devoted nor did your son-in-law to this venture?

A. That is correct.

Mr. Mead: Thank you, sir. That is all—one more question I wanted to ask the witness.

The Court: Go ahead.

Q. (By Mr. Mead): Mr. Esfeld, on the contracts which are a part and parcel of Exhibits 22 and 23 signed in behalf of the pinball venture, Mr. Forman's signature appears thereon, I believe you stated that you had conversations with both Mr. Seijas and Mr. Forman with regard to the business affairs of this company, is that right?

A. That is my recollection, sir.

Q. Why, then, is Mr. Forman's name solely on these contracts rather than Mr. Seijas?

A. Well, we considered Mr. Forman the responsible party in the concern, and we knew him and knew that he was a man of financial responsibility, and therefore we required [1082] him to sign the contracts.

Mr. Mead: Thank you, sir.

The Court: Anything else, Mr. Billinghurst?

Redirect Examination

Q. (By Mr. Billinghurst): One more question,

(Testimony of Sol Esfeld.)

Mr. Esfeld. In connection with the dividends, the two yearly dividends, which you received, did they correspond to the amounts which you reported on your son-in-law's income tax returns?

A. Yes, sir, they do, sir.

Q. And do they correspond to the amounts which were listed on the partnership returns presumably received by you?

A. Well, I haven't got the partnership returns, and I don't know what showed on those. I don't have that information.

Mr. Billinghurst: That is all.

The Court: I believe that is all, Mr. Esfeld. You may leave whenever you wish.

(Witness excused.)

The Court: Call another witness, please.

JOHN J. MICHAEL

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows: [1083]

The Clerk: Please state your full name and spell your last name.

The Witness: John J. Michael, M-i-c-h-a-e-l.

Direct Examination

Q. (By Mr. Billinghurst): Where do you reside, Mr. Michael? A. 5953 Beach Drive.

Q. What is your business?

A. I am in the coin machine business, wholesale.

Q. Wholesale coin-machine business?

A. Yes.

(Testimony of John J. Michael.)

Q. What business were you involved in during the years 1940 through '43?

A. The same type of business.

Q. Are you acquainted with Mr. William Forman? A. Yes.

Q. And are you acquainted with Mr. Army Seijas? A. Yes.

Q. And during—at sometime during the years between 1940 and '43, did you have an occasion to do business with either one of them?

A. Yes, sir.

Q. What was that occasion, Mr. Michael?

A. I sold them some pinball machines. [1084]

Q. How were the arrangements made for that sale?

A. I just don't really remember the particulars. I don't remember whether they bought them over the phone. The type of machines that they bought were of such a type that they could have just as easily bought over the phone. I don't remember whether they come in and looked at them or whether they actually bought them over the phone or what the circumstances were at that time.

Q. Do you recall who negotiated with you concerning this sale?

A. No, sir, I don't remember the particulars.

Q. Were the details of the sale, that is, identity of the machines and the amount and the date, reduced to a contract? A. Yes, sir.

The Clerk: Plaintiff's Exhibit 126 has been marked for identification.

(Testimony of John J. Michael.)

Q. (By Mr. Billinghurst): Will you examine identification No. 126, Mr. Michael? Identify it, please.

A. This is a contract that I gave to Mr. O'Leary out of our files.

Q. When did you give it to Mr. O'Leary?

A. I showed it to him about, if my memory serves me right, a month, oh, six weeks ago and just gave it to him just [1085] last week.

The Court: What is the name of your concern? Do you operate in your own name or do you have a company name?

The Witness: The present company or the one——?

The Court: The one that was then.

The Witness: This was only a trade name. It was a sole ownership. It was the trade name of Michael Brothers.

Q. (By Mr. Billinghurst): What is that document, Mr. Michael?

A. A conditional sales contract for 20 machines.

Q. What is the date? A. April 27, 1942.

Q. And who is the seller?

A. We were. That is myself.

Q. Who signed it on behalf of the seller?

A. Yes, sir.

Q. Who signed it on behalf of the seller?

A. I did.

Q. And who was the purchaser?

A. United Amusement Company.

Q. Who signed it on behalf of the purchaser?

(Testimony of John J. Michael.)

A. According to this—there again I have got to explain [1086] that it is very often we will mail out a contract to somebody that has bought some machines from us or have one of the men take the contract down to have it signed——

Q. Whose signature appears on behalf——

A. Mr. Forman's signature. May I explain myself a little bit here? I am not sure whether I was present when this contract was signed or not is the reason I was explaining that situation.

Q. Do you remember discussing or dealing with either Mr. Forman or Mr. Seijas with reference to this contract?

A. No, sir, I don't. I don't remember any of the actual small particulars on it at the time when that contract was negotiated.

Q. Had you previously been acquainted with Mr. Forman? A. A matter of a few months.

Q. How did you happen to meet him?

A. I don't remember the exact circumstances. I was under the assumption that American Discount sent him in, and they referred him to me, and he came in and bought the machines from us.

Q. Are you acquainted with his brother?

A. Al Forman?

Q. Yes. A. Yes, sir. [1087]

Q. Now, how long have you known him?

A. Oh, five or six years.

Q. Did you know him five or six years prior to this date? A. Five or six years from now.

Q. Had you known Mr. Seijas prior to the time of this contract? A. No, sir.

(Testimony of John J. Michael.)

Q. When did you first meet him?

A. About the same time.

Q. Do you recall the circumstances when you met him? A. No.

Q. Have you had any contact with Mr. Forman or Mr. Seijas since the time of the contract?

A. Yes, sir.

Q. And was this contract—pardon me. On what occasion, did——

The Court: These later contacts do you mean?

The Witness: In the case of Seijas, I ran into him numerous times on the street and in the Smith Tower Building where I had occasion to go very often. The offices were in the same building, and I met him there several times just casually, and in the case of Mr. Forman, I met him on the street maybe four or five times, and about [1088] a week before this trial, his attorney called me and asked me if he could come down and talk to me about this, and he came down and spoke to me about this, and that is about it.

Q. (By Mr. Billinghurst): Was this contract financed on behalf of the United Amusement Company by the American Discount Company?

A. Yes, sir. We sold the contract to American Discount Company. We received our pay from the American Discount Company.

Mr. Billinghurst: At this time, your Honor, we will offer Exhibit No. 126.

Mr. Mead: No objection, your Honor.

The Court: It is admitted.

(Testimony of John J. Michael.)

(Whereupon, Plaintiff's Exhibit No. 126 for identification was received in evidence.)

Q. (By Mr. Billinghurst): Were there any other contracts between your firm and the United Amusement Company approximately during those same years?

A. I don't remember from memory, but in the subpoena that was served on me, it called for another contract, and I referred you to American Discount for a copy of that contract. I believe you have a copy that is around 35 or 38 hundred dollars that was dated just prior to this one, a month or two.

Q. But you don't remember the details?

A. I don't remember it from memory, no, sir.

Mr. Billinghurst: That is all. You may question.

Cross Examination

Q. (By Mr. Mead): Mr. Michael, you have testified that you had these two transactions involving the sale of the machines to United Amusement Company? A. Yes, sir.

Q. Is that right? A. That is correct.

Q. And are you in the wholesale business?

A. Yes, sir.

Q. And you sell these machines to operators, is that right? A. Yes, sir.

Q. I think you stated that you have no independent recollection of these two particular transactions other than the documents themselves that you have seen, is that right? A. That is correct.

Q. Did you ever have any other business contact

(Testimony of John J. Michael.)

with either Mr. Forman or Mr. Seijas after these two transactions that you know of? [1090]

A. There is none that I can remember of, and I am positive there wasn't any beyond that immediate time there when they bought that bunch of machines. I don't remember whether there was a transaction besides those two contracts or not. I have been unable to find any records pertaining to any further transactions with them, but I doubt very much if there was any other business except those two contracts.

Q. I think you stated that I called on you about a week before this trial to also inquire into these transactions, is that right?

A. That is correct.

Q. Did you tell me at that time substantially just what you have got through testifying to?

A. That is correct.

Mr. Mead: No further questions, your Honor.

Mr. Billinghurst: That is all.

The Court: That is all, Mr. Michael. You are excused and may leave whenever you wish.

(Witness excused.)

VITO CUTTONE

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name. [1091]

(Testimony of Vito Cuttone.)

The Witness: My name is Vito, V-i-t-o, Cuttone, C-u-t-t-o-n-e.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Cuttone?

A. I live 119 North Tacoma, Casablanca.

Q. Casablanca Apartments?

A. Apartment 304.

Q. And that is in Tacoma?

A. Tacoma, yes, sir.

Q. And your occupation is what?

A. I own and operate the Cameo Theatre.

Q. And that is located where?

A. 1128 Pacific Avenue.

Q. How long have you been operator of the Cameo Theatre?

A. Since '52. Pardon me, '50 or '51, I don't remember exactly, four or five years.

Q. Prior to that, what was your business?

A. Pinball machines.

Q. And how long have you been in the pinball business? A. How long I been in there?

Q. Yes.

A. From '40 to '44, 1940 to 1944.

Q. 1940 to 1944? [1092] A. Yes, sir.

Q. And your business between 1944 and the theatre business?

A. Well, I sold my pinball route in 1944.

Q. I see.

A. I have been engaged in the theatre business buying property here and so forth.

(Testimony of Vito Cuttone.)

Q. All right. Where were you in the pinball business? A. In Tacoma.

Q. And what was the nature of your pinball business? Was it routes or machines?

A. Well, routes. You buy license, and they would allow you 50 machines per license, and I have three licenses in Tacoma.

Q. And you had three licenses in Tacoma?

A. Yes.

Q. And what was the name of your business?

A. Farwest Novelty Company.

Q. Farwest Novelty Company? A. Yes.

Q. With whom were you associated?

A. A. W. Paulsen and my brother-in-law Frank Risalvato, R-i-s-a-l-v-a-t-o.

Q. He is your brother-in-law? A. Yes, sir.

Q. Do you know Bill Forman? [1093]

A. Yes, sir.

Q. When did you meet him?

A. I think I met Mr. Forman latter part of '40 or '41.

Q. How did you meet him?

A. I met him in socially.

Q. Socially? A. Yes.

Q. Through whom?

A. Through Mr. Miller, Eddy Miller.

Q. Eddy Miller? A. Yes.

Q. Who is he? A. Well, he is dead now.

Q. Who was he?

A. He operated a hotel.

Q. Where did you meet him?

(Testimony of Vito Cuttone.)

A. Mr. Forman do you mean? I met him at my home at 324 North Yakima Avenue.

Q. And your home was on North Yakima at that time in Tacoma? A. Yes, sir.

Q. How frequently did you see Mr. Forman after meeting him in '40 or '41?

A. Oh, several times. I wouldn't know exactly how many times. I could make a guess, five or six times or [1094] eight or ten times.

Q. And where would you meet him on these occasions? A. At my home.

Q. Were these all social calls at this time?

A. All social calls, yes.

Q. Do you know Army Seijas?

A. Yes, sir, I do.

Q. And when did you meet him?

A. Well, I met Mr. Seijas in Seattle some years back. I don't remember whether it was '37 or '38.

Q. And how did you meet him?

A. I met him because he was a member of the Camera Club that I belonged to.

Q. In Seattle? A. Yes, sir.

Q. How frequently would you see Mr. Seijas?

A. Well, I would say not as many times as before, but just as many times, so to speak.

Q. Did Mr. Forman or Mr. Seijas ever come over to visit socially at your home together?

A. Not together they didn't.

Q. Not together? A. No.

Q. At this time in 1940 or '41 what did you know Mr. Seijas' business to be? [1095]

(Testimony of Vito Cuttone.)

A. An attorney.

Q. And what did you know Mr. Forman's to be?

A. In the theatre business.

Q. Did you ever have any conversation with Mr. Forman about the pinball business?

A. Yes, I did.

Q. About when?

A. Well, I came—I can't recall exactly. I would say first part of '42 or early part of '41.

Q. Where did this conversation take place?

A. In my home.

Q. What was this conversation?

A. The conversation was that the rules—that Bremerton was to license pinball machines, and they were interested in going into the business, Mr. Seijas and Mr. Forman.

Q. And did Mr. Forman say anything to you about Mr. Seijas' also being interested in going into the pinball business in Bremerton? A. Yes.

Q. During this same time, did you have other conversations, separate conversations, with Mr. Seijas concerning the pinball business?

A. I don't think I did. It's too far away. I cannot recall. I don't think I did. [1096]

Q. What was the conversation that you had with Mr. Forman about how they were to go into the pinball business in Bremerton?

A. Well, the same as in Tacoma where you buy a license and place machines in location.

Q. Were they conversations before or after Bremerton began the operation of pinballs?

(Testimony of Vito Cuttone.)

A. Well, first it was before the license was in Bremerton, and we took it over a few times after the license.

Q. First of all, to your knowledge, did they get a license in Bremerton?

A. I didn't get your question.

Q. To your knowledge, did Mr. Seijas or Mr. Forman or both of them get pinball licenses in Bremerton?

A. They never talked to me about it.

Q. They never talked to you about it?

A. No.

Q. How long did they continue to come to your home socially, Mr. Cuttone?

A. Do you mean after the Bremerton or before?

Q. At that time. A. Well, not too often.

Q. Was there a period when they were coming to your home? A. No special time.

Q. Did they continue to come to your home socially? [1097] A. Socially at all times.

Q. Socially at all times? A. Yes.

Q. How long did they continue to come to visit you, Mr. Cuttone?

A. Do you mean after Bremerton?

Q. Yes.

A. I can't recall. I would say a number of times.

Q. Now, you say the Bremerton deal. What was the Bremerton deal?

A. Well, you referring to the pinball machines, aren't you?

Q. Yes, sir.

(Testimony of Vito Cuttone.)

A. I am referring to that, too.

Q. All right, sir. Did you yourself ever go into the pinball business in Bremerton?

A. Yes, I did.

Q. When?

A. The first part of sometime in '42. I haven't got the records.

Q. When was it in relation to the time that the pinball routes were first beginning in Bremerton?

A. Well, I will have to make a guess. It would be the first part of '42.

Q. Did you get a license to operate pinballs?

A. I didn't get a license. Mr. Parrott did, Charlie Parrott.

Q. Charlie Parrott? A. Yes.

Q. Did Mr. Charlie Parrott get a pinball license when the licenses were first issued?

A. Yes, sir.

Mr. Mead: I object to this line of inquiry as being incompetent, immaterial and has no bearing on any of the issues involved in this case, whether Mr. Cuttone and Mr. Parrott got a license or what business they may have engaged in.

The Court: I presume this is the same matter to which Mr. Parrott has referred and which I reserved, and I presume you are going to connect that up?

Mr. Obenour: Yes, sir.

The Court: With that understanding, I am going to overrule the objection.

(Testimony of Vito Cuttone.)

Q. (By Mr. Obenour): Did you know Mr. Parrott? A. Yes.

Q. How did you meet Mr. Parrott?

A. I met Mr. Parrott when he worked for the State Tax Commission. [1099]

Q. Who actually secured the license in Mr. Parrott's name?

A. I don't know that. I couldn't answer that question.

Q. But do you know that Mr. Parrott secured a license?

A. As far as I know he did, but if he got it under his own name or other names, I don't know.

Q. Who paid for the license?

A. That I cannot remember. I don't remember whether he did or whether my company did. I can't answer that question.

The Court: Whether he or your company did?

The Witness: I don't remember that, your Honor.

The Court: All right.

Q. (By Mr. Obenour): What was your relationship with Mr. Parrott in this business?

A. Just the same.

Mr. Mead: We continue the same objection to all this line of question, your Honor.

The Court: Yes, of course. Go ahead.

Q. (By Mr. Obenour): What was your relationship with Mr. Parrott in this business?

A. Mr. Parrott?

Q. Yes. A. Just friends.

(Testimony of Vito Cuttone.)

Q. Pardon? [1100]

A. Friends. We was going into the venture.

The Court: He asked what your connection with the business was.

The Witness: With the business?

Q. (By Mr. Obenour): With this license?

A. He was—he was to get a third of the profits. In other words, if he had continued in business, Mr. Parrott would have a third of the profits and my company would receive two thirds.

The Court: What did you call your company?

The Witness: Farwest Novelty Company.

Q. (By Mr. Obenour): It would receive two thirds and Parrott would get one third?

A. Yes.

The Court: All right, go ahead.

Q. (By Mr. Obenour): Did you begin operation of the pinball business in Bremerton?

A. No, I beginning my business in Tacoma before the Bremerton operation.

Q. Did you begin to operate the pinballs under the Bremerton license? A. Yes, we did.

Q. And how long?

A. Well, I don't think we were there very long. I would say a couple of weeks or less than that.

Q. What happened after a couple of weeks?

A. Mr. Forman came over to see me one morning.

Q. Mr. who?

A. Mr. Forman, and asked me if he coud take the route over, and I told him he could.

(Testimony of Vito Cuttone.)

Q. Where did this conversation take place?

A. At 1129 Commerce Street.

Q. And what is that?

A. That is Farwest Novelty Company's office.

Q. What did you say?

A. I told him he could.

Q. How did it happen that Mr. Forman just came over and asked you to take over the route?

A. How did that happen?

Q. Yes, sir.

A. Well, I can't answer that question. He came over to see me to see if he could take the route over, and I told him he could by paying for the machines and expenses.

Q. What was he supposed to pay?

A. Just for the machines and whatever expenses we were into. For instance, the license, and I don't remember exactly.

Q. Did you sell him the route?

A. No, I sold him the machines — I mean my company sold [1102] **him the machines.**

Q. Where were the machines?

A. I don't know. I was never there. I didn't go to Bremerton.

Q. What machines were you selling him?

A. Well, the machines that was placed in Bremerton by my employees.

Q. Who were your employees?

A. Well, John Desimone, and I had three or four of them at that time.

(Testimony of Vito Cuttone.)

Q. Who was conducting the actual operation of the route? A. Mr. Paulsen.

Q. Mr. Paulsen?

A. Both Bremerton and Farwest Novelty Company. He was a partner and also bookkeeper.

Q. It was you who talked to Mr. Forman?

A. Mr. Forman came and talked, and I referred him to Mr. Paulsen for the transaction.

Mr. Obenour: If your Honor please, I would ask that this document be marked which has been taken from Exhibit 123 as 123-A.

The Court: That may be done.

The Clerk: Plaintiff's Exhibit 123-A has been marked for identification.

Q. (By Mr. Obenour): Would you refer to that, Mr. Cuttone, [1103] and can you identify those papers?

A. I can find my name, but I don't remember the transaction because Mr. Paulsen was taking care of all these matters.

The Court: Is your signature there?

The Witness: Yes, sir.

Q. (By Mr. Obenour): What is the paper you signed, Mr. Cuttone?

A. It's a contract for pinball machines, I think.

Q. Would you read it, please? A. Yes.

Q. Those are all pinball machines?

A. Yes.

Q. And the total number of machines is how many? A. Here's 11, 12—18.

Q. What is the price of those machines?

(Testimony of Vito Cuttone.)

A. It was sold, those machines. I think it was $500 a machine.

Q. $500 a machine? A. Yes.

Q. And what was the total amount of that bill of sale?

A. I will have to look it up. Eighteen machines at hundred apiece makes nine thousand, doesn't it?

Q. Yes, sir. Is there a ledger account—first entry on the ledger account is how much? [1104]

A. 9433.

Q. 9433 even? A. Yes.

Q. And the second document is what, sir?

A. Well, truthfully, I remember the first transaction, but I don't remember the second transaction. I don't remember the second transaction.

Q. Well, there is still the same amount, is it not, Mr. Cuttone, 9433 on chattel mortgage?

A. Whatever the record shows, that is what it is, and whatever the record shows, that is what it is.

Q. Referring to the notation, the papers on the back of the document, Exhibit 123-A, will you examine that, please? A. Yes, sir.

Q. From whom did you receive your money?

A. I think the American Finance Company paid us for the machines.

Q. That would be the American Discount?

A. American Discount Company.

Q. And did they pay you the total amount of the 9433?

A. I presume they did. I don't remember. Mr. Forman didn't give me my money.

(Testimony of Vito Cuttone.)

Q. You got your money from American Discount? A. I am pretty sure we did. [1105]

Q. Now, sir, would you refer to the note, the back, that I just showed you? A. Yes, sir.

Q. And it shows certain items to the language of 9433, does it not? A. Yes, sir.

Q. And this is made up of $2,015 for cash expenses and licenses, 11, 1 and 6 machines for a total of $6,561, and that totals an 8576 total?

A. Yes, sir, and there is "857 fix."

Q. Do you know what that is?

A. No, I don't, and the total 9433.

Q. And, sir, referring to that, you were also reimbursed for the total of the $2,000 including the amount advanced for licenses in Bremerton?

A. Whatever the record shows, that is what it is. Mr. Paulsen handled that.

Q. I am referring to, sir, the money for the original license in Bremerton. Would that not—referring to that—would that not indicate that you were paid for the amount of the license?

A. Truthfully, I don't remember, truthfully.

Q. Handing you Exhibit 122 and the second document, Mr. Cuttone, a conditional sales contract, can you identify that? [1106]

A. Well, I don't know whether I can or not because, if you pardon me, I will give you the same answer. Mr. Paulsen took care of all those matters, so I can't say what they are talking about.

Q. Do you recognize the signature on there?

A. Forman?

(Testimony of Vito Cuttone.)

Q. Yes, sir.

A. Yes, sir. First time I have seen his signature myself.

Q. Are there any other signature on the back of that? A. Mr. A. W. Paulsen.

Q. Who is that?

A. That is my partner and also bookkeeper.

Q. He was your partner and bookkeeper?

A. Yes, sir.

Q. And that is a conditional sales contract, is it not? A. Yes, it is.

Q. And that is for eleven machines?

A. Whatever it says, right.

The Court: Just take a look at it. It is for eleven machines?

The Witness: That is right.

Q. (By Mr. Obenour): Did your company sell eleven machines to Mr. Forman as shown on Exhibit 122?

A. I must have. I ain't got no record. You can check on the records, but I don't have any records.

Q. Were you subpoenaed to produce your own records of these transactions, Mr. Cuttone?

A. Yes.

Q. Did you search to see if you had them?

A. No, we have no records of any kind. Mr. Paulsen passed away three or four years ago, and everything he had with him and destroyed; if I had them, they would be up here.

Q. Were both of these transactions handled through American Discount Company?

(Testimony of Vito Cuttone.)

A. I think so. I haven't said for sure, but I will have to give you the same answer. Mr. Paulsen took care of all these matters.

Q. Did you handle any other transactions with the American Discount Company?

A. Well, all contracts.

Q. All contracts?

A. Our own machines he financed for us.

Q. He financed? A. Our machines.

Q. Did you contact American Discount in those deals? A. About the Bremerton deal.

Q. Who would you contact in American Discount for your loans? A. Well, Mr. Sol Esfeld.

Q. And would you contact Mr. Sol Esfeld for the refinancing of your own contracts?

A. Or Mr. Paulsen would, one or the other.

Q. And in both instances did you receive your money from American Discount Company?

A. As far as I recall, we did.

Q. Have you ever had any other business transactions with either Mr. Seijas or Mr. Forman?

A. No, sir.

Q. And since that time, have you seen Mr. Seijas or Mr. Forman? A. Not too often.

Mr. Obenour: I believe that is all. You may examine.

Mr. Mead: We have no questions, your Honor, and we move at this time to strike all the witness' testimony with regard to the partnership arrangements with regard to the question respecting his

(Testimony of Vito Cuttone.)

business venture. We objected to it in the first place, your Honor.

The Court: I think this evidence plus that of Parrott and the records connected with it make it all admissible. The objections are overruled. Motion to strike is denied, and an exception is allowed. Go ahead. [1109]

Mr. Mead: No questions.

The Court: That is all, Mr. Cuttone. You may leave.

(Witness excused.)

WENDELL H. ARNOLD

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Wendell H. Arnold, A-r-n-o-l-d.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Arnold? A. Bremerton.

Q. And your occupation?

A. I am a retail furniture store owner.

Q. How long have you been so engaged?

A. Six years.

Q. What was your business before that time?

A. I owned the Smoke Shop Restaurant and Tavern.

Q. What was the Smoke Shop?

A. A restaurant and tavern.

(Testimony of Wendell H. Arnold.)

Q. Where was it located? [1110]

A. On 222 Front Street.

Q. Where? A. 222 First.

Q. Where? A. Bremerton.

Q. What was your relation to the Smoke Shop?

A. I was the owner.

Q. When did you buy it?

A. November of 1942.

Q. What was your occupation prior to that time?

A. I was working at the Palace Recreation on Pacific Avenue in Bremerton.

Q. What were you doing? A. Cigar clerk.

Q. Who approached you concerning the purchase of the Smoke Shop? A. George Heberling.

Q. And who was he?

A. He had pinball machines, punchboard concessions.

Q. Where did you first have any conversation with Mr. Heberling concerning this matter?

A. In the Palace Recreation.

Q. When?

A. Sometime prior to—shortly prior to November 1 of '42.

Q. What was the nature of the conversation you had with [1111] Mr. Heberling concerning this matter?

A. Mr. Heberling knew of the sale of the place, the possibility of buying it, and asked me if I was interested in making a change in the partnership.

Q. What was the term of the proposed partnership?

(Testimony of Wendell H. Arnold.)

A. The term was we would buy the Smoke Shop and run it until the obligation was paid off.

Mr. Mead: We would like to object to the question on the basis of materiality and relevancy to any issue involved and all inquiry into the Smoke Shop.

The Court: Is this going to complete the data on that as far as that relates to a claimed asset of Seijas or what is it? What is the purpose?

Mr. Obenour: Yes, it ties in with the—twofold, the partnership itself as far as this witness' knowledge, the witness Seijas' testimony concerning the partnership interest being split with the Defendant Forman, being another partnership venture with Seijas and Forman, and also it is the source of the explanation of Seijas of certain monies received.

The Court: The only thing about it is that as far as these details of conversations between [1112] Heberling and the witness, I think they should be avoided.

Mr. Mead: May we have a continuing objection, your Honor?

The Court: Yes, you may. Go ahead.

Q. (By Mr. Obenour): Who was to put up the money? A. Mr. Heberling.

Q. Who would operate it? A. I would.

Q. What were you to receive from it?

A. One hundred a week.

Q. And were you ever to have any interest in it, then? A. Yes, sir.

Q. And that was when?

(Testimony of Wendell H. Arnold.)

A. When it was paid off.

Q. At this time did anyone else have an interest in this transaction other than you and Mr. Heberling? A. No, sir.

Q. Did you buy the Smoke Shop?

A. Pardon?

Q. Did you buy the Smoke Shop then at this time? A. In '42.

Q. Yes, sir. A. Yes, sir.

Q. And whose name was the license? [1113]

A. Mine.

Q. And who operated it? A. I did.

Q. Did you subsequently learn of anyone else having an interest in this company or partnership?

A. Two or three months after I took over the place, yes.

Q. What happened then?

A. Mr. Heberling brought Mr. Seijas around to the place, to the store, and said that he had a part of his interest in it.

Q. He being whom? A. Mr. Seijas.

Q. Had what?

A. Had a part of Mr. Heberling's interest.

Q. What part?

A. Well, that I don't know.

Q. Was a partnership agreement executed?

A. Yes, sir.

Q. And in this partnership agreement who were the partners?

A. Myself and Mr. Heberling and Seijas.

(Testimony of Wendell H. Arnold.)

The Clerk: Plaintiff's Exhibit 127 has been marked for identification.

Q. (By Mr. Obenour): Can you identify 127, Mr. Arnold?

A. Yes, sir. That is the partnership agreement.

Mr. Obenour: Offer 127. [1114]

Mr. Mead: Same objection, your Honor, as to materiality and relevancy to any matter involved in this controversy.

The Court: Overruled. Exhibit 127 is admitted.

(Whereupon, Plaintiff's Exhibit No. 127 for identification was received in evidence.)

Q. (By Mr. Obenour): Whose signatures are on the agreement, Mr. Arnold?

A. Mr. Heberling, Mr. Seijas and my own.

Q. How was the money obtained from which the Smoke Shop was purchased?

A. It was borrowed from the American Discount Corporation.

Q. And to whom was the money repaid?

A. To the American Discount Company.

Q. And who paid the payments? A. I did.

Q. How was it paid? A. By check.

Q. Did Mr. Heberling have anything to do with the operation? A. No, sir.

Q. Did Mr. Seijas? A. No, sir.

Q. Did you ever meet any brother of Army Seijas? [1115] A. Never.

Q. Did any brother of Army Seijas ever work in the Smoke Shop? A. Never.

(Testimony of Wendell H. Arnold.)

Q. What records of the operation were furnished to the partners?

A. Each month a profit and loss statement was given to each partner by the bookkeeper.

Q. And who was the bookkeeper?

A. Mr. Lawrence Carter.

Q. Was Mr. Seijas and Mr. Heberling furnished copies of these? A. Yes, sir.

Q. And was any partnership returns made out?

A. Yes, sir.

Q. By whom?

A. By Mr. Carter, the bookkeeper.

Q. What was done with copies of the partnership return?

A. They were sent to each partner and then sent to the Internal Revenue.

Q. Handing you Exhibit 128, sir, can you identify those documents?

A. These are the partnership returns of '42, '43 and '44 of the Smoke Shop.

Q. Are those the originals or copies of them?

A. These are the originals—these are copies, sir.

Mr. Obenour: We offer 128.

Mr. Mead: We object to this exhibit, your Honor, on the grounds of materiality and relevancy, and on the further grounds that the originals have not been accounted for, and they would be the best evidence.

The Court: Overruled. Exhibit 128 is admitted. Go ahead.

(Testimony of Wendell H. Arnold.)

(Whereupon, Plaintiff's Exhibit No. 128 for identification was received in evidence.)

Q. (By Mr. Obenour): Were any draws made from this partnership? A. Yes, sir.

Q. And how were the draws made?

A. By check.

Q. Who made them? A. I did.

Q. How would you make these draws on the company?

A. I would make a check out to each partner and mail it to them.

Q. What would be the amount of the checks?

A. There was no set amount. It was just whenever there was a surplus available.

Q. What was the comparative shares or the—how would the [1117] amounts compare to the shares of the partners?

A. After it was paid off, the share would be my half, and then their half would be divided, whichever way they saw fit.

Q. How would the two checks to Seijas and Heberling compare?

A. How would they compare? What proportion——

Q. Yes.

A. I would say they got a third each of their half.

Q. Pardon?

A. Or—they would get a quarter each of their half.

Q. Quarter each of their half? A. Yes.

(Testimony of Wendell H. Arnold.)

Q. How much would you get?

A. The other half.

Q. All right, sir. At that time did you have any information of any interest in your business of Mr. Forman? A. No, sir.

Q. To your knowledge, did Mr. Forman ever have any interest in the business? A. No, sir.

Q. To your knowledge, did Mr. Forman—was Mr. Forman to receive any of the proceeds?

A. No.

Q. To your knowledge, was any other person other than [1118] Seijas and Heberling?

A. Not at any time.

Q. Any interest in the partnership or receive the proceeds? A. No.

Q. Did you subsequently purchase the entire business? A. Yes, sir.

Q. And when was that?

A. One year after it was paid off.

Q. And how were the other interests paid?

A. By check.

Q. How was the value determined?

A. By taking the—they had, naturally, a half interest in all of the assets which would be the store inventory and bank balance.

Q. Was that the basis of purchasing the interest of Mr. Heberling and Mr. Seijas?

A. Yes. Those were set down in that contract.

Q. Were they both paid at the same time?

A. No. They weren't.

Q. Did you have pinball machines in your Smoke

(Testimony of Wendell H. Arnold.)

Shop? A. Yes, sir.

Q. And whose machines were they?

A. United Amusement.

Q. And who, to your knowledge, constituted the United Amusement Company? [1119]

A. Mr. Heberling, Mr. Seijas.

Q. And did you know of Mr. Forman having an interest in United Amusement Company?

A. At one time I did, yes. There was some problem that did arise when I was first there in business.

The Court: At the Smoke Shop?

The Witness: Yes, sir, and Mr. Forman came over representing the company, I assumed, and then I realized he must have had an interest in it.

Q. (By Mr. Obenour): What conversation did you have with Mr. Forman concerning the pinball business?

A. Very little. I don't recall at this time the problem that had arisen, but it was merely to assure us that we would have good service and that, possibly, that no other operator could offer us any more than what the company could.

Q. Do you know anything about how the receipts from the pinball machines were handled?

A. No, sir.

Q. Who would make the collections from the machines? A. Mr. Meyers.

Q. And would you receive any record of the receipts from the machines? A. Yes. [1120]

Q. And what record would you receive?

(Testimony of Wendell H. Arnold.)

A. It was a regular breakdown sheet that is made out for tax purposes for the State Tax.

Q. Would it show the total receipts of the machines? A. Yes, sir.

Q. And what amount of money would you receive from the receipts? A. Fifty per cent.

Q. Fifty per cent of what?

A. Of the total gross amount.

Q. The gross amount shown where?

A. Shown on the sheet.

Q. Shown on the sheet?

A. After it was all counted, it was reported on the sheet, and then that gross amount was split 50-50.

Q. Were any deductions taken from the gross amount before it was split?

A. Nothing except there is a little payout sheet showing when the machine goes haywire and they give nickels, of course, that comes off.

Q. Taxes? A. Taxes are taken out, yes.

The Court: Before the split?

The Witness: Before the split, yes, sir. [1121]

Q. (By Mr. Obenour): So then you would split what proportions?

A. Gross amount after taxes.

Q. After taxes and payoffs from the gross, you split 50-50 with the machine owner?

A. To clarify that, on the payoff, the sheet men behind the counter keep a sheet when something goes wrong with a machine, you have to pay, the machine doesn't pay out, and then the man behind

(Testimony of Wendell H. Arnold.)

the bar or restaurant counter would make the pay-off to the customer.

Q. Did you know of any being held off of the pinball receipts other than what was shown on the receipts themselves? A. No.

Q. Did you ever have any knowledge of such holdouts. A. No.

Q. Did you receive any money from the machines from anyone other than one-half of the net receipts shown on the receipt sheets? A. Never.

Mr. Obenour: That is all.

The Court: Let's try and conclude unless you think it will be too long. [1122]

Cross Examination

Q. (By Mr. Mead): What kind of business was the Smoke Shop, Mr. Arnold?

A. It was half restaurant and half tavern and cardroom and cigar counter.

Q. And it had a restaurant operation?

A. Yes.

Q. Involved there, too? A. Yes, sir.

Q. And how many pinball machines were there?

A. Four.

Q. What year did you purchase the Smoke Shop? A. 1942.

Q. And you were the operator of it at all times during 1942 to 1945? A. Yes, sir.

Q. And, I think, you said that the partnership originally consisted of yourself and Mr. Heberling, is that right? A. That is correct.

(Testimony of Wendell H. Arnold.)

Q. And there was a formal partnership agreement prepared between you?

A. No. It was an oral partnership between me and Mr. Heberling. There was nothing in writing until Mr. Seijas came into the picture.

Q. Now, when did Seijas come into the picture?

A. I am not positive as to the exact time, but it was two or three months after I had taken over in November, the 1st of 1942.

Q. Did Mr. Heberling tell you that Seijas was a partner with him or had an interest in his part of it? A. Yes, sir.

Q. Then was a formal partnership prepared?

A. Yes, sir.

Q. By whom was it prepared?

A. Lenihan and Ivers, I believe.

Q. They are attorneys in Bremerton, are they?

A. No, Seattle.

Q. And did Mr. Seijas sign that partnership agreement? A. Yes, sir.

Q. And you and Mr. Heberling signed it?

A. Yes, sir.

Q. When did you for the first time learn that Mr. Seijas claimed his brother Henry had an interest in the Smoke Shop?

A. Never until the other trial did I know anything about it.

Q. Did Mr. Seijas ever tell you that his brother Henry had an interest in it?

A. Not to my knowledge.

(Testimony of Wendell H. Arnold.)

Q. Did you ever hear that Mr. Seijas' brother Louie had an interest in the Smoke Shop?

A. No, sir.

Q. You were advised, were you not, Mr. Arnold, that shortly after you learned that Mr. Seijas was a partner in the business that his share had been turned over to Louie or to Henry, his brother.

A. I was not advised of that, no.

Q. You were not advised as to that? A. No.

Q. To refresh your memory, Mr. Arnold, I know some time has elapsed since you testified on that subject, and during the course of the trial of Mr. Seijas last year, I will ask you whether this might refresh your memory.

"Question: Didn't you learn later that Mr. Seijas' interest was turned over to his brother Louie—Henry, excuse me. Answer: I had heard that mentioned, sir, but there was no way for me to know. As I say, the checks that I had were made out to Mr. Seijas. Well, and I never saw the man. He never worked in the place. Question: But you were advised, were you not, that shortly after you learned that Mr. Army Seijas here was a partner in the business, shortly after that you were advised that his share had been turned over to Louie or to Henry, his brother? Answer: Well, I had heard it mentioned by Mr. Seijas' brother—Louie, [1125] you say? Question: Henry. Answer: Henry Seijas, that he was interested in it, but I have no evidence, sir. Question: You had Mr. Seijas' word for it? Answer: Yes, sir."

(Testimony of Wendell H. Arnold.)

Is that right, that he told you about that, that it had been turned over to his brother Henry or Louis?

A. That is very possible. It has been some time, and he was mentioned, but I have no knowledge of him having any interest at all.

Q. You had no formal knowledge?

A. There was no collector, anything made out for his share. It was made directly to Army Seijas.

Q. Army Seijas? A. Yes.

Q. And his brothers Henry and Louie were never around the place to your knowledge? A. Never.

Q. Now, I think you stated that Mr. Meyers collected the pinball receipts at your place?

A. Yes.

Q. You had four pinball machines?

A. Yes, sir.

Q. Were they in there by one of the United Amusement Companies?

A. Yes, they were all United. [1126]

Q. Was your contact during the entire period of time from 1942 when you came in there until 1945 with Army Seijas on behalf of the pinball operation except for the occasion you have mentioned when Mr. Forman came over there? A. Yes, sir.

Q. How frequently would you say he was over there during the period of 1942 through 1945?

A. It would be a guess, half dozen times.

Q. A total of a half dozen times?

A. Yes, sir.

Q. During that entire period? A. Yes.

(Testimony of Wendell H. Arnold.)

Q. And Mr. Forman was there once, I think you said? A. Yes.

Q. Did Mr. Meyers make all the collections from your place during this period?

A. That is correct.

Q. And I think you stated that you had no knowledge of any holdouts from the pinball receipts other than the holdouts for taxes and payouts that you have described, is that right?

A. That is right.

Q. And there were holdouts for those purposes but no holdouts from the receipts of the business?

A. That is right.

Mr. Mead: Thank you.

Mr. Obenour: That is all.

The Court: That is all, Mr. Arnold. You may leave whenever you wish and you will not have to return.

(Witness excused.)

The Court: We are going to take our evening recess now, ladies and gentlemen.

Again, I wish you a pleasant dinner and trust you find all well at home. Refresh yourselves and be ready for another day tomorrow morning at 9:30.

You may leave now.

(Whereupon, the Jury retired from the courtroom.)

Mr. Obenour: I request that the exhibits be made available this evening.

The Court: Well, it is agreeable to me. You

will have to make your arrangements with the Clerk about it, of course.

Mr. Obenour: I understand they aren't open past 5 o'clock. If any provision could be made to have access to them or some such thing.

The Court: Well, there is certainly no [1128] concern about their being tampered with or anything involved. It is just a matter of convenience, that is all, and you will have to make those arrangements with the Clerk, and any arrangements the Clerk's office cares to make is agreeable to me.

Mr. Obenour: We attempted to do that, and they said they would not be available after 5. Other than that, I request a little longer time in the morning.

Mr. Mead: As far as we are concerned, these exhibits that have been received in evidence or any other exhibits, if Counsel wants to take them for examination tonight, and the Court is willing for the Clerk to turn them over to Counsel, that is perfectly agreeable with us.

The Court: Make an arrangement with the Clerk to withdraw the items that you need to use, and permission is granted for you to use them.

(Whereupon, the Court recessed to reconvene the following morning, August 8, 1956, at 9:30 a.m.) [1129]

(Whereupon, on the 8th day of August, 1956, at the hour of 9:30 a.m. the following further proceedings were had:)

The Court: Are you ready?

Mr. Obenour: Yes, sir.

The Court: Proceed.

Mr. Obenour: Jerry Meyers.

ARNOLD J. MEYERS

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Arnold J. Meyers, M-e-y-e-r-s.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Meyers? A. Seattle.

Q. And do you have a nickname?

A. Yes, Jerry.

Q. What is your occupation?

A. I am a real estate broker.

Q. And where is your office?

A. The main office is in Seattle now.

Q. How long have you been so engaged?

A. About seven years. [1130]

Q. What business were you in before that?

A. I was in the pinball business.

Q. Pardon? A. Pinball business.

Q. How long were you in the pinball business?

A. About '42 to either '49 or '50.

Q. And what was your business before that?

A. I was in the theater business.

Q. And do you know William Forman?

A. Yes.

Q. When did you first become acquainted with Mr. Forman?

(Testimony of Arnold J. Meyers.)

A. Oh, the exact year I couldn't tell you. I would say that possibly five or six years previous to the pinball operation.

Q. That would be 1936 or 1937, somewhere in there? A. Yes.

Q. And in what manner did you become acquainted with Mr. Forman?

A. He was my boss at that time.

Q. And where were you working?

A. In Seattle.

Q. And for whom? A. Sterling Theatres.

Q. And what were you doing for the Sterling Theatres? A. I was manager. [1131]

Q. Manager? A. Manager, yes, sir.

Q. What were the theatres that you were managing for Sterling Theatres?

A. I have had the Granada in Portland, Wintergarden, and part of the time the Capitol.

Q. Were these all in Seattle? A. Oh, yes.

Q. And what was Mr. Forman's position in the Sterling Theatres?

A. He was our superintendent.

Q. How long was he so engaged?

A. I couldn't tell you exactly.

Q. Do you recall the first position which Mr. Forman had with the Sterling Theatres when you first knew him?

A. Yes. When he first came with Sterling Theatres he was manager.

Q. Manager of what?

A. I believe the Rivoli.

(Testimony of Arnold J. Meyers.)

Q. And that was where? A. In Seattle.

Q. And do you know of a Florence Theatre?

A. I beg your pardon. I think it was the Florence instead of the Rivoli.

Q. And the Florence is located where? [1132]

A. On Second Avenue.

Q. And where is it in relation to the Smith Tower?

A. I think it is in the same block.

Q. How long did you work for Sterling Theatres? A. A period of about ten years.

Q. Pardon? A. About ten years.

Q. And who was the owner or the principal owner of the Sterling Theatres?

A. John Danz.

Q. And what was the relationship, if any, between Mr. Danz and Mr. Forman?

A. At first there was no relationship, but later Mr. Forman was his son-in-law.

Q. How long did Mr. Forman work for Sterling Theatres?

A. I couldn't answer that Mr. Obenour. I don't know.

Q. Do you recall when he became general manager? A. The exact years, no, I can't.

Q. What would be your best recollection of when Mr. Forman became general manager for the Sterling Theatres?

A. I would say around '38 or '39.

Q. Do you recall when Mr. Forman left the Sterling Theatres?

(Testimony of Arnold J. Meyers.)

A. No. I wasn't with him then, so I don't know.

Q. When did you leave Sterling Theatres?

A. About 1941 or '42. [1133]

Q. And what was the occasion that you left the Sterling Theatres?

A. I fell and went into the hospital and didn't go back from there after the operation.

Q. Do you know Army Seijas? A. Yes.

Q. And when did you first meet him?

A. In either '41 or 42.

Q. How did you meet him?

A. I met him through Mr. Forman.

Q. What was the occasion on which you met Mr. Seijas? A. Through the pinball operation.

Q. Do you recall the first time you met Mr. Seijas?

A. Not directly. I was introduced to him by Mr. Forman.

Q. What was the occasion when you met him?

A. Mr. Forman asked me if I wanted to go to work for United Amusement, and that was the occasion.

Q. And what did Mr. Forman tell you as to your prospective employment?

A. At that time he wanted to know if I wanted to go to Bremerton and act as collector over there.

Q. Collector for what?

A. For the pinball routes.

Q. What did Mr. Forman tell you at this time when you were considering employment as to the

(Testimony of Arnold J. Meyers.)

business of the United [1134] Amusement Company?

A. Merely that it was a pinball operation, that he and Mr. Seijas had and that they needed me there and wanted to know if I wanted to go to work there.

Q. And how many times did Mr. Forman contact you concerning your prospective employment?

A. If I am not mistaken, I think it was twice.

Q. And on the first occasion, what was your answer?

A. I told him no and he asked me to think it over.

Q. And the second time?

A. The second time I accepted.

Q. And what were you paid?

A. To begin with I think I got $75 a week.

Q. What was your job specifically to be?

A. Merely as a collector at that time.

Q. Did you talk to Mr. Seijas concerning your prospective employment?

A. Only inasmuch as it would be a partnership. The two of them would be sitting there and it was talked over together.

Q. And was your employment discussed both by Mr. Seijas and Mr. Forman? A. Yes.

Q. Was that the first occasion you had met Mr. Seijas? A. That was the first time, yes. [1135]

Q. And when did you begin work, Mr. Meyers?

A. I am not positive on the date, but it was the either later in '41 or early '42.

(Testimony of Arnold J. Meyers.)

Q. When you first went to work, who was doing the collecting? A. Crawford, Ken Crawford.

Q. What else was he doing?

A. Well, he was more or less the manager of the routes there.

Q. At the time you went to work, how many routes were there?

A. There was one in the county and—do you mean that were owned by the company?

Q. Yes, sir.

A. One in the county and two in the city that were owned by the company and another one was a partnership.

Q. And you did not go to work for the company until after the city routes were in operation?

A. That's right.

Q. What were your duties in connection with the work done by Mr. Crawford?

A. Merely as—well, it would take two of us to make the collections and we went around together and did that.

Q. Did you talk to Mr. Forman after you began work as to the operation, manner of operation?

A. Yes. [1136]

Q. What conversation did you have with Mr. Forman concerning the manner of operation?

A. Well, it was pretty slipshod, and by that I mean from an operational standpoint. We had conversations regarding that and eventually he became the manager.

Q. With whom would you have the greater num-

(Testimony of Arnold J. Meyers.)

ber of contacts as between Mr. Seijas and Mr. Forman?

A. At the start I would say Mr. Forman.

Q. And how long did this continue?

A. Well, it is hard to put a date on it. It would be a continuation. Of course, Seijas entered into it more as time went on and I became better acquainted with him. In other words, he would be into these meetings more and we would discuss things that way.

Q. When you became manager, did you make any reports to either Mr. Forman or Mr. Seijas?

A. Yes, once a week.

Q. Once a week? A. Yes.

Q. What would be the type of thing you would report?

A. Oh, how business was would be one of the points that were brought out, whether we needed equipment, costs, things of that nature, regular operation.

Q. And were these reports made at the meetings you have just been referring to? [1137]

A. Yes. There was no set time for a meeting, or anything. I would come in on the one day and we would sit down possibly fifteen minutes to a half an hour. That was about it.

Q. With whom would you have the meetings at first? A. With Mr. Forman.

Q. And you say later as you became better acquainted with Mr. Seijas he entered into the meetings? A. Yes, he would sit in.

(Testimony of Arnold J. Meyers.)

Q. What was Mr. Crawford's position after you became manager?

A. Well, for a time it was a reversal. He helped me for a while and then later on he went out on his own.

Q. For whom was Mr. Crawford working when you first went to work?

A. United Amusement Company. I use that name, United Amusement Company, because it is the basic one.

Q. Did you receive any instructions when you went to work?

A. Not in particular except I was sent over to go around with Crawford and learn what it was about.

Q. What instructions did you receive? Who gave you those?

A. I imagine at that time it would have been Mr. Forman.

Q. Now, what exactly were your duties when you went to work over there, Mr. Meyers?

A. Merely as collector. [1138]

Q. There were how many routes?

A. There were a total of four routes but one of them at that time was not owned outright by the company, it was a partnership there with another partner.

Q. And did you ever collect with any representative of this other partner? A. Yes.

Q. And who was the collector?

(Testimony of Arnold J. Meyers.)

A. The only name I can remember is Andy. I don't know what his last name was.

Q. And for whom was he working?

A. Heberling.

Q. What route did you collect with Andy?

A. It was called the "Sea Route," but whether that is Bremerton Amusement or the American Amusement, I might have them reversed. It would be one or the other.

Q. Why did you collect the Sea Routes with Andy?

A. On account of the partnership there with Heberling. That was Heberling's employee.

Q. All right. Now, you referred to the Sea Route. There were four routes. Where were they located? A. One in the county.

Q. And was that commonly known as a county route? A. As the county route.

Q. Do you know the name of that company?

A. That was United Amusement Company.

Q. Plain United Amusement Company?

A. Yes.

Q. And the three other routes were located where? A. In Bremerton.

Q. And was there a company name to them?

A. Yes, on each one of them.

Q. What were the three company names?

A. The first which would be the "A" route was United Amusement Company of Bremerton, and the "B" route, I may have these reversed, it was either the American Amusement Company or the

(Testimony of Arnold J. Meyers.)

Bremerton Amusement Company. That would be B and C.

Q. How many machines were on each route?

A. The city license called for a total of 35 machines per route, and there were three routes which made a total of 105 at the peak.

Q. And the county route, how many?

A. I am going to have to estimate that. That would be roughly about 50 machines.

Q. Were there any limits as to the number of machines you could operate within its license?

A. I don't believe there were.

Q. Where were these machines located?

A. In the county. [1140]

Q. What was the nature of the business where these machines were located?

A. Oh, the majority of them would be beer parlors.

Q. Now, the county route, what part of the county were the machines located?

A. All the way from Manchester to just the other side of Silverdale going north, the town there. I can't recall the name of it.

Q. Where is Manchester in relation to Bremerton? A. That would be south.

Q. And was there any division of the locations in the county as to the county route operated by United Amusement Company and any other persons?

A. Well, Heberling had a route there also.

Q. Heberling had a route there? A. Yes.

(Testimony of Arnold J. Meyers.)

Q. And where was his locations in the county as compared to the United Amusement Company's?

A. Well, he went as far north as Poulsbo. We didn't go into there, and he was not in Port Orchard. However, he went over on Bainbridge Island which we didn't do.

Q. Was there any division of the county between the two routes, that is, Heberling's route from United Amusement Company?

A. Do you mean a dividing line? [1141]

Q. Yes, sir. Was there like a general geographical division between their locations? A. No.

Q. Would you please describe just what was involved in your duties of collecting from a location?

A. Naturally, the machines would be emptied first and the money counted, and then a tabulation. The first thing would be to take the pay outs. In other words, faulty equipment would be a pay out from the house to the customer.

Q. Would you describe the machines that you operated, first of all? Just what were they?

A. Well, they were one ball pinball machines, automatic pay off.

Q. One ball automatic pinball pay off machines?

The Court: Do you mean automatic paying out of coins when the requisite number of figures were lit.

The Witness: No free play on it.

Q. (By Mr. Obenour): Where was the coin container in these machines?

A. I don't know what you mean by coin containers.

(Testimony of Arnold J. Meyers.)

Q. Well, the money that was played into the machine, how was that kept within the machine?

A. Well, that dropped through a—well, there is a pay-out [1142] unit in one of those, and as it feeds off a belt, why it would drop down to pay out the unit which kept it full to take care of automatic pay outs. Any overflow would fall into a regular can that was in the same drawer. All the mechanism was contained in one drawer in the center of the machine.

Q. You referred to pay outs? A. Yes.

Q. What were the pay outs?

A. In case of you might have a jammed coin or something of that nature and the mechanism would stop. At that time, why the house operator would check that and in turn make the pay out and put it down on a slip and we would refund that to the house.

Q. All right, sir. You would go in and get the money from the machine? A. Yes.

Q. What would be the first thing you would do?

A. Count it.

Q. Count the money? A. Yes.

Q. And where would you count it?

A. That could be any place.

Q. Generally where in relation to the location. Would you count the money at the machines or would you go to [1143] another part of the establishment?

A. Usually if they had an office or a back room, why that is what we used.

(Testimony of Arnold J. Meyers.)

Q. All right. If they had such a room you went there to count it? A. Yes.

Q. Who would be there when you would count it?

A. Oh, sometimes the operator was there and sometimes he wasn't. Sometimes no one was there except us.

Q. And you would count the money, and then what would you do?

A. From there you had a tabulation. Your city and state tax was deducted and the balance was split 50-50 with the house.

Q. Were the pay outs taken before or after the tax? A. No, before.

Q. So after you had your total, the first thing you did was deduct the pay outs?

A. That's right.

Q. And who received that?

A. The house got that.

Q. And then you computed the tax?

A. Yes.

Q. Handing you Exhibit 84, Mr. Meyers, can you identify that, please? [1144]

A. Yes. That is our standard form.

Q. And what type of form is that?

A. It is a regular collection report form. It is a standard form used by practically all the companies.

Q. And would you please describe what the entries are that you would make on that form, Exhibit 84?

A. Well, to one side, your first column, every

(Testimony of Arnold J. Meyers.)

machine has a state certificate number that is issued by the tax department by the state and that is the way they are entered. Then you have a break down. This form calls for a pay register which we didn't have, but then your total amount that was in that machine, and then your deduction for your taxes, and then your net amount to the other side, and the break down into a balance.

Q. Was a slip made out for every machine or every location? A. Every location.

Q. And how many copies were made?

A. Two.

Q. So on that you would show the location, the individual machines, the receipts in each machine, the deduction of pay out, the taxes computed, and the net? A. That's right.

Q. Is there, then, a division of the net between the location owner and the machine owner?

A. Yes. There is a space provided for that.

Q. All right. What would you do with the copies?

A. One copy went to the operator, and the other one came in to our office.

Q. What would you do with the nickels themselves?

A. Oh, in most cases why you would sell them back to the location, and in many cases where there were small spots, why they would take just their share. Sometimes when there was a nickel shortage in Bremerton, they started parking meters in Bremerton about the same time they did the ma-

(Testimony of Arnold J. Meyers.)

chines, and there was a shortage and a good demand for nickels all over.

Q. Now, when you would sell the nickels back, what would then be the form of the money you received? A. Cash.

Q. You would compute these receipts, you would sell the nickels back and have the money left?

A. Yes.

Q. What money would you then give to the location owner?

A. Well, he received all of the nickels.

Q. All right, sir. But as of the balance which was his share, would he receive that?

A. Oh, yes.

Q. And you would receive the other 50 per cent of the net, is that right? A. Yes. [1146]

Q. What would be done with the money representing the ten per cent tax for the city?

A. We took that.

Q. And the state? A. Yes, we collected that.

Q. "We" being whom, the collector?

A. Yes.

Q. And you would make collections on your route by route, or how would you determine where you would go for your collections?

A. No. It was taken more by location than it was by route. In other words, we didn't count the route. We might get a part of the "A" route, a part of the "B" route, and a part of the "C" route on one day. They might all be on the same street,

(Testimony of Arnold J. Meyers.)

so for that reason we would go through them that way.

Q. How many days a week would you collect?

A. At the beginning we collected five days a week.

Q. How would you then keep the money, keep track of the money that you would have collected?

A. Through the slips, through our copies.

Q. What would you do with the slips and the money itself as you would collect on these locations?

A. Well, in my particular case, I kept them in the safe at the hotel. [1147]

Q. How long would you keep them there?

A. Well, to begin with I came in on Wednesday nights, and Saturday, and on Wednesday the city funds would be brought in, and then on Saturday we would bring in the county routes.

Q. You say "bring," what do you mean?

A. Well, from Bremerton to Seattle.

Q. Where in Seattle?

A. To the Smith Tower.

Q. What kind of containers would you have the money and receipts in?

A. Usually in envelopes, if I remember correctly.

Q. And in the envelopes, then, would be what?

A. Would be these—it was broken down into the various routes. It would be the money and the slips for the one route, for the "A" route, for the "B" route, and for the "C" route.

(Testimony of Arnold J. Meyers.)

Q. Money and slips in the individual envelopes by routes? A. Yes.

Q. How would the money that you would turn in compare to the money shown on the receipts?

A. It would in most cases be right on.

Q. And if it were not right, what would be the difference?

A. Well, there might be a little overage or shortage.

Q. Would that be a matter of mathematical error or some [1148] removal?

A. Usually mathematical error.

Q. To whom would you bring these envelopes containing the receipts and the money of the individual routes?

A. They went directly to the bookkeeper.

Q. And who was he?

A. Most of the time it was Mr. Renstrom.

Q. Where was his office?

A. Just down the hall from—also in the Smith Tower.

Q. Whose instructions were you following in that practice?

A. I don't believe there was any instructions issued on that. It was just a routine that we established.

Q. "We" being whom?

A. Mr. Forman, Mr. Seijas, and myself, and the bookkeeper.

Q. And would you run any kind of a tape on your totals? A. Oh, yes.

(Testimony of Arnold J. Meyers.)

Q. And what would he do with the tape?

A. That went in with the slips.

Q. When you say "tape," what do you mean?

A. Adding machine tape.

Q. How many men did you have working for you at Bremerton?

A. I will have to stop to figure that one. I will make a quick guess and say at the peak we had about 15 men.

Q. 15? A. Yes, including the county. [1149]

Q. And what were those men's duties?

A. Collectors and mechanics.

Q. Collectors and mechanics? A. Yes.

Q. And is that, you say, at the peak? A. Yes.

Q. When was the peak?

A. Well, that would be during the war years.

Q. Particularly, '42 to '45?

A. Yes, right in that period.

Q. And after '45?

A. Well, it gradually went down to where it finally wound up with one mechanic and myself.

Q. One mechanic and yourself? A. Yes.

Q. When was that?

A. That was at the close, around 1949 or 1950.

Q. 1949 or 1950? A. Yes.

Q. Was there any office or shop in Bremerton?

A. Yes. We had a shop on Burwell, I think it was called.

Q. On Burwell? A. On Burwell.

Q. What was the shop used for?

(Testimony of Arnold J. Meyers.)

A. Repairing machines. [1150]

Q. Did you have an office?

A. We had a girl there that took in calls.

Q. And what were the nature of the calls you received?

A. Trouble calls, machines out of order.

Q. Are you familar with the term "nickel calls"? A. Yes.

Q. And what were they?

A. Well, someone would run out of nickels and put in a call for them.

Q. Was that also a type of service call that would be made? A. Oh, yes.

Q. Would Mr. Seijas and Mr. Forman come over to Bremerton? A. Occasionally.

Q. Occasionally? A. Yes.

Q. How often would Mr. Seijas come to Bremerton?

A. Well, again, I am going to have to guess, and I would say practically once a month.

Q. Once a month? A. Yes.

Q. What would be the occasion that he would come to Bremerton, sir?

A. He usually made the payment to the city as far as the taxes were concerned. He would bring the collection over for that. [1151]

Q. And how many times or how frequently would Mr. Forman come over?

A. Sometimes he would come with him and sometimes he didn't.

Q. Would Mr. Seijas and Mr. Forman at any

(Testimony of Arnold J. Meyers.)

time during this period of '42 to '45 visit locations?

A. Yes.

Q. And what would be the purpose of visiting the location?

A. Oh, no definite purpose. More to visit and see how things were going.

Q. Did they ever come over with you?

A. Yes.

Q. Each of them or either of them?

A. Both.

Q. And when they would come over with you, what would they do?

A. Well, in some particular cases, why there might be some man they would want to see, and I would go along with them or take them there.

Q. Were either of them with you on your route while you collected?

A. I don't believe either one of them ever did.

Q. Would you make any reports to Mr. Seijas or Mr. Forman when you would bring the money in to Seattle? A. Yes.

Q. When you brought the money into Seattle, you would give [1152] the receipts and the envelopes to Mr. Renstrom? A. Yes.

Q. What would you do as concerning reporting to Mr. Seijas or Mr. Forman?

A. Well, that again would refer more to what the business had been doing and what we could do to bring it up, new locations, any that we had lost.

Q. Did Mr. Forman ever leave the route, to your knowledge, leave the business?

(Testimony of Arnold J. Meyers.)

A. Well, to the best of my knowledge, Mr. Forman went out when the county route was sold or shortly after the county route was sold, and then the city routes were sold from that time.

Q. Up until the time Mr. Forman went out of the business, how frequently would you see him?

A. Oh, possibly once a month—coming over to Bremerton?

Q. Yes, sir.

A. Yes, sir, approximately once a month.

Q. And when you would come to Seattle, who would you see on these reports up until the time Mr. Forman left? Who would you see most frequently in your reports as between Seijas and Forman?

A. I would see Mr. Forman because he was the one that started me in with it and there was more friendship there. [1153]

Q. What particularly would Mr. Seijas and Mr. Forman do in the business?

A. Well, they are the men that put up the money and they had to pass on buying any equipment or anything of that nature.

Q. Did you report all of the money on these receipts that you took out of the machines?

A. No.

Q. What would you do?

A. It was held out separately and a separate report on it. It was turned into either Mr. Forman or Mr. Seijas.

Q. Now, referring to what you would do when

(Testimony of Arnold J. Meyers.)

you would collect from the machines, the first thing you would do is count the money? A. Yes.

Q. And what amount would you report on this Exhibit 84?

A. Well, we would report everything here except what we—let's use the term "stole" from the machines.

Q. Are you familiar with the term "hold out"?

A. The same thing.

Q. And was this hold out of money taken from the collections, was that in any way reported on these receipts? A. No.

Q. What would you do with the money that you would take out of the machines and not report?

A. It was made up in separate envelopes with the list of the locations, the amounts that were taken from the machines, put into separate envelopes and turned into either Mr. Forman or Mr. Seijas.

Q. When would you bring that money over?

A. That would either come in on these same dates, either Wednesday or Saturday.

Q. Would you take hold outs from all locations?

A. No.

Q. How would you determine what was to be held out?

A. It was based on the better spots. The ones that were doing the most business, and it started originally with a license hold out. At the time I went there originally so much a week was being held out from the machines against the Federal licenses that had to be paid, and that, of course, included

(Testimony of Arnold J. Meyers.)

the city licenses also. Then, later the system was changed and we got the locations to pay their half and we paid our half of the licenses. However, we never discontinued the taking of the money on the taxation.

Q. Did you receive any instructions as to the continuation of the hold outs after the taxes were paid by the location? A. Yes.

Q. Who gave you those instructions? [1155]

A. Well, I don't know—I don't know whether it was one or both.

Q. One or both as to whom?

A. Mr. Forman or Mr. Seijas.

Q. What instructions were you given as to the continuation of the hold outs after the taxes and the licenses were paid by the locations and yourselves?

A. To the best of my knowledge, it was common procedure. It was being done by other companies and that we were going to start that practice and carry it out.

Q. Were you given any instructions as to the amount you were to hold out?

A. No. That was left to my discretion.

Q. How would you determine how much was to be held out?

A. Well, I set an average of what a machine should do and based more or less on that average. If it went a good deal over it would run heavier, and if it went lighter why in some instances there would be weeks where there would be none on a certain machine.

(Testimony of Arnold J. Meyers.)

Q. What record did you make, then, of these hold outs?

A. I made—well, you might call them tapes. In some instances they were adding machine tapes and some were written in longhand.

Q. When would you do that?

A. Usually at the same time that I compiled the records for [1156] the various routes.

Q. And how would the tapes correspond to the money that you had?

A. They would balance.

Q. What type of container would you have the tapes and money in?

A. Regular envelopes.

Q. Would it be sealed or open?

A. Sealed.

Q. To whom would you give these envelopes?

A. Either to Mr. Forman or Mr. Seijas.

Q. As between Mr. Seijas and Mr. Forman, who would you give the envelopes to the greater number of times?

A. The procedure that I followed I would always try and report to Mr. Forman, and if he wasn't there, I reported to Mr. Seijas.

Q. Was there any reason why you did this?

A. Oh, I think mainly through our past connection I figured him as more as my boss than I did Mr. Forman—or, Mr. Seijas.

Q. Handing you Exhibit 79, would you look through the exhibit and see if you can identify any entries contained therein as being in your writing?

(Testimony of Arnold J. Meyers.)

A. Yes, 5-2-45.

Q. And would you please hold up the exhibit and show the [1157] Jury what part is in your writing?

A. Well, just in this particular case, just the numerals. It was typed.

Q. All right, sir. Now, referring to that, are those entries directly into the Exhibit 79 or is that on a separate paper?

A. You lost me there. I don't know what you mean.

Q. Are your entries directly upon the book itself or is it on a sheet that has been affixed?

A. It is a separate sheet.

Q. Is that the type of sheet you referred to that you ran on the hold outs?

A. That would be one form.

Q. One form? A. Yes.

Q. Would you describe just how that tape is made up?

A. Well, this is the location name on this side, the amount here, and the total here (indicating).

Q. Is any of it typed? A. Yes.

Q. What is typed?

A. The names of the location.

Q. The names of the location? A. Yes.

Q. And what are they? [1158]

A. Crow's Nest, Knett's, Dock, Beach, Aldrich, Lois, Navy Yard Cafe, Red Rooster, Pop's Inn.

Q. That is 5-2-45? A. Yes.

Q. And part of that is typed? A. Yes.

Q. What part is in your writing?

(Testimony of Arnold J. Meyers.)

A. The numerals.

Q. And what are they?

A. $300, $75, $100, $200, $35, $25, $25, $25, $50, for a total of $835.

Q. And all of it including the total is in your writing?

A. Yes. There are some others that aren't.

Q. What part is not in your writing?

A. Well, it says, "Dash, 25, one-half equals 405.

Q. Would you hold that up and show the Jury what part is in your writing and what part is not?

A. Mine carries through down to this point, and these down in here are added to it (indicating).

The Court: Step down in front of the Jury box and point that out.

The Witness: (Thereupon, the witness complied.). This point down through here is mine, this portion in here (indicating).

Q. (By Mr. Obenour): Speak up, please, sir.

A. This to this point is mine (indicating).

Q. "This point" is what? A. 835.

Q. Is that the total?

A. My finger is on it here, the total.

Q. The total up is yours? A. Yes.

Q. Below that is what?

A. Is 25 and then there is an 810 here and one-half equals 405.

Q. That is not yours?

A. No. This date, incidentally, is not mine.

Q. This date? A. Scratched up here.

Q. In the corner? A. Yes.

(Testimony of Arnold J. Meyers.)

Q. All right. Resume the stand.

(Thereupon, the witness complied.)

Q. Would you refer to the book and find any other entries that are in your writing?

A. Yes, the next one, 5-5.

Q. And what entries are in your handwriting and what are not?

A. Everything except the last part here. It is rather hard to make out. It looks like "one-half equals 350." [1160]

Q. Except the "one-half equals 350"?

A. Yes.

Q. And is the name of the location in each instance typed or written?

A. No. This is printed.

Q. Printed? A. Yes.

Q. Whose printing is that? A. Mine.

Q. Your printing? A. Yes.

Q. Have you gone through that book, Mr. Meyers, prior to entering the courtroom?

A. Oh, yes.

Q. And have you examined the tapes that have been affixed to the document, Exhibit 79, from that date subsequent? A. Yes.

Q. And have you examined the slips, adding machine tapes, that have been pasted into Exhibit 79?

A. Yes.

Q. In each instance can you identify the writing upon these slips as to whether it is yours or not?

A. Yes.

Q. And what is your identification of the writing

(Testimony of Arnold J. Meyers.)

upon the slips that have been added to Exhibit 79 for dates [1161] subsequent to May 2, 1945?

A. Well, to the best of my knowledge, it looks like Army Seijas.

Q. All right, sir. I mean the tapes themselves. Does each contain your writing?

A. Not in all cases, no.

Q. Not in all cases? A. No.

Q. What had been the instances where it has been your writing?

A. I don't follow you there.

Q. What entries on these tapes have been in your writing?

A. Oh, the amounts, the total and the location?

Q. And the location, yes. A. Yes.

The Court: Is that true in every instance where there is a slip there?

The Witness: In all these that apply to mine. There have been some that have been typed. However, I did the typing on those.

Q. (By Mr. Obenour): And on these slips have there been a division of the total below your entries? A. Yes.

Q. Are those entries in which the total is divided, in your writing? [1162] A. No.

Q. Would you refer to August 5, sir?

A. Yes, sir.

The Court: 1945?

Mr. Obenour: Yes, sir. Exhibit 79.

Q. (By Mr. Obenour): And would you show that slip to the Jury, please?

(Testimony of Arnold J. Meyers.)

A. Yes. (Thereupon, the witness complied.)

Q. And is that slip in your writing?

A. No.

Q. With the exception of the slip of August 5, are all of the slips contained in Exhibit 79 tapes that have been prepared by you?

A. Not all of them, no.

Q. And that is as to the locations and to the amounts? A. No, they are not all mine.

Q. And which ones are not?

A. I notice several right here in the beginning. There are quite a few right here in the beginning.

The Court: Do you mean January or February?

The Witness: This is dated January 5th.

The Court: What I was trying to get at is what you meant by "in the beginning."

The Witness: The beginning of the book.

Q. (By Mr. Obenour): Is that an entry directly into the [1163] book, or is that a slip?

A. It looks like it is direct.

Q. Now, I am referring only to the entries which are made by affixing a slip to the book. Are all of the slips that have been pasted or fastened to the books slips that were prepared by you?

A. As I remember it, the majority of them are although I think there are a few that are not mine.

Q. And in those that were yours, in each instance was the entry of location and the amount and the total either in your writing or done by you on a typewriter or an adding machine? A. Yes.

Q. And the division of the total where the slips

(Testimony of Arnold J. Meyers.)

contained such division, were those entries in your writing? A. No.

Q. When, sir, did you make out the slips that are contained in the book which were prepared by you?

A. Usually the night previous to the day I came in.

The Court: Do you mean in to Seattle?

The Witness: Yes.

Q. (By Mr. Obenour): And the slip for May 2, 1945, was made by you on or about what date?

A. More than likely made the night of the 2nd.

Q. The night of the 2nd? [1164]

A. Yes. I am assuming that is a Friday and I came on a Saturday.

Q. What did you do with that slip?

A. That was attached to the money and that was in the envelope.

Q. And turned in when?

A. And turned in on the following day.

Q. To whom?

A. To either Mr. Forman or Mr. Seijas.

Q. And had you seen that slip since you turned it into either Mr. Forman or Mr. Seijas?

A. No.

Q. Did you make any entries——

A. No.

Q. Did you make any entries of tapes or entries at all in Exhibit 79 other than on or about the date shown on those slips? A. No.

Q. Are there some slips, sir, that contain a date

(Testimony of Arnold J. Meyers.)

in your writing? A. Yes.

Q. And the date on the slip which has been made by you when?

A. At the same time I made out the slip.

Q. When did these hold outs begin? [1165]

The Court: In each instance did these slips made out by you accurately reflect the amount of hold-out money that was contained in the envelope that the slip was with?

The Witness: That's right.

The Court: Go ahead. Excuse me.

Q. (By Mr. Obenour): When did these hold outs begin, Mr. Meyers?

A. I would say either '42 or '43.

Q. How long did they continue?

A. They continued through to, to the best of my knowledge, until the end of '45.

Q. Did you ever receive any instructions not to hold out receipts? A. Yes.

Q. When?

A. At the time that we thought we had a sale of the city routes.

Q. What were you told?

A. That they wanted to bring the take up. In other words, so it would make a good appearance.

Q. Did you do that? A. Yes.

Q. And what did you do?

A. We just stopped, and at that time it happened to be [1166] during a period where it didn't reflect too seriously and it just looked like one darn good week that time.

(Testimony of Arnold J. Meyers.)

Q. After this did you receive any other instructions to resume hold outs?

A. I believe we stopped it at that time.

Q. Did you ever receive any instructions that a sale had been made and to go ahead and resume holdouts? A. I think not.

Q. You quit hold outs for about a week, then, you say?

A. In this one particular case, I think that was it, and we resumed and there was another buyer and then we stopped it at that time and that was the end of it.

Q. You quit for about a week when you thought you had a buyer? A. Yes, that's right.

Q. And then it resumed? A. Yes.

Q. Was that the city or county route?

A. No, in the city.

Q. Did you ever discontinue hold outs in the county route?

A. No. That ran right up until the time it was sold.

Q. And do you recall when it was sold?

A. I couldn't give you the date, no, sir.

Q. To whom was it sold?

A. It was sold to—well, George Heberling, [1167] indirectly, and I don't remember—Schneiderman.

Q. Schneiderman and Heberling?

A. Schneiderman and Heberling.

Q. Who showed the buyer around the county route? A. I did.

(Testimony of Arnold J. Meyers.)

Q. And who was that? A. Schneiderman.

Q. And after the county route was sold, you continued to operate the city route?

A. That's right.

Q. And the hold outs continued in the city routes how long?

A. As I say, I think it was around the end of '45.

Q. Was that at the time the city routes were sold as Mr. Forman's sale?

A. I don't know just when Mr. Forman did sell the route. I don't remember the dates.

Q. Did the hold outs continue as long as Mr. Forman was in the business?

A. I think they stopped shortly before that.

Q. Who did Mr. Forman sell to?

A. To Henry Morin.

Q. To your knowledge, did Mr. Forman thereafter have any interest in the amusement companies? A. Not to my knowledge, no, sir.

Q. Did the hold outs discontinuance have [1168] anything to do with the volume of business of the pinball routes?

A. No, not very much because business was falling off quite fast.

Q. Yes, sir. Would the falling off of business have anything to do with the discontinuance of hold outs? A. No.

Q. After Mr. Forman sold to Mr. Morin, how did the business operate?

A. It operated the same. Morin was over there

(Testimony of Arnold J. Meyers.)

for a while and, well, he caused enough disturbance to where Seijas pulled him out.

Q. What was Morin's interest in the business, to your knowledge?

A. My knowledge is he was a half partner—I will take that back. I think he had 49 per cent of the interest.

Q. And you say he was over there for a while. Where? A. Just going around the routes.

Q. And then, after you say Seijas pulled him out, what did he do? A. I don't know.

Q. Was Mr. Morin consulted regarding the purchase of additional equipment? A. Yes.

Q. Did you have any business with Mr. Forman after Morin was in? [1169]

The Court: Particular reference has been made to Exhibit 76 which refers to the year 1942. Perhaps it escapes me, but has his testimony covered these other periods of 1943, 1944, and 1945, represented by Exhibits 77, 78, and 79?

Mr. Obenour: I believe, your Honor, he has in Exhibit 79 for the year 1945.

The Court: Whatever one it was. Only one book in particular was referred to.

Q. (By Mr. Obenour): Have you also examined the books, Exhibits 76, 77, and 78, for the years '42, '3, and '4, to determine if there were any entries of slips that jou have described in '45?

The Court: You can do that at the recess. It wasn't clear to me about that and I thought it might not be clear to the others.

(Testimony of Arnold J. Meyers.)

The Witness: There are none of mine in 76, none in 77, none in 78.

The Court: Then, only in 79?

The Witness: Only in 79 are mine.

Q. (By Mr. Obenour): However, during the years '42, '43, and '44, was this same practice continued of holding out and reporting the hold outs with receipts to either Mr. Seijas or Mr. Forman?

A. Yes. [1170]

Q. Are you familiar with the business of Dock Concessions? A. Yes.

Q. Did you have machines on location there?

A. Yes.

Q. There were hold outs taken from Dock Concessions from the machines? A. Yes.

Q. And who, to your knowledge, operated Dock Concessions? A. Goldstein.

Q. And did Mr. Goldstein know hold outs were being taken from the machines? A. No.

Mr. Mead: What Mr. Goldstein knew is a conconclusion that is objected to your Honor.

The Court: Yes. The form of the answer will have to be stricken on the grounds of the form of the question. As far as this witness knows, what Mr. Goldstein knew would be something only known to Mr. Goldstein, but what as far as this witness knows, or whether this witness was informed, or something of that kind, is permissible.

Mr. Obenour: I thought he was referring to the second question, your Honor.

(Testimony of Arnold J. Meyers.)

The Court: Were you referring to the answer to what Mr. Goldstein knew, Mr. Mead? [1171]

Mr. Mead: Yes, your Honor.

The Court: That answer will be stricken.

Mr. Mead: And, of course, on the further grounds it is incompetent and immaterial as to any inquiry concerning Dock Concessions.

The Court: Well, that general objection is overruled, but the form of the question was objectionable.

Q. (By Mr. Obenour): Would you do anything to advise Mr. Goldstein that the hold outs were being taken from the machines at Dock Concessions? A. No.

Mr. Mead: That is further objected to on the grounds it is a conversation with a third party who is now dead and is not in any way binding on this defendant.

The Court: Overruled. It merely calls for what, if anything, this witness did to advise Mr. Goldstein. Overruled. You may answer.

The Witness: No.

Q. (By Mr. Obenour): Did you do anything?

The Court: He said no.

Q. (By Mr. Obenour): Would Goldstein in any way have been able to see what money was being taken from the machine as compared to the amount reported on the receipts? [1172]

Mr. Mead: That calls for a conclusion.

The Court: Yes, the form of the question is objectionable. If you want to ask him whether Gold-

(Testimony of Arnold J. Meyers.)

stein participated in the collection, that would be permitted, but the form of the question is objectionable.

Q. (By Mr. Obenour): Was Mr. Goldstein ever present? A. He has been, yes.

Q. When he was present, would he participate in any share of the division? A. No.

Mr. Mead: That is objected to as being incompetent and immaterial, your Honor, and has no bearing on the issues involved in this controversy, and is an attempt now to inject a third person into the situation whose testimony has—who now is dead.

The Court: Overruled. The answer will stand.

Q. (By Mr. Obenour): Did any of the location owners participate in the division of the hold outs? A. Only one.

Q. Who was that?

A. That was the Pasttime in Port Orchard.

Q. And who operated the Pasttime?

A. Rylander and Myhre. [1173]

Q. And is that Robert Rylander?

A. Yes, I believe that is right.

Q. And in what manner would he participate in the hold outs?

A. He had definite knowledge that—well, there was an agreement with him that he would get half of the hold outs.

Q. Did you have a location called the Smoke Shop? A. Yes.

Q. Who operated the Smoke Shop?

(Testimony of Arnold J. Meyers.)

A. There were several owners. Wendell Arnold is the one I recall being there the longest.

Q. Did he participate in the hold outs from machines in his location? A. No.

Q. Are you familiar with the Beach?

A. Yes.

Q. Who operated the Beach?

A. For a while I did. Later on, why, there were others.

Q. And who were the others?

A. I can't recall their names.

Q. Were there hold outs made from machines at the Beach? A. Yes.

Q. From whom did you receive instructions to cease the hold outs?

A. I think from both Mr. Forman and Mr. Seijas. [1174]

Q. And what was the purpose of ceasing the holdouts? A. On account of the sale.

Q. And after the sale was made of the city routes, what happened then?

A. It was discontinued before that.

Q. Were you given any instructions not to resume?

A. It wasn't feasible to resume. There wasn't enough business.

The Court: That doesn't answer the question.

The Witness: No, it was not continued.

Q. (By Mr. Obenour): Was there any reason why you did not resume the hold outs?

A. That is the reason I just gave.

(Testimony of Arnold J. Meyers.)

Q. What is that?

A. There just w sn't enough business to.

Q. There wasn't enough business?

A. That's right.

Q. And as the business declined, the hold outs declined, is that right?

A. Yes. You might say it just tapered off to where there were not any more.

Q. You don't recall the dates, though?

A. No, I don't.

Mr. Obenour: I believe that is all. You may examine. [1175]

The Court: It is fairly close to our recess time. Would you like to have that now?

Mr. Mead: Yes, your Honor.

The Court: Very well, we will recess for 15 minutes.

(Thereupon, a short recess was taken.)

The Court: Proceed, Mr. Mead.

Cross Examination

Q. (By Mr. Mead): Mr. Meyers, I think you stated that you became acquainted with Mr. Forman because you were both working for the Sterling Theatres, is that right? A. That is correct.

Q. He was an employee of that company as well as yourself? A. That's right.

Q. And at the time you went to work for this pinball venture, what sort of work were you doing?

A. I was working in the shipyard at that time.

Q. And what shipyard were you working in?

(Testimony of Arnold J. Meyers.)

A. Seattle-Tacoma.

Q. In Seattle? A. Seattle-Tacoma.

Q. Seattle-Tacoma? A. Yes. [1176]

Q. Was that in Seattle or Tacoma?

A. In Seattle.

Q. And when did you discontinue the work with the shipyard?

A. At the time I went to Bremerton.

Q. But what was the date of that termination of your employment with the shipyard?

A. I couldn't tell you that exactly.

Q. Do you know whether it was in 1942 or 1943?

A. To the best of my knowledge, it was in 1942.

Q. And do you know whether it was in the summer or the fall or the spring of 1942?

A. I believe it was in the fall of '42.

Q. In the fall of 1942? A. Yes.

Q. And had you already terminated your employment with that work with the shipyard when you went to work for Seijas and Forman?

A. No.

Q. You were still working in the shipyard?

A. That's right.

Q. How did you happen to leave that employment and go to work for Seijas and Forman?

A. By this offer from Mr. Forman.

Q. Did you see him on the street or did you go call upon him?

A. No, he came out to the house. [1177]

Q. He came out to the house? A. Yes.

(Testimony of Arnold J. Meyers.)

Q. And asked you to go to work? A. Yes.

Q. Now, I think you testified that during this period of time, then, from the fall of 1942, that you were employed as the collector, is that right?

A. That's right, at the beginning.

Q. And did you continue in that capacity?

A. Yes.

Q. Did you have other collectors besides yourself? A. Yes.

Q. And that continued up to the year 1945?

A. Yes.

Q. Now, your association got closer with Mr. Seijas as you became acquainted with him, is that right? A. That is true.

Q. And you became acquainted with him in the fall of 1942? A. Yes.

Q. After Mr. Forman sold out his interest in the city route to Mr. Morin in 1946, I think you then testified you had no further connection with Mr. Forman in connection with the pinball business? A. That is true.

Q. And you took your instructions and your [1178] orders thereafter from Mr. Seijas and his other partners, did you? A. Yes.

Q. After 1946? A. That's right.

Q. Now, when in 1946, do you recall that Mr. Forman sold his interest to Mr. Morin?

A. I don't know that date without records.

Q. In any event, was it made known to you by Mr. Seijas or Mr. Forman or both of them, that

(Testimony of Arnold J. Meyers.)

Mr. Morin was now a partner in the business and Mr. Forman was out of the business?

A. I think possibly by both of them.

Q. By both of them? A. Yes.

Q. Did you then take Mr. Morin over and take him around and show him the various locations and introduce him to the people who owned these locations? A. Yes.

Q. Is that right? A. Yes.

Q. Now, then, following your employment with Mr. Seijas and Mr. Forman, did you continue your employment in this pinball venture between Mr. Morin and Mr. Seijas? A. Yes.

Q. And how long did you continue to work for them? A. Until 1950. [1179]

Q. Now, in the year 1950 what did you do?

A. At that time they passed a new ordinance which outlawed the automatic pay offs and went over to what we call a free play, and business at that time just went so low that it was no longer profitable.

Q. Now, when you say "they passed the ordinance," are you referring to the City of Bremerton?

A. I think it was statewide, as I remember it.

Q. Statewide?

A. Yes. I think it was a court decision.

Q. And I take it, then, in that year, in 1950, you discontinued your association with the pinball business? A. That's right.

Q. So your total employment, then, in the pin-

(Testimony of Arnold J. Meyers.)

ball business was from the fall of 1942 until 1950?

A. Yes.

Q. And do you remember in what portion of the year 1950 you terminated that relationship?

A. I believe in the spring.

Q. In the spring of 1950? A. Yes.

Q. And then what did you do?

A. That is when I went into the real estate business.

Q. Did you open an office? [1180]

A. First I went to school and then I went into a partnership in the office.

Q. When did this occur?

A. That would be about '51.

Q. 1951?

A. Possibly the latter part of 1950.

Q. Now, commencing from the time you left the pinball business and started in the real estate business, who had occasion to represent you as your attorney? A. No one.

Q. Did Mr. Seijas ever represent you?

A. No.

Q. Did you have occasion to see Mr. Seijas over this period of time?

A. I have talked to him from time to time, yes.

Q. You talked to him from time to time?

A. Yes.

Q. I think you were interviewed by the Revenue agents, Mr. O'Leary and Mr. Oftedal with respect to Mr. Seijas' income tax problems, were you not, sir? A. That is true.

(Testimony of Arnold J. Meyers.)

Q. When were you first interviewed with regard to those problems?

A. I don't recall the date.

Q. You don't recall the date? [1181]

A. No.

Q. What is your best recollection of the date?

A. Let's see. Well, again I will have to guess. I will say around '51 or '52.

Q. Could it have been in the fall of 1951?

A. I couldn't say for sure.

Q. I see. But in any event, you were interviewed on that occasion by Mr. O'Leary and Mr. Oftedal, were you not? A. Yes.

Q. And this investigation was in Mr. Seijas' income tax problems? A. Yes.

Q. You were apprised of that by Mr. Oftedal and Mr. O'Leary that that was the purpose of the inquiry, were you not, sir? A. That's right.

Q. And your best recollection is that it was the fall of 1951 or early part of 1952?

A. I am guessing at that, yes.

Q. But you remember distinctly that interview?

A. Oh, yes.

Q. Did you have occasion, Mr. Meyers, at that time or at some subsequent time following the interview, to sign a written statement covering the interview? A. Yes. [1182]

Q. Now, did Mr. Seijas discuss with you on or about that time or prior to the date of the interview, his problem with regard to the tax investigation that was then instigated against him?

(Testimony of Arnold J. Meyers.)

A. No.

Q. You did not discuss his problem?

A. No.

Q. Did he mention to you or discuss with you the subject matter of the inquiry which was anticipated would be made on the occasion of your interview with Mr. Oftedal and Mr. O'Leary?

A. As I remember it, I told him afterwards that I had been called down there and had had an interview, yes.

Q. And you told him afterwards about that?

A. That's right.

Q. And you didn't have any discussion with him prior to the interview with respect to the subject matter of the inquiry or anything of that kind? Did you discuss the fact that you were going up there to have an interview with Mr. O'Leary and Mr. Oftedal about Mr. Seijas?

A. I might have mentioned that I was called there, but that was it.

Q. Is it not a fact, Mr. Meyers, that on an occasion in the fall of 1951, early part of 1952, when you had this interview with Mr. O'Leary and Mr. [1183] Oftedal, that Mr. Seijas accompanied you to their office representing you as your attorney at the interview and that his admission to the proceedings was denied by Mr. O'Leary and Mr. Oftedal because it was his income tax affairs that were being inquired into? A. No.

Q. That is not a fact? A. That's right.

Q. Now, on a second occasion, or when was there

(Testimony of Arnold J. Meyers.)

a second occasion, if there was that, that you again discussed with Mr. O'Leary and Mr. Oftedal the subject matter of Mr. Seijas' income tax investigation? A. Yes, there was a second.

Q. There was a second interview? A. Yes.

Q. When did this interview occur?

A. Well, again, I am going to have to guess the dates. I would say possibly six months later.

Q. About six months later?

A. It could have been less.

Q. And so that would be sometime in 1952?

A. '52, I imagine, yes.

Q. Upon that occasion was a written statement taken from you or was it merely an informal interview?

A. I believe that there was only one written statement taken. [1184]

Q. Only one written statement taken?

A. Yes, that I signed. In other words it was under oath.

Q. And that was when?

A. I believe it was the second interview.

Q. The second interview? A. Yes.

Q. That would be sometime in 1952?

A. I believe so.

Q. Was that interview with Mr. O'Leary and Mr. Oftedal? A. Yes.

Q. But you do not know the dates of it?

A. No, I don't.

Q. And a written statement was taken from you at that time, is that right? A. That's right.

(Testimony of Arnold J. Meyers.)

Q. You signed the statement, did you?

A. Yes.

Q. And that inquiry was into Mr. Seijas' income tax liability? A. That is correct.

Q. Prior to that second inquiry, did you have occasion to talk with Mr. Seijas with respect to the subject matter of the inquiry and to discuss with him the testimony that was anticipated might be inquired into?

A. No, I never had that with Mr. Seijas. I have had conversations with him but not definite [1185] instructions on anything of that kind.

Q. But you did have conversations with him then, prior to the second interview at which time the subject matter of your testimony would be discussed?

A. The only conversation I had with him regarding that was what was asked at the first interview.

Q. So following the first interview you had a discussion with Mr. Seijas as to what was asked at the first interview? A. Yes.

Q. But prior to the second interview you had no discussion with him? A. No.

Q. Was the subject matter of his income tax investigation and the immediate problems of discrepancies in the year 1946, 1947, and 1948, discussed between you and Mr. Seijas? A. No.

Q. It was not a subject of discussion?

A. No.

(Testimony of Arnold J. Meyers.)

Q. Were these so-called hold outs that you have referred to the subject matter of discussion?

A. No.

Q. They were not the subject matter of discussion? A. No. [1186]

Q. And he did not discuss with you your testimony with respect to these hold outs or what they might be? A. No.

Q. What it might be, is that right?

A. That's right.

Q. Now, is it not a fact, Mr. Meyers, that upon the occasion of your next interview or following interview with the agents O'Leary and Oftedal, that you were accompanied to their office and represented by an attorney by the name of Ringold?

A. Ringold?

Q. Ringold? A. Yes.

Q. You are acquainted with Mr. Ringold?

A. Yes.

Q. Is it a fact that you were represented by Mr. Ringold upon the occasion of the second interview? A. That's right.

Q. Who was Mr. Ringold?

A. At one time he was in Mr. Seijas' office.

Q. And in this particular time he was in Mr. Seijas' office and was an employee of Mr. Seijas?

A. No, that isn't true. He was on the way of breaking away from Mr. Seijas at that time forming his own office.

Q. He was on the way of breaking away from

(Testimony of Arnold J. Meyers.)

[1187] Mr. Seijas but he was in Mr. Seijas' office, was he not?

A. He was still occupying the desk, although I think they were just waiting for their other office to be readied.

Q. And he was an employee of Mr. Seijas?

A. That I couldn't say although I doubt it at that time.

Q. And did you discuss with Mr. Seijas and Mr. Ringold the subject matter of your testimony upon the occasion of the second visit? A. No.

Q. You did not? A. No.

Q. You didn't discuss it with either one?

A. I might have with Mr. Ringold afterwards. He was denied admission in there at that time.

Q. So when you came up there with Mr. Ringold to interview or be interviewed by Mr. O'Leary and Mr. Oftedal, they declined to admit him to the conference because Ringold was associated with Mr. Seijas and it was Mr. Seijas' income tax returns that were being investigated, is that right?

A. That was the reason, yes.

Q. That was the reason? A. Yes.

Q. Did Mr. Seijas arrange for Mr. Ringold to go up there? A. No, I asked him to go. [1188]

Q. Who paid Mr. Ringold's fee?

A. Nobody paid him because he didn't do anything.

Q. And you had no discussions with him about the matter?

(Testimony of Arnold J. Meyers.)

A. No. I told him what happened afterwards and that was all.

Q. Now, on the occasion of that interview with Mr. O'Leary and Mr. Oftedal, did you not state that you had discussed the matter of your testimony with respect to these hold outs with Mr. Seijas?

A. No.

Q. You did not? A. That's right.

Q. Is it a fact that you did discuss the subject matter of the hold outs or that—with Mr. Seijas, or that wasn't brought up at that time?

A. No. There was no discussion with Mr. Seijas after the first interview outside of the fact that I might have mentioned I was down there and that was it.

Q. And you did not state to Mr. Oftedal and O'Leary at that time that you had discussed with Seijas the subject matter of these alleged hold outs?

A. That's right.

Q. Now, when was the second or the third occasion that you talked with the agents Oftedal and O'Leary, if there was a third occasion? [1189]

A. I don't believe there was before the trial.

Q. So that was the last time?

A. That's right.

Q. And so we can now fix two meetings that you had at which this matter was inquired into prior to the time of the trial? A. That's right.

Q. Now, up to the time of the trial, Mr. Meyers, had you not been apprised by Mr. Seijas of his problem with regard to the statute of limitations

(Testimony of Arnold J. Meyers.)

and his desire to place back in the years 1945 and early years, unexplained income which he was being charged with for the years 1946, '7, and '8 which was the subject matter of this trial? A. No.

Q. You had not been advised of that?

A. No.

Q. And that was no concern of yours, of course?

A. That's right.

Q. Now, I think you testified, Mr. Meyers that this so-called hold out that has been referred to here, terminated in 1945, is that right?

A. To the best of my knowledge, yes.

Q. To the best of your knowledge?

A. Yes. [1190]

Q. It terminated in 1945? A. Yes.

Q. And you testified to that effect in Mr. Seijas' trial last year, didn't you? A. That's right.

Q. And you are testifying to it again?

A. Yes.

Q. Now, during the course of the trial of the Seijas trial, were you again interviewed by Mr. O'Leary and Mr. Oftedal with regard to the subject matter of the hold outs and how long they continued?

A. I don't recall. I don't believe I was.

Q. I will ask you, Mr. Meyers, if it is not a fact that during the course of the preparation for trial you were not present in room 1015 Federal Courthouse in Seattle at 8 a.m. o'clock on Friday morning, June 17, and were present——

The Court: What year would that be?

(Testimony of Arnold J. Meyers.)

Mr. Mead: June 17, 1955, your Honor.

Q. (By Mr. Mead): At which there was present Mr. Holtberg, Mr. Arnold J. Meyers, yourself, and Mr. Edward J. O'Leary?

A. I believe you are right. I was up to the Federal Building, up to the Federal Courthouse.

Q. You were there at that time? [1191]

A. Yes.

Q. Now, during the course of the preparation for this trial of Mr. Seijas last year, I assume that you had occasion to discuss your testimony not only with the agents representing the government but with Mr. Seijas and his attorney, did you not?

A. No. I was never called in by them.

Q. You were never called in? A. No.

Q. Did you state to Mr. O'Leary at that time and in the presence of the other gentlemen, Mr. Holtberg, and at that time, I am referring to Friday morning, July 17 at 8 a.m. o'clock in Seattle, that these hold outs had continued into 1946?

A. No, I didn't state that. The only thing that I can base that on is by these slips which were in evidence here and I have absolutely no records of my own, and without them I couldn't say when it started or when it stopped.

Q. And so you did not state that to Mr. O'Leary at that time, to the best of your recollection?

A. That's right.

Q. Now, I assume, and I believe you have already testified that the exhibits which are marked Plaintiff's Exhibit 79, that these diaries for 1945,

(Testimony of Arnold J. Meyers.)

'44, '43, and '42, which have been introduced [1192] in evidence, you had the occasion to examine these photostatic copies, have you not, sir? A. Yes.

Q. And they have been exhibited to you by the government, so you are quite familiar with them?

A. That's right.

Q. Have you ever seen the originals of these diaries? A. No.

Q. You have never seen the originals?

A. No.

Q. Now, would you hand the witness Exhibit 79, please. I believe you testified, Mr. Meyers, that at the time these collections were made that you followed a procedure which was established by which the receipts were reported on a printed form which you examined here this morning?

A. Yes.

Q. Is that right? A. Yes, that's right.

Q. And was there attached also, to that printed form upon occasions, a tape which listed the amounts from the various locations?

A. Oh, yes.

Q. To verify the amounts? [1193]

A. On each particular route there was a tape for each route.

Q. There was always a list attached or a list verifying the items listed in the report?

A. That's right.

Q. And that tape would be turned into Mr. Renstrom, the bookkeeper, or left at the office, would it? A. Yes.

(Testimony of Arnold J. Meyers.)

Q. Was Mr. Renstrom always present when these receipts were turned in?

A. Yes, unless he was out for lunch or something of that nature. He was always the man that always received them.

Q. He always received them? A. Yes.

Q. How many locations starting out with the year 1945 which was covered by the exhibit you made, you have it in your hand, were these hold outs that you have testified, taken from? Approximately how many locations?

A. I would have to go through here and count them.

Q. You were the one that made these collections, and you were the one that made these hold outs. Could you state approximately how many locations there were?

A. Well, I can guess. I can say 10 or 12.

Q. 10 or 12 locations? A. Yes. [1194]

Q. And how were these hold-out locations selected by you?

A. By the amount of business that they were doing.

Q. So they were the larger locations?

A. That's right.

Q. That you selected, is that right?

A. Yes.

Q. Now, I believe you testified that the business got progressively worse about this time in 1945, so the hold outs were smaller, is that right?

A. That's right. It was going downhill.

(Testimony of Arnold J. Meyers.)

Q. And that was particularly true after the war terminated, is that right? A. Yes.

Q. Which was in the—when was the war over, do you recall?

A. I was asked that before, and I don't remember.

Q. Well, you have an idea about that, Mr. Meyers?

A. Well, I will guess and say '45.

Q. About the summer of '45? A. Yes.

Q. Right along in there? A. Yes.

Q. After that the receipts dropped off perceptibly, did they not? A. Yes. [1195]

Q. And the hold outs dropped off along with them? A. Yes.

Q. So the hold outs, then, it is your recollection, the receipts were greater in 1944 and the earlier years? A. Yes.

Q. Now, if you will refer to the exhibit that you have and turn to the date of July 14?

A. Yes.

Q. There is a slip that has been pasted into the book on that day, apparently, and it is reproduced in the exhibit, and the heading of that exhibit is the "Blue Moon"? A. Right.

Q. What was the Blue Moon?

A. A tavern.

Q. And who was the owner and operator of the Blue Moon at this time?

A. It was Zimmerman, I think was his name.

Q. Mr. Zimmerman? A. Yes.

(Testimony of Arnold J. Meyers.)

Q. And who else was interested in it?

A. I don't know of anyone else.

Q. But you were acquainted with these owners of these locations pretty well because you visited them, didn't you? A. That's right. [1196]

Q. Now, I notice in here there is a location that has been referred to as the "Beach," and you referred to it in your testimony this morning.

A. Yes.

Q. You testified with respect to it? A. Yes.

Q. Who was the owner of the Beach?

A. Well, there were several owners in there, myself included, and to give you the names of them, I would have to go back into the records and try and dig them out for you. I don't recall their names.

Q. When were you one of the owners of the Beach? A. That would be along about '47.

Q. You didn't acquire an interest until '47?

A. Yes.

Q. Was Mr. Seijas' brother an owner of that establishment.

A. I don't know. He worked in there. Whether he was an owner or not, I don't know.

Q. When did he work in there, do you know?

A. No, I couldn't tell you.

Q. Now, there is another establishment listed in here and it has been referred to as the Smoke Shop. Who was the owner of the Smoke Shop?

A. Wendall Arnold. [1197]

Q. Were there any other partners in the Smoke Shop?

(Testimony of Arnold J. Meyers.)

Q. Do you mean at the same time that Arnold——?

Q. Yes. A. Not to my knowledge.

Q. Not to your knowledge? A. Yes.

Q. Were there holdouts from the Smoke Shop?

A. I believe not.

Q. You believe not? A. No.

Q. You don't recall any?

A. No, I don't think so.

Q. At least, you didn't hold out any money?

A. That is right.

Q. From the Smoke Shop, is that right?

A. Yes.

Q. And you are certain of that?

A. I am positive. I could check in a hurry by going through that, but I don't recall as it being in here.

Q. Now, there is an establishment that was known as Pop's? A. Pop's Inn.

Q. Pop's Inn? A. Yes.

Q. Where was that located?

A. Out in Charleston. [1198]

Q. I beg your pardon? A. Charleston.

Q. Charleston? A. Yes.

Q. And who were the owners of that establishment?

A. Zimmermann was also in there at one time, and I think eventually that Seijas bought that.

Q. And when did Seijas buy it, do you know?

A. I couldn't tell you the date.

(Testimony of Arnold J. Meyers.)

Q. But, at least, Seijas was an owner or his brothers were an owner of that establishment?

A. Yes.

Q. And you are familiar with that?

A. Yes.

Q. Were there hold outs from that establishment? A. At one time, yes.

Q. At one time? A. Yes.

Q. There were? A. Yes.

Q. And so you recall hold outs from that establishment? A. That is right.

Q. And now, is it your testimony, Mr. Meyers, that at what establishments there would be hold outs and the amount of the hold outs was entirely [1199] up to you and a matter within your discretion? A. Not entirely.

Q. Not entirely? A. No.

Q. I understood you to testify to that this morning, or did you testify to that fact this morning?

A. I don't believe so. I said it was more or less left to my discretion. However, I would have to discuss that before I could go ahead and do that.

Q. But you testified this morning that it was more or less left up to you to determine that, is that right? A. To determine the amounts.

Q. To determine the amounts?

A. That is right.

Q. And then it wasn't left up to your discretion to determine the establishment?

A. No, not in all cases I could recommend which

(Testimony of Arnold J. Meyers.)

ones it should be, and it would more than likely have been followed.

Q. Now, did you make a statement to Mr. O'Leary and Mr. Oftedal on the occasion of these meetings that you discussed in which a written statement was taken that there were only six or seven locations involved in these holdouts?

A. It's possible. When I gave you the ten or [1200] twelve, I told you I would just make a guess. I did the same thing there. I had no records to go by.

Q. How much of a salary did you draw during this period of time?

A. Started out at $75 and finally got $115 a week and expenses.

Q. When did you start getting $115 a week?

A. I couldn't tell you that without the records.

Q. Well, was it after Mr. Forman left the business?

A. Oh, no, that was during Forman's time.

Q. During that time? A. That is right.

Q. And did you participate in these so-called holdouts and receive part of that yourself?

A. I might have indirectly by getting amounts of cash periodically. Now, that could be $20, $25 or it could have been $50. We used it mainly as an expense account to take clients out to dinner or something of that nature, buying them a bottle.

Q. So the only amount that you ever got out of it was just for expenses, is that right?

A. That is right.

(Testimony of Arnold J. Meyers.)

Q. But it's your testimony that you were directed by these owners to steal this money from these locations, and it was up to you as to how [1201 much you would steal, is that right?

A. Well, pretty much so, yes.

Q. And you came back and turned the money in weekly all during these four years that you were there and received no compensation for that other than just your salary you got?

A. That is right.

Q. You have had no business association, of course, with Mr. Forman since he sold out in 1946, have you? A. No. I haven't seen him.

Q. Did you ever approach him to employ you in the theatre business? A. No.

Q. Did you ever express an opinion to Mr. George Heberling or any other individual that you were mad at Forman because he had not employed you in the theatre business?

A. I don't believe so, no. I have heard that also.

Q. You have heard that also? A. Yes.

Q. But you don't believe you did?

A. No. I have heard the fact that I am supposed to be terribly mad at Mr. Forman. However, I have nothing against Mr. Forman.

Q. You have nothing against Mr. Forman?

A. No. [1202]

Q. He treated you fairly?

A. That is right. He employed me for a job, and I got paid for it, and that was it.

Q. And you have nothing against him?

(Testimony of Arnold J. Meyers.)

A. No.

Q. His treatment of you was fair at all times?

A. That is right.

Q. You don't recall whether you ever made that statement or not? A. Not that I know of.

Mr. Mead: Thank you. I think that is all.

The Court: Is that all?

Mr. Obenour: Just several things.

Redirect Examination

Q. (By Mr. Obenour): During this period that Mr. Forman was in the business, where was his office? A. In the Smith Tower.

Q. And where was it in relation to Mr. Seijas' office?

A. There was a connecting door between the two.

Q. And did that continue after Mr. Forman left the office and as long as you remained in the pinballs?

A. No, I think Mr. Forman had moved to another office before that time, before it ended. [1203]

Q. And at the time of your interview with the agents, did you also discuss with Mr. Forman the fact that you had talked with the agents?

A. No.

Q. Did you furnish a copy of it—did you receive a copy of the statement that was transcribed of your interview? A. Yes.

Q. Did you show anyone that copy or furnish it to anyone? A. No.

Q. You did not furnish it to anyone?

(Testimony of Arnold J. Meyers.)

A. I still have the copy.

Q. Has either Mr. Forman or Mr. Seijas seen it?

Mr. Mead: I didn't hear.

The Court: The question was, did either Mr. Seijas or Forman see his copy of his interview.

The Witness: I don't believe so.

Q. (By Mr. Obenour): Mr. Ringold?

A. No, I didn't have it at that time. Let me clarify this. If I remember correctly, the copy I got was also one out of the Federal Building, and Ringold was not along on that.

Q. Concerning your being mad at anyone or [1204] Mr. Forman, are you mad at anyone?

A. Not right now.

Q. Is your testimony in any way influenced by your personal feelings either for or against Forman or Seijas? A. No.

Q. Have you had any conversation with Mr. Forman recently just before the trial or in the process of the trial?

A. I saw him yesterday at noon. I ran into him coming out of the elevator, and that is the first time?

Q. What was your conversation?

A. He wanted to know how my wife was and what I had been doing, and that was it.

Q. Any conversations as to what your testimony would be? A. No.

Q. And did you have any interest in this case now, in any way? A. Not a bit.

Mr. Obenour: That is all.

(Testimony of Arnold J. Meyers.)

Recross Examination

Q. (By Mr. Mead): May I inquire with respect to your discussion with Mr. Forman. You said you hadn't seen him until in the elevator. Had you ever [1205] talked to me or anyone representing him?

A. I never saw you until right now.

Q. That is today in the courtroom?

A. That is right.

Mr. Mead: That is all.

The Court: That is all, Mr. Meyers. You are excused and you may leave.

(Witness excused.)

The Court: Call another witness, please.

GEORGE ADOLPH HEBERLING

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: George Adolph Heberling.

The Clerk: Spell your last name.

The Witness: H-e-b-e-r-l-i-n-g.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Heberling? A. Seattle.

Q. And your address?

A. 115 Highland Drive. [1206]

Q. Your occupation?

A. I am in the pinball business.

(Testimony of George Adolph Heberling.)

Q. How long have you been in the pinball business? A. Since about 1932.

Q. Where did you first begin operation of pinball machines? A. In Seattle.

Q. And are you in business with anyone?

A. My brother.

Q. And his name is what? A. Chester.

Q. Did you ever operate pinball machines anywhere other than Seattle?

A. I have operated some in King County and Bremerton.

Q. Did you ever operate in Kitsap County?

A. I did.

Q. And Bremerton was in Kitsap County?

A. Correct.

Q. When did you operate in Kitsap County?

A. I think I operated, as near as I can remember, possibly from about 1935 on.

Q. 1935 on? A. Until today.

Q. Until today? A. Yes.

Q. And in this operation are you in business with your brother? [1207] A. Correct.

Q. Has there been a division of the particular locations or areas which you would be more closely associated with than your brother and vice-versa?

A. Yes. I have in the past operated the Bremerton area, and my brother operated the Seattle area.

Q. Could you have operated as early as 1932 in Bremerton? A. I could have.

Q. When you say you have operated since 1932, is there a distinction between operation in Kitsap

(Testimony of George Adolph Heberling.)

County outside of the City of Bremerton and operating within the City of Bremerton itself?

A. Very much so.

Q. In what way?

A. There is two separate licenses. There is a city master license and a county master license.

Q. Was there anytime that you did not operate either in Kitsap County or Bremerton?

A. There was a time.

Q. When was that?

A. That was, I believe, during the administration of Ralph Purvis.

Q. And who was he?

A. Prosecuting attorney. [1208]

Q. And when was that to the best of your recollection?

A. Well, I think possibly from about '36 to '39 or '40.

Q. And during that period, did you operate either in the City of Bremerton or in the county?

A. No. May I clarify that?

Mr. Mead: That is objected to as highly immaterial to any issue involved here as what he did during the early years.

The Court: I suppose it is background material. Let's get over it quickly with not too much detail.

Q. (By Mr. Obenaur): When did you resume operation in Kitsap County?

A. About 1940, I believe.

(Testimony of George Adolph Heberling.)

Q. What was the occasion when you resumed operation?

A. The prosecuting attorney at that time was Fred Cohen, I believe, and his policy was to permit the operation of pinball machines.

Q. Are you familiar with any lawsuit that was in the process of being brought against Mr. Purvis to test the validity of his rulings concerning the operation of pinballs? A. No.

Q. At the time you operated prior to 1940, had you known of either Army Seijas or Bill Forman?

A. No, I did not.

Q. Were they in business over there?

A. No.

Q. Who was operating in the county other than yourself?

A. Well, there was a number of operators. I can't recall their names, just who they were, but there was quite a few different companies. I think Shyver's Music Company was one, and I don't recall who all the others were.

Q. Had either Seijas or Forman had any interest in there to your knowledge?

A. Not to my knowledge.

Q. Do you know Bill Forman and Army Seijas?

A. I do.

Q. When did you first meet them?

A. About 1940, I think, '41.

Q. Whom did you meet first?

A. I am afraid I can't answer that question. I don't remember which one.

(Testimony of George Adolph Heberling.)

Q. In what way did you become acquainted with Mr. Seijas and Mr. Forman?

A. Well, I understood they were going to operate over there, and that they were going to operate in the county, and the city at that time was not opened, just the county opened up first. [1210]

Q. What was the occasion in which you became acquainted with them?

A. I don't recall the exact occasion. I heard about them around the territory, and I met them possibly in some social way or some way, and somebody introduced them to me. I don't recall who.

Q. When the county licensed pinball operations, did you obtain a license from the county?

A. I obtained one from the county.

Q. Who then had licenses to operate pinball machines in the county? A. They and ourselves.

Q. There were two licenses only?

A. I think so.

Q. And who had the interest, the business interest, in your license?

A. My brother and myself.

The Court: Speak a little louder, Mr. Heberling. We have got a little noise outside.

The Witness: I am sorry.

The Court: That is all right. Go ahead.

Q. (By Mr. Obenour): Did you operate, then, the county route when you received your license?

A. I did.

Q. Did your brother have anything particularly

(Testimony of George Adolph Heberling.)

[1211] to do other than have a business interest in it?

A. That is all he had to do, just business.

Q. And he was operating another part of your pinball operations elsewhere?

A. In King County, Seattle.

Q. Did you have any discussions with Mr. Seijas and Mr. Forman concerning the locations of routes in the county?

A. We had more or less of an agreement to divide the territory between us.

Q. In what way?

A. Well, we took one location, and they took one location.

Q. And was there any area — division of the county? A. Not particularly.

Q. When you say you divided as to location, how was that agreement reached?

A. Well, the agreement was reached. We tried to analyze to the best of our ability the value or the type of account that each location was and divide it accordingly.

Q. At this time was there competition between you and your brother as one interest and the other operation for the location?

A. I wouldn't think so, no. I would say no to that.

Q. Prior to the agreement?

A. Prior to the agreement? [1212]

Q. Prior to the agreement, was there any competition? A. No.

(Testimony of George Adolph Heberling.)

Q. Did you ever go into the business with Mr. Forman and Mr. Seijas? A. Yes, I did.

Q. When?

A. About 1942, I believe, early in '42.

Q. And what was the occasion that you went into business with Mr. Seijas and Mr. Forman?

A. Well, the City of Bremerton passed an ordinance allowing pinball machines, and I attempted to get a license and was denied the license from the City of Bremerton, and in the meantime, why, Mr. Forman and Mr. Seijas came to me and made me a proposition for a partnership, and the other company came to me and offered me a partnership.

Q. What was the other company?

A. McGill.

Q. At this time had licenses been issued in the City of Bremerton?

A. To my knowledge, there were four licenses, as near as I can recollect;—four licenses issued in the City of Bremerton, and I was denied one.

Q. Who got the four?

A. I think it was a man named Crawford who [1213] was an automobile dealer, and another Crawford who was no relation to him, a man by the name of Parrott, and the McGill license.

Q. And you say you were made a proposition by whom?

A. By both the McGill people and Mr. Forman and Mr. Seijas.

Q. What were the propositions made to you?

A. Well, through the years I had built up a tre-

(Testimony of George Adolph Heberling.)

mendous amount of goodwill among the locations, and both Forman and Seijas and the other company found themselves unable to put machines in these locations owing to the friendship and goodwill that these people felt towards me, and, in fact, they told them they couldn't put any machines in until they had made some agreement with me, so they both came to me for a partnership inasmuch as—seemed to control a certain amount of locations at the time.

Q. Did you accept either proposition?

A. Yes, I accepted Mr. Forman's and Seijas' proposition.

Q. What was the agreement, then, between you and Seijas and Forman as to this partnership?

A. Well, they told me that they owned all of one route, and they controlled three routes. They told me they owned all of one route, a half of another route and a third of another route, so I put in proportion my share of the money and equipment. [1214]

Q. Your share of what?

A. Well, naturally, in going into a partnership you have to put up your particular share of the money that is involved to set up the operation. In other words, buying the equipment and buying the [illegible]. Does that clarify it?

Q. All right, sir. Now, just whom were you going into partnership in these different routes? Were you going in just with Seijas and Forman or were

(Testimony of George Adolph Heberling.)

you going in with other partners who had the remaining interest in these routes?

A. I understood I was going in the remaining partnership, the silent partnership.

Q. What was your share you were to contribute as to equipment and money?

A. My share was one half.

Q. And who was to put up the other half?

A. Mr. Forman and Seijas.

Q. And were the other partners to put up any money or equipment.

A. Supposedly so.

Q. Did you fulfill the terms of the agreement?

A. I did.

Q. And what did you put up?

A. Well, I don't recall the exact amount of [1215] money. What do you mean by what I put up?

Q. Did you put up an equal amount of equipment and machines? A. Correct.

Q. And an equal amount of money?

A. Correct.

Q. And what were the companies in which you invested? A. The names of them?

Q. Yes, sir.

A. United Amusement, American Amusement of Bremerton and Bremerton Amusement.

Q. And United Amusement is United of Bremerton or United Amusement?

A. I understood they had an operation of their own in the county that I had nothing to do with

(Testimony of George Adolph Heberling.)

or knew anything particular about, and I don't know what they called that, but I think ours was called United of Bremerton.

Q. All right, sir. What was the interest that you had in the United Amusement of Bremerton as you understood it? A. One half.

Q. One half? A. Yes.

Q. And the remaining half was owned by whom?

A. United of Bremerton. I understood I had [1216] one half and the other half was owned by Forman and Seijas.

Q. What was their interest in the remaining half, to your knowledge?

A. I don't quite follow that.

Q. Were they equal partners of the remaining half? A. I assume so.

Q. Bremerton Amusement Company, what was your understanding as to the partnership interest in that company?

A. Bremerton Amusement Company, the one that Mr. Crawford was supposed to have an interest in—the names of the companies and who had interest in them and those two remaining companies, I don't know which was which.

Q. Of the two remaining that was American Amusement and Bremerton Amusement?

A. Yes.

Q. Regardless of which was which of the second route, what was your understanding of the interest?

(Testimony of George Adolph Heberling.)

Mr. Mead: I object to that as calling for a conclusion.

The Court: Yes. The form of the question is objectionable.

Q. (By Mr. Obenour): What was the interest you had in the remaining routes?

A. One fourth. [1217]

Q. And who had the remaining interest in this second company? A. Bob Crawford.

Q. How much did he have? A. One half.

Q. And who had the other quarter?

A. Forman and Seijas.

Q. And the third company, what interest did you have? A. One sixth.

Q. And who had the remainder of that?

A. I don't know exactly who that was. I understood there was a fellow by the name of Parrott that had it. I understood afterwards Vito Cuttone had an interest in it.

Q. What were you told when you bought into this third company by Mr. Seijas and Mr. Forman as to who owned the remainder of the interest?

A. Parrott, man by the name of Parrott.

Q. Parrott had how much?

A. He would have had two thirds, I think.

Q. Mr. Parrott had two thirds, and you bought a half interest in the remaining third?

A. Yes. I think I wound up with a sixth. It's a little bit confusing on these figures.

Q. But this is what you were told by Seijas

(Testimony of George Adolph Heberling.)

[1218] and Forman at the time you bought half of your interest? A. That is right.

Q. Do you recall whether it was Forman or Seijas that told you as to Mr. Crawford's interest?

A. To the best of my knowledge, it was Mr. Forman.

Q. And who told you as to the remaining two-thirds interest in the third company?

A. Mr. Forman, I believe.

Q. And you were told that interest was owned by Parrott? A. Correct.

Q. And during this time, did you continue to operate any route of your own apart from your interest with Seijas and Forman?

A. I operated my own county route.

Q. Who kept the books for these three companies, United of Bremerton, Bremerton and American?

A. Well, they were kept in Mr. Forman's and Seijas' offices, and I don't recall the man's name.

Q. Are you familiar with a man by the name of Renstrom?

A. Yes. That is who it was.

Q. How long did your partnership continue with Seijas and Forman in the city routes?

A. Until the early part of '45, I believe.

Q. During this time, what was your participation in the operation of these three city routes?

A. Well, when I went into partnership with them, I remember quite distinctly that I told them that I didn't care to have anything to do with the

(Testimony of George Adolph Heberling.)

political situation, but that I felt that it was my job to maintain the goodwill and the friendship of these accounts inasmuch as I thought I had them at this time, and we were in more or less of a battle with McGill over locations, so my particular job insofar as this operation's concerned was to maintain the contacts and try to build up as much goodwill as we could with the locations that we had and to contact new locations.

Q. All right, sir. Now, during this time that you were in business with Seijas and Forman, did you ever buy out any of the other interests in these companies? A. I did.

Q. And what did you do?

A. Well, I went to Mr. Forman and I suggested to them that we buy these other people out—silent partners then—and he thought it was a pretty good idea inasmuch as the business was going along, so I asked him how much that Mr. Crawford would take for his half interest, and he told me $20,000. I brought down the check for $10,000 made out to Bob Crawford.

Q. What happened then?

A. Well, I met Mr. Crawford later on on the [1220] ferry, and I was congratulating him upon the fact that he had received $20,000 for his half interest in this particular business, and I found out he didn't receive his check. He got no check.

Q. To whom did you give your check for $10,000? A. To Mr. Forman.

Q. Was that check cashed?

(Testimony of George Adolph Heberling.)

A. I don't know. I never could find—I assume it was cashed. It was cashed. It was taken out of my deposit, but I never have been able to find the check.

Q. You looked for the check?

A. I looked for the check. It happened back, I assume, about '43 or '44.

Q. And how much later did you have this conversation with Mr. Crawford?

A. Oh, I would say it was possibly three or four months later that I met him on the boat.

Mr. Mead: I object to conversations with someone else, and move the witness's answer be stricken in regard to that.

Mr. Obenour: There is no conversation, your Honor.

The Court: He hasn't related any conversation yet. Go ahead.

Q. (By Mr. Obenour): Did you ever buy out [1221] the two-thirds interest in the third company?

A. Yes.

Q. How did you do that?

A. I gave Mr. Forman a check for—I don't recall the amount of it.

Q. And what were you buying out then?

A. Supposedly the interests of either Parrott or Cuttone, whoever was the partners.

Q. And up until that time what were you told as to the share or interest of either Parrott or Cuttone in this third company?

A. The division that I spoke of.

(Testimony of George Adolph Heberling.)

Q. Two thirds and one third?

A. One half and one third, I think. It's a little bit confusing.

Q. To whom did you give the check to buy out Cuttone's interest? A. That I am not sure of.

Q. During this time that you were in the companies, who made the collections for these routes?

A. I collected two locations, and the reason that I collected those two locations to start with, they happened to be two personal friends who were angry with me for going into partnership.

Mr. Mead: I object to this answer as not being responsive. [1223]

The Court: There is no need to go into the explanation. Which ones did you collect?

The Witness: Pardon me.

The Court: That is all right. Go ahead.

The Witness: The Palace—the Crow's Nest and the Charleston Club.

Q. (By Mr. Obenour): Did the Charleston Club have another name? A. Kuett.

Q. Who owned the Crow's Nest?

A. At the time I was collecting I believe a man by the name of Hawthorne. I don't recall the other partner.

Q. And who owned the Charleston Club or Kuett's? A. A man by the name of Kuett.

Q. And was there any agreement as between you and the location owners as to your collecting on these locations? A. In what way?

(Testimony of George Adolph Heberling.)

Q. Any agreement as to whom should make the collections on these two spots?

A. The locations insisted I make the collections.

Q. Who were the regular persons employed to make collections?

A. To start with, there was a man by the name of Andy Anderson and Jerry Meyers who started to collect. [1223]

Q. Who was Andy Anderson?

A. He was a man that had been working for me.

Q. And you say "to start with," when was this?

A. Well, at the start or the beginning of this partnership which was possibly early—I can't recall the exact date. Possibly early in '42, and Mr. Anderson was drafted shortly afterwards.

Q. Why were there two collectors?

A. Well, we were both a—as a partnership, it seemed logical to have two collectors, one representing each partner.

Q. And Anderson represented whom? A. I.

Q. And Meyers represented whom?

A. Forman and Seijas.

Q. And how long did the two of them continue to collect?

A. Up to the time that Mr. Anderson was drafted, and he went into the Army.

Q. Who collected after that?

A. Mr. Meyers.

Q. And did he collect all of the locations except Knett's and the Crow's Nest? A. Yes.

Q. Who, then, would make calls upon these lo-

(Testimony of George Adolph Heberling.)

cations, Mr. Heberling, other than the collectors? [1224] Who else would make calls?

A. Service men.

Q. And would the collectors—would you make any nickel calls or would the service men make nickel calls?

A. Service men would make nickel calls.

Q. Now, when you had come to collect at these locations, what would be in these coin boxes?

A. IOU's.

Q. And how would the IOU's be there?

A. Well, the standard procedure in this business is to—in the location, naturally, they become short of nickels if there had been any play. So the location calls in and asks for a nickel call, so a service man then, who is in that particular area, counts out the nickels. He gives the merchant the nickels, and the merchant gives him cash or IOU's. If he gives him cash, he puts it back in the machine. Now, the standard procedure on IOU's, because in a number of events, why, a place has been broken into, and that way there is not left a lot of cash in a particular machine.

Q. How would you then handle the IOU's when you would make your collection?

A. Well, I would handle the IOU's—they would be in the machine, and a duplicate would be in the merchant's possession, so we checked one against the other. [1225]

The Court: Subject break?

(Testimony of George Adolph Heberling.)

Mr. Obenour: This is going to be a little lengthy. One place is as good as another.

The Court: Well, make a note so you don't have to back track on it.

We are going to take our noon recess at this time, and keep in mind my admonition.

Recess until 1:30.

(Thereupon, a noon recess was taken.) [1226]

Afternoon Session

The Court: Proceed.

Q. (By Mr. Obenour): We were referring to IOU's, I believe, Mr. Heberling, from the location owners? A. Yes.

Q. And how would you receive payment for the IOU's?

A. Well, the merchant would have the cash and we would deduct the pay-outs that the machines might have paid out, and then deduct the taxes and split 50-50.

Q. All right, sir. What would you do with the —would you make receipts? A. Correct.

Q. And handing you Exhibit 84, can you identify that, sir?

A. Yes, that is a collection report.

Q. Was that the type of form you used to record the receipts? A. Yes. Correct.

Q. And you made out such receipts when showing the gross take of the machine and paid out the taxes for city and state and the 50-50 split between machine operator and location owner?

(Testimony of George Adolph Heberling.)

A. Correct.

Q. And what would you do with the receipts?

A. I would take them in with the collection and turn them over to the bookkeeper in the offices of Forman and Seijas. [1227]

Q. And with the receipts would you give anything else to the bookkeeper? A. The cash.

Q. And how would the cash correspond to the amount shown on the collection receipt?

A. It would correspond with the figures.

Q. And was that done in every instance that you collected from the time you began operation in '42 as long as you stayed in the business?

A. As long as I continued in the business.

Q. Was all of the money taken from the machines shown on these collection slips by you?

A. No.

Q. What money was not shown on the collection slips which you prepared and turned into the bookkeeper?

A. The money that was held out in these particular locations.

Q. And what was the money held out? How was the money held out? A. Taken off of the top.

Q. All right. Would you describe the manner in which you would remove the money from the machine and what would happen then?

A. Now, I don't remove the money. Do you [1228] mean get it from the location owners?

Q. Yes, sir. How would the money be not reported?

(Testimony of George Adolph Heberling.)

A. It would be taken off of the top of the gross collections.

Q. All right, sir. Now——

The Court: When you say "off the top," do you mean the first thing you did was take that out, is that what you mean?

The Witness: Correct.

Q. (By Mr. Obenour): The money would be removed from the machines, the machine emptied?

A. Yes.

Q. Would you do that when you would collect?

A. Will you put that question to me again?

Q. When you would go to collect, what would be the first thing you would do from these locations?

A. Well, we would have the amount of money checked with the IOU's and decide what to take off the top of it, how much money to take off of the gross and report the balance.

Q. And who would decide this?

A. It was generally based on the collection of the machines.

Q. You say we. Who is "we"?

A. The location owner and myself. [1229]

Q. And where was this done?

A. In the location owner's spot.

Q. And what locations were these?

A. Two locations, the Crow's Nest or the Charleston Club.

Q. And what would you do with this money that was held off the top?

(Testimony of George Adolph Heberling.)

A. I would give it either to—bring it in to Mr. Forman or Mr. Seijas, I believe Mr. Forman.

Q. Would you bring all of the money held off the top in? A. Yes. Correct.

Q. And did the location owner receive any money from the hold out? A. Correct.

Q. What would the location owner receive?

A. His half.

Q. When would he get it? A. At the time.

Q. All right, sir. Now, would you describe just how these receipts would be made up, then, and describe how the location owner was paid, what money you then had left, and what did you do with it?

A. The location—the money that was made out on the receipt was turned in, of course, was turned in to the bookkeeper. The money that was held out was divided with the location and the half that I [1230] got I brought in to the office of Forman and Seijas.

Q. Would it be in any sort of container?

A. No. It was in cash.

Q. Who would you bring this money to?

A. Mr. Forman, I believe.

Q. What would you tell Mr. Forman when you would give him this money?

A. I would tell him this was it, this was the holdouts from these two locations I was collecting from.

Q. Would you give him any information as to how much had been received from each location?

(Testimony of George Adolph Heberling.)

A. Well, he could look at the collection slips. One would verify the other.

Q. Would you give him any written record showing the amount of hold outs?

A. None whatsoever.

Q. How would he know how much had been held out of Kuett's and how much had been held out of the Crow's Nest?

A. He would have no way of knowing that, I assume, except from what I brought in unless he so desired to check with Kuett.

Q. Would you tell him how much had been received from Kuett's and how much had been received from the Crow's Nest?

A. That's right. [1231]

Q. When did this hold out begin, Mr. Heberling?

A. Well, from the inception, from the start. These two particular locations insisted that I collect from them and I was approached by either Mr. Forman or Seijas, I can't be too sure about that, that they needed considerable money to take care of the political situation, which I could well believe inasmuch as I found myself unable to get a license, so I naturally assumed that the city officials were receiving some——

Mr. Mead: I object to that as being a conclusion and move it be stricken.

The Court: Strike the portion of the answer with respect to the witness's assumption. Obviously, he has very fairly said it was an assumption.

(Testimony of George Adolph Heberling.)

The Witness: I am sorry.

The Court: That portion, of course, is not evidence.

Q. (By Mr. Obenour): Did you have any conversation with either Seijas or Forman as to instructing you to make hold outs of the receipts from the locations you were collecting?

A. Yes, I did.

Q. From whom did you receive the instructions?

A. I am not positive. [1232]

Q. You are not positive as to who would be the persons you would receive such instructions from?

A. I am not positive. It was either one or the other.

Q. As to whom?

The Court: Either one or the other of whom?

The Witness: I still——

The Court: Who is the "whom" that you are speaking of?

The Witness: Who is the which?

The Court: State another question. I am trying to ask you this without leading you. That is what we are trying to do.

Q. (By Mr. Obenour): You say you don't know who gave you the instructions to hold out. You are not sure as to whom would have given you the instructions?

A. No, I am not sure. It had to be one or the other.

Q. One or the other. Who are you talking about?

A. Mr. Seijas or Mr. Forman.

(Testimony of George Adolph Heberling.)

Q. Did you have any conversation with either Seijas or Forman about holding out on other locations? A. Yes.

Q. What conversation did you have with them about holding out other locations?

A. I asked them if they were doing it in other locations, and they told me they were in a few, but [1233] most of the locations didn't have anything to do with it.

Q. I am sorry, would you repeat your answer?

A. That they were doing it with some other locations, but the most of them wouldn't have anything to do with it.

Q. During this period that you were associated in the pinball business with Seijas and Forman, who, as to between the two of them, Seijas or Forman, did you have the greater amount of your contacts with? A. Mr. Forman.

Q. And was there any reason for this?

A. Well, from the start of our partnership, I didn't have much confidence in Mr. Seijas.

Q. Accordingly, who did you contact when you had conversations about the hold outs or bringing the money in?

A. Practically all the time with Mr. Forman.

Q. What was the purpose of this hold out as—first of all, did you have conversations with Seijas and Forman as to the purpose of the hold outs?

A. Yes.

Q. What was the conversation?

A. If I remember, as near as I can recall, I

(Testimony of George Adolph Heberling.)

told them that I had never done anything like that, and I was—I wanted to discuss it with my brother sometime, and he says, "You will have to use your [1234] own best judgment as to what you are going to do about that."

Q. Who said that? A. My brother.

Mr. Mead: I move that be stricken.

The Court: The statement of his brother is excluded.

Q. (By Mr. Obenour): Did you discuss with Seijas and Forman as to the purpose of the hold outs?

A. Yes. The purpose of the hold outs was to take care of the political situation.

Q. Was there any conversation with Seijas and Forman about the tax consequence of the hold outs?

A. No, not at the beginning.

Q. Was there at any time?

A. Later on I became very concerned about it.

Q. What conversation then was there about it between Seijas and Forman and yourself concerning the tax effect of the hold outs?

A. Well, there was very little conversation about the tax effect of the hold outs. I don't remember any particular conversation about that.

Q. Did you have any conversation with either Seijas or Forman as to holding out in order to save the tax money for that you were reporting?

Mr. Mead: Objected to as a leading question, your Honor. [1235]

The Court: Yes, it is leading.

(Testimony of George Adolph Heberling.)

Q. (By Mr. Obenour): Was there any time that the hold out was not split by you with the location owner? A. No.

Q. Were you ever given any instruction by either Seijas or Forman not to split on any particular times with the location owner? A. No.

Q. What would you do with this money you received that was not reported?

A. The money that I got, which was very little, I kept——

Q. No, sir, I am referring now to the money that wasn't reported on the receipts. What would you do with it?

A. Well, I handed it to Mr. Forman.

Q. Did you ever receive any of it?

A. I received some of it, yes, sir.

Q. When? A. From time to time.

Q. From whom?

A. From Mr. Forman, I believe.

Q. And what would be the form of the money you would receive from Mr. Forman?

A. Cash.

Q. Would you have any conversation with Mr. [1236] Forman as to what this money was?

A. None particularly. I knew what it was.

Q. What would you do with your half of the money you had received?

A. I kept it in a safe, and at the end of the year I was very concerned about it, so I discussed it with my brother and with my accountants, and

(Testimony of George Adolph Heberling.)

I asked my accountant what I should do about it.

Mr. Mead: Objected to——

The Court: What you said can be stated, but not what the accountant said to you.

Q. (By Mr. Obenour): Did you inquire as to how this money should be handled on your own tax returns from an accountant? A. Yes.

Q. And were you advised? A. Yes.

Q. And did you act in accordance with the advice you received? A. Yes.

Q. What did you do?

A. I paid on it under miscellaneous income received.

Q. Did you report this money you had been given, this unreported money, on your own tax return? A. On my own tax return. [1237]

Q. And how did you report it?

A. Under miscellaneous income received.

Q. And has this matter been investigated by Internal Revenue Agents?

A. They had a very thorough investigation of my tax returns.

Q. And were you required to pay anything additional on this?

A. They were satisfied that I had paid my tax.

Q. At the time did you have knowledge as to whether or not Jerry Meyers was making similar hold outs in his collections?

A. Well, I could get very little information from Jerry Meyers. I tried to find out several things,

(Testimony of George Adolph Heberling.)

but I couldn't so I dropped the whole matter. I didn't try to find out anything.

Q. Was Jerry Meyers working for you?

A. Supposedly so.

Q. And what was your association between Jerry Meyers and yourself? A. Very unfriendly.

Q. And did you receive any information from him as to any practice he might be following?

A. He refused to give me any.

Q. Did you receive any receipts from either [1238] Seijas or Forman of any additional unreported income from collections other than those you were making? A. None.

Q. Did you receive any money held off from Meyers' checks?

A. I might have received a little.

Q. And would you have any way of knowing what money you were receiving from Forman as to being your collections or anyone else's?

A. I assume that they were from some other hold outs in other locations.

Mr. Mead: I move that be stricken.

The Court: Yes, the answer is stricken.

Q. (By Mr. Obenour): Were you told anything as to whether the money you received from Forman was any share of your interest in the company?

A. Yes.

Q. What were you told?

A. It was a share of the hold outs.

Q. Did you receive any money as your share of the income reported on the books of the company?

(Testimony of George Adolph Heberling.)

A. I received all of that.

Q. And did you receive any partnership informational returns as they were prepared each year reflecting the amounts reported by these partnerships of which you had an interest? [1239]

A. Yes, I was giving my returns to Mr. Renstrom, I believe.

Q. And did you receive the money that was reported on the information returns? A. Yes.

Q. And did you report that money on your own return? A. Yes.

Q. And this money additional that you reported, was that reported somehow?

A. Under miscellaneous income.

Q. Was this miscellaneous income reported by you then money received from the company in addition to the amount received and reported?

A. Yes.

Q. How long did you continue your association with Seijas and Forman in the pinball business?

A. Up to early in 1945.

Q. What happened then?

A. Well, I became very unhappy over the situation and wanted to get out. I believe sometime in late '44 I suggested that they buy me out, that I wanted to get out, and I was informed by Mr. Seijas or Mr. Forman that Mr. Seijas was going to buy me out, so the deal was made entirely with Mr. Seijas at that time.

Q. And were you bought out?

A. I beg your pardon? [1240]

(Testimony of George Adolph Heberling.)

Q. Were you bought out?

A. I was bought out.

Q. Now, at this time how many routes did you have? A. In this partnership?

Q. Altogether. A. With my brother, too?

Q. Well, in Kitsap County and Bremerton, what routes did you have an interest in?

A. I had a half interest at that time in Bremerton, American and United.

Q. United of Bremerton? A. Yes.

Q. Did you also still have your county route apart from that?

A. I also had my county route which I didn't sell.

Q. What did you sell?

A. Just my partnership in the Forman and Seijas partnerships.

Q. Three city routes? A. Yes.

Q. And you sold to whom?

A. To, I thought, Mr. Seijas.

Q. And how much did you receive?

A. I believe $40,000. It was either $35,000 or $40,000.

Q. Did you receive a check in this amount?

A. Yes, I received a check from it.

Q. From whom? A. Mr. Seijas.

Q. How long did these hold outs continue to your knowledge?

A. Well, they continued all the time I was with them.

(Testimony of George Adolph Heberling.)

Q. During this time, who did you principally turn over your money to?

A. Mr. Forman, I believe.

Q. Handing you Exhibit 76 to 79, have you previously examined Exhibit 76 to 79?

A. I have seen some of these.

Q. Have you examined the books to determine whether any entries are in your writing or not?

A. There is none in my writing.

Q. Have you ever noticed any entries referring to George, "Geo. H. O." and "C. N."?

A. I have seen some of them, yes.

Q. Would you have any knowledge as to whether or not those were a record of the receipts you held out and turned over to Mr. Forman?

A. Well, these amounts I can't be too sure of. My memory won't go back that far.

Mr. Mead: I object to his testifying further, your Honor. [1242]

The Court: Yes. Ask another question.

Q. (By Mr. Obenour): You say as to these amounts—during this time reflected in the Exhibits 76 to 79, were you making hold outs of the Crow's Nest and Knett's and turning the money over? A. Yes.

Q. Do you now have any recollection of the amounts?

A. No, not the exact amounts, no.

Q. After you sold out your city route, the interest in the city routes, what routes did you have then?

(Testimony of George Adolph Heberling.)

A. I had my county route and interest in the Seattle operations.

Q. Did you later buy any additional routes in Kitsap County? A. Yes.

Q. What routes did you buy?

A. We bought out Mr. Schneiderman and myself bought out their county route.

Q. "Their" being whom?

A. I beg your pardon?

Q. Whose county route?

A. Mr. Forman's and Seijas' county route.

Q. Who is Mr. Schneiderman?

A. Mr. Schneiderman was—the first time I met Mr. Schneiderman, Mr. Forman brought him to my [1213] house and introduced him. Previously I think he had been in the gas business, and that was my first time I had ever met him.

Q. When was this?

A. In '46 sometime, I believe.

Q. Could it have been the last part of '45?

A. It could have been.

Q. In any event, had you ever been acquainted with Mr. Schneiderman before that time?

A. No.

Q. And who bought him to your house?

A. Mr. Forman.

Q. What did he say when he brought him to your house, Mr. Forman?

A. That he introduced me to him, and he was interested in buying their route out and if I wouldn't be interested in going in with Harry and

(Testimony of George Adolph Heberling.)

buying in with him, inasmuch as Mr. Schneiderman didn't have enough money to swing the route.

Q. Did Mr. Forman tell you the price that they asked for their county route? A. Yes.

Q. And what was it?

A. Forty thousand dollars.

Q. As a result of that conversation, what was decided? [1244]

A. ell, with consider*ation* discussion with my brother, of course—is that all right?

The Court: Don't tell what your brother said.

Q. (By Mr. Obenour): Did you discuss it with your brother?

A. Yes, and decided to go in with Mr. Schneiderman to buy the route.

Q. What were the terms under which you bought the route? A. Cash.

Q. How much?

A. Twenty thousand apiece.

Q. Twenty thousand apiece as to whom? Who put up the $20,000 apiece?

A. I put up $20,000 and Harry Schneiderman put up $20,000.

Q. Whom did you pay?

A. Well, I believe that Mr. Schneiderman handled the transaction. I gave Mr. Schneiderman my $20,000, and he went and completed the deal with Mr. Forman.

Q. And thereafter did you continue to operate the county route?

A. Yes, I continued to operate my county route

(Testimony of George Adolph Heberling.)

as before, and Harry Schneiderman operated the other route.

Q. And did you receive, then, half interest in the formerly Forman and Seijas county route?

A. Correct. [1245]

Mr. Obenour: I believe that is all.

The Court: You may cross-examine.

Cross Examination

Q. (By Mr. Mead): When did you sell your interest out?

A. I am a little bit hard of hearing.

Q. When did you sell out the interest in the city routes?

A. In—do you mean you are speaking of the Forman routes—Forman-Seijas' City of Bremerton?

Q. I am speaking of the transaction you say you sold out to Seijas for $35,000 to $40,000 and got a check from him: when did you do that?

A. To the best of my knowledge it was sometime in '45.

Q. Do you know whether it was early in the year or late in the year, or when was it?

A. It slipped my memory a little bit. To be truthful, I have forgotten.

Q. Well, would it be March—summertime or in the fall? A. I think it was March.

Q. I beg your pardon? A. I am not sure.

Q. You are not sure? A. I am not sure.

Q. All you can say is that you sold out some-

(Testimony of George Adolph Heberling.)

time in 1945?, [1246] A. That is right.

Q. You haven't been back into your records to refresh your memory about the dates or any of these transactions? A. No.

Q. I think you stated that you did all of the collecting while you were associated with Seijas and Forman insofar as the places known as the Crow's Nest and Knett's were concerned?

A. Correct.

Q. And that continued right up to the time you sold out? A. Correct.

Q. And that was because you were well-acquainted with these people, is that right?

A. That was the reason, yes.

Q. Now, were all of the collections that were made from the Crow's Nest and Knett's that you have described you made, known to the owner of those locations? A. Yes.

Q. Now, you have stated that there was a hold out there and that money was taken off the top from these two locations during the time you were making the collections, is that correct?

A. That is correct.

Q. Was that money divided with the location owners? A. Yes. [1247]

Q. And the location owners then knew that there was a hold out at that location?

A. In those two particular locations, yes, sir.

Q. And by that I mean you didn't steal any money from the owners of those locations?

A. I hope to tell you I didn't steal any money.

(Testimony of George Adolph Heberling.)

Q. Now, I think you stated that it was discussed —the reason was discussed for this hold out that they were license money and taxes and political charges, is that right, and that was the reason for it?

A. That was the reason for it. That was the reason that was brought out.

Q. That was the reason brought out for the hold out? A. Yes.

Q. And that is the reason that Mr. Forman explained to you that there would be a hold out or some money taken off the top?

A. Either Mr. Forman or Mr. Seijas. I wouldn't be too sure.

Q. Now, I think you said that of this money that was taken off the top for that purpose, that would apply to all the collections that you made where there was a hold out from these two establishments, Knett's and the Crow's Nest, is that right? A. Yes. [1248]

Q. And I think you stated you got some of that money, but you went on to add that the money which you got was very little, is that right?

A. That is right.

Q. Now, what do you mean by very little?

A. Well, I don't believe I was getting—because there was some other locations I felt that I wasn't told about.

Q. Well, I mean the money that you got from these locations that you know about was very little, is that right?

A. Well, I imagine, possibly—my thought on

(Testimony of George Adolph Heberling.)

that, in seeing these figures that I have talked about, why, I was amazed of the amount of money that it was.

Q. That is my point. Now, having seen these figures and these diaries which Mr. Seijas said he kept during this period of time, are you amazed at those? A. Yes, I am amazed at those.

Q. You are amazed at them? A. Yes.

Q. The amount of money that was involved in so-called hold outs from these two locations that you have personal knowledge of was much less, then, than any such figures as that, was it not—much smaller, in other words? A. I would say so.

Q. And a hold out, any part of that you maintained for any political purpose or tax money or the like, was very [1249] little, I think you said?

A. Well, at least—I am trying to refresh my memory. It seems like that was a lot of money.

Q. I beg your pardon?

A. It seemed like an awful lot of money.

Q. Do you mean these Seijas figures seemed like a lot of money? A. Yes.

Q. I think you stated you were amazed at them, is that right? A. Yes.

Q. You knew about what the collections were at the Crow's Nest and Knett's and you were familiar with the total receipts of his business, at least, for those two locations, weren't you, sir?

A. Yes, as near as I can remember.

Q. And you were in this business prior to the time that you entered into the business with Seijas

(Testimony of George Adolph Heberling.)

and Forman, and you continued in this type of business afterwards, and you are generally familiar with the receipts that could be anticipated from this type of business, are you not, during this period?

A. I think so.

Q. Now, as to Knett's and the Crow's Nest, who were the owners of the Crow's Nest during this period of 1942 to '45 when you sold out? [1250]

A. Well, to start with, there was two brothers, I think, at the time we went in there by the name—the Mattox Brothers, and they afterwards—I don't know when or I can't recall the year. They sold out to a man by the name of Hawthorne and Rusden.

Q. So Haywthorne and Rusden were the owners of the Crow's Nest during the latter part of this time, were they, during these years?

A. That is correct, yes.

Q. I assume you would be acquainted with them because you knew those owners where you made the collections? A. That is right.

Q. And now Mr. Hawthorne's name was what, sir, his full name?

A. I don't know—Dick Hawthorne.

Q. And Mr. Rusden's name?

A. Charley Rusden, I believe.

Q. Charles Rusden. Where is Mr. Dick Hawthorne at the present time?

A. He is in the pinball business in Seattle.

Q. And Mr. Rusden—where is Mr. Charles Rusden at the present time?

(Testimony of George Adolph Heberling.)

A. Mr. Hawthorne is in Seattle. He is in Seattle, and Mr. Rusden, I don't know where he is.

Q. You don't know where he is? [1251]

A. No.

Q. Now, with regard to Knett's, what was the name of that establishment?

A. Charleston Club.

Q. And who were the owners of that club during this period? A. The man is dead.

Q. I beg your pardon?

A. The man has died. His name was Knett.

Q. And he has since passed away?

A. Yes, sir, he has passed away.

Q. Do you know when he passed away, sir?

A. Several years ago. I don't recall exactly.

Q. Now, I think you stated that during the period of time you had this association with Seijas and Forman that your dealings were largely with Mr. Forman because you had no regard for Mr. Seijas, is that right?

A. Let's put it he put no confidence in me.

Q. No confidence in Mr. Seijas, and I think you said that you had an unfriendly feeling towards Mr. Meyers, is that right?

A. I felt that Mr. Meyers had an unfriendly feeling towards me.

Q. And you felt he was unfriendly towards you? A. Very much so.

Q. And I assume that was somewhat of a mutual feeling, then? [1252]

A. No, I don't think so. I tried to obtain infor-

(Testimony of George Adolph Heberling.)

mation from him. After all, he was on my payroll as well as Mr. Forman and Mr. Seijas', and I felt I was entitled to any information about locations or something that I so desired. However, I received nothing but grunts or he'd just walk away from me.

Q. Do you have a friendly or unfriendly feeling as far as Mr. Forman is concerned?

A. No, I have none.

Q. Do you have a friendly or unfriendly feeling? A. I don't have an unfriendly feeling.

Q. You don't have an unfriendly feeling?

A. No.

Q. I will ask you, Mr. Heberling, whether or not Mr. Meyers, the gentleman you referred to, made the statement in your presence that he had attempted to secure employment in the theatre business with Mr. Forman, that Mr. Forman had not employed him, and that he was mad at Mr. Forman because of that fact and unfriendly to him because of that fact?

A. Yes, he told me that Bill had let him down.

Q. And had not employed him in the theatre business? A. That is right.

Q. And he was unfriendly to Mr. Forman?

A. This was after years. This was not during the time. [1253]

Q. Yes, I understand that. When was that statement made, sir? A. At this first trial.

Q. At Mr. Seijas' trial? A. Yes.

Q. And both you and Mr. Meyers were witnesses

(Testimony of George Adolph Heberling.)

in Mr. Seijas' trial, were you not, sir? A. Yes.

Q. And so it was on the occasion of your visiting with Mr. Meyers in the witness room that that observation was made, was it, or during the course of that trial?

A. It was in just general conversation.

Q. Yes, I understand.

Mr. Mead: I think that is all, sir.

Redirect Examination

Q. (By Mr. Obenour): You say you were amazed at the figures you saw there, Mr. Heberling?

A. I said I was surprised at the figures.

Q. Why were you surprised?

A. Well, I just couldn't—well, I just really couldn't visualize that amount of money.

Q. What knowledge did you have of the amount of money that was being held out? [1254]

A. I had no knowledge.

Q. Did you know anything about any hold outs other than what you were holding from Kuett's or the Crow's Nest? A. No, I had no knowledge.

Q. Did you keep any records of the amount you yourself were holding out from those two locations?

A. No, I did not.

Q. Did you expect to get half of all of the money you held out, or was part of it to be diverted to some other use?

A. I was under the impression it was to be diverted to some other use.

Q. And the only knowledge that you would have

(Testimony of George Adolph Heberling.)

of the hold outs which you received would be what you got back from Mr. Forman as compared to what is reflected in Seijas' records?

A. Yes, that would be the only comparison that I could use.

Q. Did you receive half of the amount that was shown as the total hold outs of this business?

A. By no stretch of the imagination.

Q. Did you receive half of the amount shown as being hold outs by you?

A. Yes. That is about what I think, somewhere in those figures. [1255]

Q. You say you have been in the business for sometime and have a knowledge of its returns. What, sir, were you reporting for the returns for the county routes during the years '42 to '45?

A. Well, county routes were never as large. County collections were never by any—were never as large as the city collections. Bremerton collections were amazing in comparison with the county route.

Q. Yes, sir, but what was your own business grossing apart from your contact with Seijas and Forman? What was your own business grossing for receipts during the period of '42 to '45?

A. We were grossing enormous figures.

Q. What were they?

A. Do you mean in King County or Bremerton?

Q. Bremerton, Kitsap County, your locations there.

(Testimony of George Adolph Heberling.)

A. Well, it's a little difficult question to answer. I can't exactly recall.

Q. What is your best recollection?

A. I would say that they were four or five times greater than ordinary.

Q. What do you mean, ordinary?

A. Times like—ordinary times before the war; before the war it was, I would say, it was five to ten times as great during the war than it was previous to the war. [1256]

Q. What would be your best estimate or recollection of the gross take that you were showing for your county route during '42 to '45?

Mr. Mead: That is pure estimate, your Honor, and has no bearing upon anything involved here.

The Court: I think so. Overruled.

The Witness: Well, in terms of figures, I can't recall a figure then, but I would say they were, the county locations, were probably about half as great as the city locations. Would that answer it?

Q. (By Mr. Obenour): No, sir. What were you reporting for your own county route apart from the interest you had with Seijas?

The Court: As the gross receipts?

Mr. Obenour: Gross receipts.

The Witness: Well, I can't remember that.

Q. (By Mr. Obenour): What is your best recollection?

Mr. Mead: He said he couldn't remember, your Honor.

(Testimony of George Adolph Heberling.)

The Court: I understand. If he can make an estimate, he can be required to do that.

The Witness: I would say it was probably about five or six thousand a week. [1257]

Q. (By Mr. Obenour): Five or six thousand a week?

A. Yes, that would be the gross of the county.

Q. That would be twenty-five hundred to three thousand dollars to your county route?

A. That would be the gross. I would say I was probably getting about three thousand a week, twenty-five hundred to three thousand a week.

Q. What were you reporting yourself during this period from pinball income, Mr. Heberling?

A. I think about, during those war years, about $150,000.

Mr. Mead: This is speculative and has no materiality or relevancy to issues involved.

The Court: What he reported, I think, is not of interest.

Mr. Obenour: As to interest——

The Court: It might involve a lot of other facts. He has given the figures on the gross. The reporting amount might be dependent upon a lot of other factors. We don't want to go into it.

Q. (By Mr. Obenour): And after 1945, how did —what was the results, your gross receipts of your county routes?

Mr. Mead: Objected to as being entirely lacking in materiality and has no bearing or relevancy to issues involved here and is pure speculation. [1258]

(Testimony of George Adolph Heberling.)

Mr. Obenour: I submit they went into the matter, his knowledge and familiarity with receipts.

The Court: Yes, I think so. That inquiry was made, and I believe it is legitimately within that field. You may answer.

Q. (By Mr. Obenour): How would the gross receipts compare in the years following 1945 to the amount you had given for '42 to '45?

A. I would say they dropped. I would say they were about 20 per cent of what they were during 1945. They have dropped 80 per cent.

Q. Over what period of time?

A. They started dropping off in '47, '48, '49.

Q. Started dropping off in '47? A. Yes.

Q. And up until that time, how would your gross receipts compare?

A. They held right up particularly during the war years.

Q. Until '47?

A. Until about early in '47, I guess.

Q. All right, sir, and was this drop of 80 per cent immediate or was it a gradual drop from '47-8-9 to date? A. It was a pretty rapid drop.

Q. And what time was this—any particular time this [1259] occurred?

A. I would say in '49—if I am not getting off the subject—in '49 it dropped so bad that we were ready to abandon the business then. I believe that Mr. Forman or Mr. Seijas walked away from his operation in '49.

(Testimony of George Adolph Heberling.)

Q. What is your feeling towards Mr. Forman now, Mr. Heberling?

A. Well, we are not unfriendly. I have no particular feeling one way or another.

Q. And did you testify in Mr. Seijas' trial?

A. Yes.

Q. And do you have any feeling towards Mr. Seijas, friendly or unfriendly?

A. Not particularly, no.

Q. Did you testify in any matter in the Seijas trial that you have not testified to here?

A. I have tried to tell nothing but the truth.

Q. No, sir. Did you testify in the Seijas trial upon any matter that you haven't testified here?

A. No.

Q. You testified here in any manner that you didn't testify in the Seijas trial? A. No.

Q. Is your testimony in any way affected by any feelings you have towards any of the parties?

A. No.

Q. Did Mr. Meyers give any statement to you that any feelings he had would affect his testimony in this trial or in the Seijas' trial?

Mr. Mead: That is improper and calls for a conclusion asking specifically what he stated. That calls for a conclusion.

The Court: Yes, it does call for a conclusion.

Mr. Obenour: I ask the question to be read, your Honor. I believe it was "If he said anything as to his feeling."

The Court: You can ask him if anything more

(Testimony of George Adolph Heberling.)

was said beyond what has been covered, but the witness' inference or conclusion about his lack of saying something is not proper.

Q. (By Mr. Obenour): Did Mr. Meyers say anything to you that because Forman let him down he intended to make any statement either in the Seijas trial or Forman's trial?

A. No, he did not.

Q. Have you talked to Mr. Forman concerning your testimony here? A. I beg your pardon?

Q. Did you talk to Mr. Forman at any time concerning your [1261] testimony here?

A. I think so.

Q. What? A. I don't see—why-what?

Q. Have you? A. Have I?

Q. Yes, sir. A. No.

Q. Have you seen him about the courthouse?

A. Yes.

Q. And did you have conversation with Mr. Forman as to what you were to testify to?

A. Not as to what I testified to. I said simply my testimony was hurting.

Recross Examination

Q. (By Mr. Mead): Now, Mr. Heberling, with regard to these two locations where you stated you made the collections, the location owners there knew if they were any holdouts, did they not?

A. Yes, of course they did.

Q. You say, "Of course they did." Why would they know about it?

(Testimony of George Adolph Heberling.)

A. Because they had the money in their possession.

Q. And what was the practice when this money was counted [1262] out in those two locations as well as other locations, would not the location owners be there when the money was counted, their money was counted?

A. I don't know what procedure that Jerry Meyers went about in his particular——

Q. I am talking about what you did.

A. In my particular instance, I explained to you quite thoroughly, I think, how it was handled, that the locations were—the money was counted out because they had to have nickels to do business with and that the IOU's given to the merchants and myself and so he had to account, naturally, for that amount of money that he was giving in nickels.

Q. But wasn't the merchant or the location owner present when this was done?

A. Of course.

Q. Of course he was present?

A. Of course he was present.

Q. When you say you explained it to me, you explained it from the witness stand?

A. Yes. Pardon me if I——

Q. I am not being critical, Mr. Heberling.

A. I am trying to explain it to everybody, then.

Q. I want to get the facts. You and I have never had any conversations at all about these facts, have we? [1263] A. No.

(Testimony of George Adolph Heberling.)

Q. And when you say you explained it to me, you meant you explained it to the Jury and here in the courtroom, is that right, sir?

A. That's right.

Q. Now, it was, then, the practice that these two locations when this collection was made, or the collections made, for the location owners to be there and present when the money was counted?

A. Yes.

Mr. Mead: Thank you, sir.

The Court: That is all, Mr. Heberling. You are excused and may leave whenever you wish.

(Witness excused.)

Call another witness.

Mr. Billinghurst: Call Mr. Rockwell.

The Court: You have been previously sworn, Mr. Rockwell. Take the stand.

W. A. ROCKWELL

recalled as a witness on behalf of the Plaintiff, having been previously sworn, was examined, and testified further:

Direct Examination—(Continued)

Q. (By Mr. Billinghurst): Mr. Rockwell, yesterday you identified a document labeled [1264] Plaintiff's Exhibit 121 as a work sheet of the capital accounts of the business known as the Dock Concessions, is that correct? A. Yes, sir.

Q. And I believe you stated that that work sheet was in your handwriting?

A. That's right.

(Testimony of W. A. Rockwell.)

Q. And that it was based on accounting records required by you as part of the business records and accounting records of this concern from time to time in the routine of accounting transactions with the firm? A. Yes.

Q. And I believe also you stated, Mr. Rockwell, that the records including the data from which you prepared the worksheets you did not have in your possession in the courtroom yesterday, is that right?

A. Yes.

Q. Do you have that record now, or records?

A. I do.

Q. What is it? Can you describe it?

A. Well, it is—this is the journal of which the receipts and the disbursements over these years in question were written up in my office, and from these sheets with the journal entries at the end of the year is where the information came from that went on to this sheet—— [1265]

The Court: Give the exhibit number.

Mr. Billinghurst: 121.

The Witness: Exhibit 121, and these records were used in both Exhibit 121 and also on the income tax returns, for the preparation of the income tax returns.

Q. (By Mr. Billinghurst): And the basis of the capital account summary and worksheet which you have, then, is the accounting book which you have in your possession?

A. That was also prepared from the information that is accumulated here.

(Testimony of W. A. Rockwell.)

Q. And who was the journal prepared by?

A. This was prepared in my office.

Q. And under whose direction?

A. Part of my work or part of some of the employees that I had in my office.

Q. And has the journal been in your possession since it has been prepared? A. Yes, sir, it has.

Mr. Billinghurst: At this time we will renew our offer.

The Court: Your offer of Exhibit 121?

Mr. Billinghurst: Yes, sir.

The Court: All right. Do you want to look at the books? [1266]

Mr. Mead: Your Honor, we won't attempt to look at them now.

The Court: I realize that, and if you want some time to do that——

Mr. Mead: I suggest it be reserved. I suppose he would like to introduce this?

The Court: Yes. The offer of Exhibit 121 is made. Now, the books from which it is derived are here. If you want to see them and have some time to do that, of course, I will give you an opportunity.

Mr. Mead: It is an extensive document, your Honor. I imagine it would take a little time.

The Court: However, the witness says all data contained in this transcript are taken from these records, and I want to give you an opportunity to satisfy yourself, or you can do it on voir dire if you wish.

(Testimony of W. A. Rockwell.)

Mr. Mead: Can we do that? We have objected to the materiality of this exhibit, and we reserve the right to make additional objection after examining the journal from which it is prepared.

The Court: The only thing is, I am concerned about getting on with it now, if you want, however, we can take it up after noon recess. [1267]

Mr. Mead: That might be preferable because it might take a few minutes to look at the journal.

The Court: Mr. Rockwell will be free to explain to Mr. Mead anything he may desire during recess, and that will expedite matters.

All right. Step down, Mr. Rockwell.

(Witness excused.)

AVERY J. SINGER

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Avery J. Singer, S-i-n-g-e-r.

Direct Examination

Q. (By Mr. Billinghurst): Where do you reside, Mr. Singer? A. Seattle.

Q. What is your business?

A. Safe deposit vault.

Q. I am sorry, I couldn't hear you.

A. Safe deposit vault.

Q. Where is it located?

A. 507 Third Avenue. [1268]

(Testimony of Avery J. Singer.)

Q. In what building?

A. It is known as the Morrison Hotel Building now. It formerly was the Arctic Building many years ago.

Q. Where is it located with reference to the Smith Tower?

A. Right—the Smith Tower is directly west of us across the alley.

Q. How long have you been associated with the firm? A. Going on 23 years.

Q. What is the name of the firm?

A. Day and Night Safe Deposit Vault, Incorporated.

Q. What is your present capacity with the firm?

A. President and Treasurer.

Q. Are you acquainted with Mr. Army Seijas?

A. Yes, sir.

Q. Do you recall whether or not he has had any accounts with your firm?

A. He has had two or three in the past years.

Q. Do you recall approximately when?

A. Well, maybe 10 or 12 years ago, up to several, two or three or four months ago, as near as I can tell.

Q. Are you acquainted with Mr. William Forman? A. As a customer of the firm only.

Q. Do you recall whether or not he has had any previous accounts with your firm in the past?

A. Yes, he had an account. [1269]

Q. About when?

A. I believe—I wouldn't know without the rec-

(Testimony of Avery J. Singer.)

ord. His record card will show exactly. I am only guessing. I can't tell from memory. There is only one record card.

Q. Mr. Singer, I am handing you Government's Exhibits for identification No. 66 and 67. Can you take a look at No. 66 and tell me what it is, please?

A. 66 exhibit is a card, contract card, belonging to Army Seijas' father.

Q. What is the date of it?

A. It was dated 1938 when he took the box.

Q. And does the card indicate when that account was closed? A. February 8, '41—'51.

Q. Does the card indicate who in addition to Mr. Seijas, senior, if anyone, was to have access to the box?

A. Army Seijas was signed on as a co-renter September 15, 1942.

Q. Now, will you take a look at No. 67?

A. Yes.

Q. Can you describe it?

A. Well, this seems to be a list—seems to be a list of entry slips.

Q. I believe the exhibit is in the envelope, Mr. Singer. Will you look at the envelope and its contents? [1270]

A. There are two entrance slips, one on January 12, '48, one in March of 1948.

Q. And to which account do they pertain?

A. To Box 1141. That is the same box as Exhibit 66, two entrance slips for that particular box.

Q. Now, Mr. Singer, you are the operator of

(Testimony of Avery J. Singer.)

the safe deposit vault business known as Day and Night Bank, are you not?

A. Day and Night Safe Deposit Vaults.

Q. And as such are you the custodian of records? Are you in charge of the records over there?

A. No. My secretary takes care of all records.

Q. But does she do so under your supervision and instructions? A. In a general sense, yes.

Q. Do you recognize these exhibits as being part of your records, or not?

A. Yes, I recognize this card because my name appears when Mr. Army Seijas signed on his father's box in September of '42. I did the transaction because my signature witnessed the transaction.

Q. Now, do you recognize the entry slips?

A. As of his signature, yes, or similar. They couldn't be anybody else's.

Q. The slips themselves?

A. He signs—do you have another slip of Army Seijas, [1271] because it appears that one of these slips was signed for two boxes. I am not sure. It looks like——

The Court: The only question now, Mr. Singer, is, are you satisfied these are original records of your organization?

The Witness: Yes, although they are signed differently. He sometimes signed "A. Seijas" and sometimes "Army Seijas."

Q. (By Mr. Billinghurst): Will you identify those two exhibits, those just handed to you?

A. Yes, sir, I do.

(Testimony of Avery J. Singer.)

Q. What is the number of the exhibit in your hand? A. No. 62.

Q. What is it, please?

A. A contract card for a safe deposit box for Mr. W. R. Forman, and it was rented in March 14, 1942.

Q. When was it relinquished?

A. March—just a minute here. April 22, 1952.

Q. What is the number of the box?

A. No. 976.

Q. What was the rental of the box at the time when the box was taken out by Mr. Forman?

A. When he rented the box it was a small box rented at that time. During the depression years we rented them small boxes for $4 a year. [1272] The next year he transferred to a larger box, or the next one. In months afterwards he transferred to a larger box which was an $8 box and retained that box until the time of cancellation.

Q. Can you examine the next exhibit, the one in your left hand—your right hand.

A. The one of the entrance slips?

Q. Yes. A. Yes.

Q. What number is it, please?

A. It is numbered 65. I have a list here. In order to clarify any misunderstanding as to these entrance slips, when we were requested something more than a year ago to produce the entrance slips and the contract cards for Mr. Seijas, Mr. Forman's box was included in the summons. We, therefore—my secretary looked carefully. We were sup-

(Testimony of Avery J. Singer.)

posed to produce the records up to '48 for the Forman box, which we did at that time, because the slips prior to '48 had been destroyed, which we do every three or four years. We have to get rid of a ton of stuff that is way back yonder. So that is why all we have on Mr. Forman's box is the entrance slips for 1948. We were asked to have them from '42 to '48, but, you see, the '42s to '48 had been destroyed before we got the summons. Therefore, we had '48 and we saved them at that time. [1273]

Q. All right, sir. And then all of these records are the last available records concerning these accounts, is that right?

A. These are the only records available that we have on Mr. Forman's Box is what we have presented to the court.

Q. Now, will you take a look at——

The Court: That is Exhibit 63? 63 is the entrance slips for Mr. Forman's box?

The Witness: No, is was on 65.

The Court: We better be sure and not get them mixed up. Get the slips back in the envelope.

The Witness: Here is the envelope I had them in.

The Court: Is that Exhibit 65?

The Witness: Yes.

Q. (By Mr. Billinghurst): Take a look at Exhibit No. 68.

A. 68 isn't here. I haven't any 68.

The Court: No, you have got the wrong number.

The Witness: You probably mean 64.

(Testimony of Avery J. Singer.)

Q. (By Mr. Billinghurst): Exhibit 67, I believe. A. I have 67.

The Court: That has been covered. That is two slips, one for January and March of '48. That has been covered.

Mr. Billinghurst: They have identical [1274] exhibit numbers on two exhibits.

The Court: Make sure they are not mixed up.

Mr. Billinghurst: Identical exhibits. This is the exhibit in question.

The Court: Let the witness see it again so there will be no misunderstanding. Give the other one back and we will give it another number. Which exhibit are you examining now?

The Witness: I am looking at 67.

The Court: Tell us about Exhibit 67.

The Witness: Well, there is a number of entrance slips, when a man came into his box.

The Court: What man?

The Witness: Mr. A. Seijas, from box 760. That is another box, 760, and there is another list made of that. I haven't got that list with me. The court has that, or the attorneys have that. There are sixteen entries in that box, and I don't know whether they are in order, I can give you all the dates of them.

The Court: They will appear on the slips.

Q. (By Mr. Billinghurst): Whose name appears on them, Mr. Singer?

A. Army Seijas and A. Seijas on all of them.

(Testimony of Avery J. Singer.)

Q. And which safe deposit account box number do they refer to? [1275]

A. 760 on all excepting one slip which includes 1141-N. A renter having two boxes may put both numbers on the one entrance slip if he chooses, because why make two. There is one ticket that he entered both boxes, and I can give you the date, April 8, '48, he went into both boxes.

Q. And is the same situation true with respect to this group of entry slips that you have described with respect to the others that they constitute the only existing records of entry in your possession now? A. Yes.

Mr. Billinghurst: We will make an offer of the exhibits, Your Honor.

The Court: Exhibits 62, 63, 64, 65, 66, and 67, are those now offered?

Mr. Billinghurst: Yes.

The Court: Is there one you haven't covered?

Mr. Billinghurst: That must be the one extra 67.

The Witness: What do you want, me to tell you about 64?

The Court: I don't want you to tell me anything.

The Witness: Pardon me. I just wanted to know what I am supposed to do. [1276]

The Court: That is perfectly all right. You are doing fine. I was just trying to help out and I think I got it confused. We better take a recess, and will you get this straightened out? There has been a double numbering and that caused a problem. We

(Testimony of Avery J. Singer.)

had better take a recess and we can get it all straightened out. Take the afternoon recess.

(Thereupon, a short recess was taken.)

Q. (By Mr. Billinghurst): Mr. Singer, will you now identify what is numbered Exhibit 64?

A. This card, in the first place, the box was No. 836-N and it was changed to 760, Box 760.

Q. What is the card, Mr. Singer?

A. How is that?

Q. What is the card?

A. It is A. Seijas, and I think in this case his father signed on the card as a co-renter.

The Court: Is it an application card? Is that what it is?

The Witness: This is a contract card, and, then, if I may continue, Mr. William Forman was signed on the card as a deputy at that time—at a future time. I think that would be December 11, but it doesn't show the year when Mr. Forman was signed on. Mr. Seijas witnessed it because— [1277] and above that in the same year "7-10-34". That is a long time ago—December 11, '34.

Q. (By Mr. Billinghurst): That is the time when the application was made?

A. That is the time that Mr. Forman was signed on this card as deputy.

Q. When was this account closed?

A. This account was closed out in February 1951.

Q. And, again, with respect to the other items which you have examined, and testified to, is that

(Testimony of Avery J. Singer.)

card part of the official files and business records of the Day and Night Safe Deposit Box?

A. It is.

Q. In whose handwriting is it?

A. Mr. Seijas, A. Seijas, and his father A. Seijas, which he used to signed and did sign on his original card, Armador Seijas, William F. or J. Forman, as near as I can make out the middle initial, as deputy, and Army Seijas signed it as a witness below it.

Q. I will now hand you what is identified as No. 62, Mr. Singer. A. Yes.

Q. I believe you have previously testified in part as to what this is?

A. This is Mr. Forman's individual card [1278] and the only one that I know of available at any time. As I said, he rented it in 1942 and moved to a larger box in '43.

Q. What date in 1943?

A. January the 7th, 1943, he took the larger box and retained that box until cancellation date of April 22, 1952.

Q. All right. Now, can you describe the smaller box that was originally rented, as to size?

A. It would be 23 inches long and four inches wide and about five and a half deep.

Q. And how large was the larger box?

A. The larger box would be approximately twice that size, at least two-thirds larger.

Q. Do you recall the dimensions of it?

A. I can't give you that exactly. I think they

(Testimony of Avery J. Singer.)

are about three and a half inches deep. They are all the same length, 22 or 23 inches long, all of our boxes are that length, and this box, and the $4 and $8 box, and it is a matter of depth. I can't tell you just exactly, but I think it is about three and a half inches deep instead of two inches. It is almost twice the capacity.

Mr. Billinghurst: At this time we will offer identification No. 62 which has been identified as Mr. Forman's application; No. 63, the entry slips relating to the same account of Mr. Forman; [1279] and No. 64, Mr. Seijas' application for Box No. 760; No. 65, entry slips relating to that account; No. 66, Mr. Seijas application for Box 1141, and No. 67, the entry slips relating to that account.

The Court: Are you satisfied these numbers are all straightened out?

Mr. Billinghurst: Yes, sir.

The Court: All right.

Mr. Mead: May I inquire of the witness, Your Honor?

The Court: Yes, you may.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Singer, with respect to Exhibit 64, you have identified that contract as a contract with your compay between A. Seijas, Army Seijas, and apparently his father, and stated that Mr. Forman was designated as deputy?

A. That third signature is deputy. We never permit but two principals on any one account. The third must be a deputy, if anything.

(Testimony of Avery J. Singer.)

Q. Yes, sir. Now, the signature that is on here, I will ask you if it isn't John Sullivan rather than Mr. Forman?

A. I don't see too well, but it is John Sullivan, the attorney. You are right.

Q. John Sullivan and not William Forman?

A. I apologize. I don't see too well, but I remember John Sullivan.

Q. The same as the prize fighter, John L. Sullivan? A. I know him intimately well.

Q. That is the name on this card as deputy, Mr. Singer, and not William Forman, isn't that right?

A. Yes.

Mr. Mead: We have no objection, your Honor, to any of these exhibits with the exception of 62 and 63 which have to do with Mr. Forman's box on the basis that it is incompetent and immaterial and do not pertain to any issue involved in this case.

The Court: The exhibits are all admitted, 62 to 67 inclusive.

(Thereupon, Plaintiff's Exhibits Nos. 62 to 67 inclusive, for identification, were admitted into evidence.)

Q. (By Mr. Billinghurst): Mr. Singer, do you have a recollection of the visits which Mr. Seijas made to your place of business during the years in which these boxes were rented by him?

A. I have many recollections, but I couldn't give you the dates of any of them.

Q. May I ask you if you recall approximately how often he [1281] visited these boxes during the

(Testimony of Avery J. Singer.)

earlier years of the decade of the 1940's, we will say in 1941, '2, '3, '4, and '5?

Mr. Mead: That calls for a conclusion. The witness stated he could not recollect, and the entry slips serve as the best evidence.

The Court: The entry slips are the best evidence.

Mr. Billinghurst: I believe the entry slips started with 1948.

The Court: The entry slips were destroyed prior to 1948?

Mr. Billinghurst: That is right.

The Court: The witness may give whatever he knows or remembers about it.

The Witness: If I may be permitted, I can explain to you gentlemen and the court a little bit. Way back 20 or 22 years ago I worked in my vaults every morning, and then later I only worked from 10 to noon when I put on more help, so that I contacted Mr. Seijas on many times, but I wouldn't know the time, what time of the day. If somebody was ill I might be on duty, or if somebody was on vacation. I might have waited on him, but I knew Mr. Seijas because he had several clients, elderly people that had boxes, and he would have to come with them and see about their will, and I know he used to come and go. Then, his father had a box, as shows in the evidence, and he signed on his father's box, and he had something to do with taking care of his father's affairs, and he had his own box, so that he would come and go, but I wouldn't say every day. To just be a rough guess on my part, maybe

(Testimony of Avery J. Singer.)

once a week, twice a week, we would see him going into the courthouse. We knew who Army Seijas was on account of his coming in frequently, even with his clients, as well as his own account.

Q. (By Mr. Billinghurst): Now, Mr. Singer, do you have any recollection as to how often Mr. Forman may or may not have visited his box during the years in question?

Mr. Mead: Same objection, your Honor. The best evidence would be the slips.

The Court: The slips prior to 1948 have been destroyed. Go ahead.

Mr. Mead: And also on the grounds of materiality and on the grounds that the witness would be required to guess, and it should be inquired of him first if he knows.

The Court: I think that is what the question [1283] now is, does he have any recollection of how frequently Forman used the box prior to the period when we have the records.

The Witness: In the earlier part, I don't even recall from the card when he rented the box, but if I knew what date he rented it, I know in the earlier period I used to wait on Mr. Forman quite often. I wouldn't say it was every day, and I might, if he came in after 10 and I was there, maybe I waited on him because my duty would be posting books, and I would wait on customers. If I was alone I waited on customers, and I always felt he was a business customer and was coming on business for the theaters.

The Court: We are not concerned about that.

(Testimony of Avery J. Singer.)

There is just the question of how frequently he was there is all.

The Witness: That is more than I could tell you.

Mr. Billinghurst: That is all. You may inquire.

The Court: Do you have any cross-examination, Mr. Mead?

Mr. Mead: I have just one question, your Honor. [1284]

Cross Examination

Q. (By Mr. Mead): How old are you, Mr. Singer? A. 80 years.

Mr. Mead: Thank you, sir. That is all.

The Court: You are excused, Mr. Singer, and you may leave whenever you wish, sir. Thank you.

(Witness excused.)

HARRY D. BALDWIN

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name, Mr. Baldwin, and spell your last name.

The Witness: Harry D. Baldwin, B-a-l-d-w-i-n.

Direct Examination

Q. (By Mr. Billinghurst): Where do you reside, Mr. Baldwin? A. Seattle.

Q. What is your business?

A. I am with the Washington Mutual Savings Bank.

Q. In what capacity? A. Vice president.

(Testimony of Harry D. Baldwin.)

Q. How long have you been with the bank?

A. Over 37 years.

Q. In your capacity as Vice president of the bank, are you in custody of the business records maintained by the bank?

A. I am in charge of the Mortgage Loan Department.

Q. And as such do you have access and control of records of the bank? A. Yes, sir.

Q. Are you acquainted with Mr. Army Seijas?

A. No, sir. I have met him but I wouldn't know him to see him now.

Q. Are you acquainted with Mr. Forman?

A. I know Mr. Forman.

Q. Do you recall, Mr. Baldwin, whether or not Mr. Forman has had any accounts with your bank?

A. Yes, sir. He has had two.

Q. Do you have any documentary records concerning those accounts?

A. I brought the two signature cards.

Q. Do you have them with you?

A. Yes, sir.

Q. Will you refer to this, please?

A. Yes, sir.

The Clerk: Plaintiff's Exhibit 129 has been marked for identification. [1286]

Q. (By Mr. Billinghurst): Will you identify those cards, Mr. Baldwin, as to what they are?

A. Well, the first one is a signature card indicating the savings account opened by Mr. William R. Forman on April 27, 1933. The second is another

(Testimony of Harry D. Baldwin.)

savings account opened by Mr. Forman, William R. Forman, administrator of the estate of Michael, and it looks like Trenton. I can't quite read it. That is in July 6, 1943. It is Thornton, pardon me. T-h-o-r-n-t-o-n.

Q. Whose signature appears on those cards?

A. William R. Forman.

Q. Now, are there any other signatures on those cards? A. No.

Q. What is the purpose of the signature cards?

A. Well, for means of identification in case Mr. Forman wished to withdraw the funds at a later date.

Q. In what manner?

A. By withdrawal slip, by mail possibly.

Mr. Billinghurst: At this time we will introduce Exhibit 129.

Mr. Mead: If the Court please, the exhibit has been identified as a signature card of Mr. Forman as administrator of the estate of Michael Thornton opened in July 1943, and the other one is a signature card of a savings account opened by [1287] Mr. Forman in 1933, April 1933, and the account having been closed does not appear just when it was, and we object to the exhibit on the grounds of materiality, relevancy to the matter involved in this controversy.

The Court: It doesn't appear at present to have any relevancy. Until that appears I will reserve.

Mr. Billinghurst: Thank you, your Honor.

Q. (By Mr. Billinghurst): Mr. Baldwin, do you

(Testimony of Harry D. Baldwin.)

know whether or not Mr. Seijas made an application for a loan with your bank at any time?

A. Yes, he did.

Q. Do you have any documentary records of such an application? A. Yes, we do.

The Clerk: Plaintiff's Exhibit 130 has been marked for identification.

Q. (By Mr. Billinghurst): What is Plaintiff's Exhibit 130, Mr. Baldwin?

A. Well, this is an application for a loan of $30,000 dated April 27, 1943.

Q. And who was the applicant?

A. Signed William R. Forman, and accompanying it is another application signed by his partner in this enterprise [1288] that is purchasing this piece of commercial real estate, Mr. Army Seijas.

Mr. Billinghurst: May we have the Seijas application identified, please.

The Clerk: Plaintiff's Exhibit 131 has been marked for identification.

Q. (By Mr. Billinghurst): Referring first to No. 131, can you describe that?

A. 131 is an application which was filed on the same date that Mr. Forman did by Army Seijas an attorney who together with Mr. Forman was purchasing Seattle business property for an investment.

Q. What is the date of the application?

A. April 27, 1943.

Q. Where was the application made, if you know?

(Testimony of Harry D. Baldwin.)

A. It was made to me at the main office of the bank.

Q. If there is any data on the application, does it appear in handwriting or in printing of some kind?

A. It is all in my handwriting except the signature of the applicant.

Q. Can you state the circumstances under which your handwriting appears on the application?

A. Well, yes. The two men applied to the bank for a loan to help them buy this property, and I talked to each of them and took down the essential data concerning the [1289] real estate and concerning their own personal selves while they were at my desk.

Q. All right. Now is that true of Exhibit 130 relating to the application of Mr. Forman?

A. Yes.

Q. That is also in your handwriting?

A. Yes.

Q. And the data was received in the same manner? A. That's right.

Q. And have these records been in the possession of the bank since the time of the application?

A. Yes, they have.

Q. Until today? A. Yes.

Mr. Billinghurst: At this time we will offer 130 and 131, if your Honor please.

Mr. Mead: We object to these exhibits on the grounds of materiality and relevancy, they having to do with a purchase of a piece of real property, a

(Testimony of Harry D. Baldwin.)

loan in connection with it, and is not material to any issue involved herein.

The Court: I would like to examine the documents. On the face of it at the moment, at least, there is no immediate appearance to me what the relevancy is. If you want to proceed, you may do so [1290] and I will consider this matter further.

Q. (By Mr. Billinghurst): Mr. Baldwin, as a part of this application is there a financial statement section of the application? A. Yes.

Q. In both the application of Mr. Forman?

A. Yes.

Q. And Mr. Seijas? A. Yes.

Q. What type of information appears on that financial statement?

A. Well, in making a loan it is customary for a man to request information concerning the applicant, financial standing, cash, bonds, real estate, assets, liabilities, and net worth.

Q. Do you recall whether or not Mr. Forman made any statement to you concerning cash in his possession at that time?

A. I believe so. If so, it's written down there on the application. These are just dictated, really, by the applicant to me and I write down what they say.

Q. All right. Can you state what Mr. Forman said about any cash he might have had in his possession?

A. May I refer to a copy of that?

Mr. Mead: That is objected to, your Honor, [1291] until the exhibit is introduced in evidence.

(Testimony of Harry D. Baldwin.)

The Court: Well, this is independent of the exhibit.

Mr. Mead: He is testifying with respect to it and the contents of it.

The Court: The point of it is that if he is relating, as I understand it, a conversation that he had with Mr. Forman as to which he made notes at the time in the form of this exhibit, I think he can refresh himself, if need be, by the notes made at the time concerning the conversation, and is entirely independent of the admission of the exhibit itself. However, I will hear you further if you think that is incorrect.

Mr. Mead: I would like to object to it on that ground, and on the further ground that the question calls for an answer which would obviously be incompetent and immaterial because it has no bearing on the sole issue in this case which is the income tax liability of Mr. Seijas, and whether or not Mr. Forman conspired with him to evade that liability for the years in question.

The Court: The question, Mr. Baldwin, do you understand, is limited to what Mr. Forman informed you concerning the amount of cash he then had on hand. [1292]

The Witness: Yes, sir.

The Court: Isn't that the question?

Mr. Billinghurst: Yes.

The Court: The objection is overruled. You can answer that, and if need be, you may refer to any

(Testimony of Harry D. Baldwin.)

memorandum you made at the time to refresh your recollection.

The Witness: At the time he told me that he had cash in banks of $36,750, and cash in safety deposit boxes in the Smith Tower of $25,000.

Q. (By Mr. Billinghurst): Now, the same question with relation to the statement Mr. Seijas may have made to you concerning cash which he had on hand at that time?

A. Well, on the same day Mr. Seijas said he had $10,000 in a savings and loan association in the form of shares, $500 in the National Bank, and $20,000, I think it is, in the safe deposit box, but he told me to scratch that out, that he didn't want that to show—$21,000. I did a pretty good job of scratching that out.

Q. Would you be able to tell from the original, Mr. Baldwin?

A. I can by a collateral note. He said he had between $25,000 and $30,000 in a safe deposit box, but at his request I eliminated it from the application.

Q. Who signed these, No. 130——

The Witness: Your Honor, I don't know which one that is. 130 is signed by William R. Forman.

Q. (By Mr. Billinghurst): And who signed 131? A. Mr. Seijas.

Q. Do you recall whether or not your bank has had any other transactions with these two gentlemen?

A. Yes. We made Mr. Forman a loan on a home several years prior to this transaction.

(Testimony of Harry D. Baldwin.)

Mr. Billinghurst: At this time we will renew the offer of the two exhibits, 130 and 131.

The Court: My impression is that the exhibits in and of themselves as such are not admissible. I will sustain the objection to admission of the documents as an exhibit in themselves.

Mr. Mead: We renew our objection to the testimony of this witness and move to strike it, your Honor, on the same grounds and for the further reason that the testimony relates to the contents of documents which your Honor has ruled inadmissible.

The Court: No. I think I must make it plain that the testimony as it stands is the testimony of Mr. Baldwin with respect to what was said to him on that occasion. The only occasion that—the only part that the documents had in the matter is that Mr. Baldwin was using them to refresh his recollection as to what the conversation was at that time. At least that is what my understanding [1294] was, and I now advise the Jury to that effect, that the portion of the testimony is in the record for your consideration. The objection is sustained as to the exhibits themselves.

Mr. Mead: Thank you, your Honor.

Mr. Billinghurst: That is all.

Cross Examination

Q. (By Mr. Mead): Mr. Baldwin, you are personally acquainted with Mr. Stoiber? A. No.

Q. Are you personally acquainted with Mr. Forman?

(Testimony of Harry D. Baldwin.)

A. Yes, in that I met him at one time since then on another application for a real estate loan that did not materialize. So I remember him whereas I am sorry I do not remember Mr. Scijas.

Q. On the occasion that you have described where this information was given to you by Mr. Scijas and Mr. Forman in connection with the loan for a purchase of a piece of property in Seattle, could you fix the date of that please?

A. Yes. The date of both applications is April 27, 1943.

Q. April 27, 1943? A. That's right. [1295]

Q. Mr. Scijas, I think you testified, asked you to obliterate or to remove from his application certain information that he had given to you with respect to the assets?

A. Here is about the way it happened. I asked him what he had, how much cash, and he said he had this amount in cash in the safe deposit box, and by the time I had written down, he said, "Don't put that down, please. Please eliminate it," so I scratched it out.

Q. Mr. Forman asked you to scratch out any information that he had given to you about his assets?

A. No. I have no personal recollection of this transaction, frankly, except by referring to my own handwriting and my own notes. I assume he did not because it is not scratched out.

Q. So Mr. Scijas asked you to eliminate some of the information on your report that he had given

(Testimony of Harry D. Baldwin.)

you, but Mr. Forman apparently did not because none of the information that he gave you was eliminated, is that your understanding?

A. Yes, sir.

Mr. Mead: That is all.

The Court: Thank you, Mr. Baldwin. You may leave whenever you wish.

(Witness excused.) [1296]

WALTER GEORGE SEELBACH

recalled as a witness on behalf of the Plaintiff, having been previously sworn, was examined, and testified further:

Redirect Examination

Q. (By Mr. Billinghurst): You have been previously sworn, Mr. Seelbach? A. Yes.

The Clerk: Plaintiff's Exhibit 132 has been marked for identification.

Q. (By Mr. Billinghurst): Mr. Seelbach, will you examine Exhibit 132 and state what it is?

A. A signature card for an account opened by William R. Forman in our Metropolitan Branch.

Q. What is the date?

A. The date the account was opened?

Q. Yes. A. January 29, 1937.

Q. Whose signature appears on the card?

A. William R. Forman.

Q. Are there any other signatures authorized to use the account? A. Not on this account.

Q. And is this card, Mr. Seelbach, a business record of the bank? A. It is. [1297]

(Testimony of Walter George Seelbach.)

Q. And did you cause it to be brought over here today? A. I did.

Q. And it was in your possession? A. Yes.

Q. And has been in the bank's possession until you brought it over here today, is that correct?

A. That is right.

Q. Is the date when the account was closed indicated? A. Indicates January 12, 1942.

Mr. Billinghurst: We will offer at this time No. 132, your Honor.

Mr. Mead: If the Court please, we object to the materiality and the relevancy of the exhibit on the grounds that it shows upon its face that it is a signature card in the Metropolitan Branch of the First National Bank of Seattle covering an account closed January 1942, and, therefore, could have no bearing on any issues involved.

The Court: At the present time I do not see the materiality of the exhibit. Accordingly, it is reserved.

Mr. Billinghurst: You may examine.

Mr. Mead: No questions.

The Court: That is all, Mr. Seelbach.

(Witness excused.) [1298]

Mr. Obenour: At this time we call Mr. Oftedal for a limited purpose.

The Court: Very well.

WILLARD A. OFTEDAL

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

(Testimony of Willard A. Oftedal.)

The Clerk: Please state your full name and spell your last name.

The Witness: Willard A. Oftedal, O-f-t-e-d-a-l.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Oftedal? A. Anchorage, Alaska.

The Court: You are going to have to speak much louder.

The Witness: Anchorage, Alaska.

Mr. Mead: Your Honor, we object to this witness being called for a limited purpose and we reserve the right to inquire into any subject which may have a bearing on this case.

The Court: It is a matter of order of proof, if I am not mistaken. I will keep your objection in mind and go forward and we will see what the matter is. [1299]

Mr. Mead: Thank you, your Honor.

Q. (By Mr. Obenour): What is your occupation?

A. Special agent for the Internal Revenue Service.

Q. How long have you been so engaged?

A. Nine years.

Q. And how long have you been in Anchorage, Alaska? A. One year.

Q. Prior to that time where were you stationed?

A. Seattle, Washington.

Q. How long were you in Seattle?

A. Eight years.

(Testimony of Willard A. Oftedal.)

Q. And what were your duties while you were in Seattle?

A. Investigation of frauds against the Treasury Department.

Q. And in the course of your official duties as Special Agent, did you have occasions to investigate the tax liability of Army Seijas? A. Yes.

Q. In the course of your official duty did you have occasion to have an interview with William R. Forman on or about September 7, 1952?

A. Yes.

Q. And as a result of that interview on that date did you make a request of Mr. Forman to produce certain checks written by him? A. Yes.

Q. And did you receive those checks? [1300]

A. Yes, sir.

Q. And did you cause those checks to be reproduced by photostat? A. Yes.

Q. And what did you do with the originals?

A. I don't have a recollection but I must have returned them. I don't have them.

Q. You don't have them? A. No.

Q. Did you in the normal course of your duties return any documents that you have specified from either Mr. Seijas or Mr. Forman? A. Yes.

Q. And did you have any records now that you obtained from Mr. Forman in the course of the investigation which were not returned to him?

A. I have photostatic copies.

Q. And may I have them, please?

A. They are on the desk over there (indicating).

(Testimony of Willard A. Oftedal.)

Mr. Obenour: I ask they be marked.

The Clerk: Plaintiff's Exhibit 133 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 133, can you identify those checks, please, sir?

A. Yes, sir. [1301]

Q. What are those checks contained in Exhibit 133, Mr. Oftedal?

A. They are checks allegedly paid to Frederick B. Cohen.

Q. And written by whom?

A. Mr. Forman.

Mr. Obenour: Offer 133.

Mr. Mead: May I inquire of the witness, your Honor?

The Court: Yes.

Examination on Voir Dire

Q. (By Mr. Mead): These are photostatic copies of checks, the originals of which were furnished to you by Mr. Forman at your request, is that correct? A. Yes, sir.

Q. And a subject matter of the inquiry at this time was into the tax liability of Mr. Cohen, is that correct? A. Yes, sir.

Mr. Mead: We object to the exhibit, your Honor, as being immaterial and not relevant to any matter involved in this controversy.

The Court: Overruled. Admitted.

(Thereupon, Plaintiff's Exhibit 133 for identification was admitted into evidence.)

(Testimony of Willard A. Oftedal.)

Mr. Obenour: That is all on this matter for [1302] this time, your Honor.

The Court: Do you wish to cross on this subject, Mr. Mead?

Mr. Mead: I think not, your Honor.

The Court: If you wish, you can cross-examine later when Mr. Oftedal returns.

(Witness excused.)

JAMES P. CONWAY

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: James P. Conway, C-o-n-w-a-y.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Conway? A. Albany, California.

Q. What is your occupation?

A. Postal Inspector and Question Document Analyst.

Q. And what?

A. Question Document Analyst.

Q. Question Document Analyst? A. Yes.

Q. How long have you been with the Post Office? [1303] A. About seventeen years.

Q. And in what capacity did you serve during the time of the Post Office?

A. Well, I have been engaged in the examination of question documents virtually all of that time,

(Testimony of James P. Conway.)

and a portion of that time to various investigations and investigative work for the Postal Inspector Service.

Q. Did you operate a scientific laboratory devoted to the detection of forgery and identification of handwriting and typewriting and any other aspects of the analysis of questioned or disputed documents?

A. Yes. I am in charge of the Regional Laboratory of the Postal Inspectors Service located in the Post Office and Courthouse Building in San Francisco.

Q. And what does that laboratory consist of?

A. Well, it consists of the usual graphic and microscopic and lighting facilities which are used in connection with the study of disputed and questioned documents; also chemicals and that sort of thing.

Q. How long have you been in charge of this laboratory in San Francisco? A. Since 1942.

Q. What training, if any, have you taken for the position that you hold with the Post Office?

A. Well, my training began in 1939 in Washington, D. C. [1304] I was stationed there at that time and I was training under the auspices of the Chief Inspector of the Post Office Department. My special training briefly consisted of study of various texts in this field and understudy period of about two years in the Departmental Laboratory, lectures, and supervisory instructions from the other government laboratories, studies of the National Bureau of

(Testimony of James P. Conway.)

Standards, and research and experimentation which began then, and, of course, still continues.

Q. What professional experience have you had as a question document specialist?

A. Well, I have operated on my own responsibility as a specialist since 1940, the latter part of 1940, and I have handled cases of all types, civil and criminal, where documents were in question or dispute, where there were questions of alteration or substitution, the sequence of writings, the age of writings, and virtually every type of thing that comes up in the document of the case.

Q. What type of writings have you been concerned with?

A. Well, handwriting, typewriting, printing, numerals, anything in the field of graphic arts.

Q. During this period how many questioned or known documents have you analyzed in your capacity as a question document specialist? [1305]

A. I don't have an exact figure, but the questioned known documents together would exceed 55,000.

Q. And how many cases have been involved in these estimated 55,000 documents that you have been concerned with?

A. Well, between 5500 and 6000 separate cases.

Q. Have you written any papers or manuscripts in this professional field?

A. Yes. I have written a number of papers. For example, Identification of Hand Printing which was published in the Journal of Criminal Law, Crimi-

(Testimony of James P. Conway.)

nology and Police Science, Opinion vs. Demonstrative Evidence in the Identification News, and other papers.

Q. Are you a member of any national or international society of specialists in this professional field?

A. Yes. I have been a member for a good many years of the International Association for Identification. I have served as Chairman of their Question Document Committee, and I have also been elected to the American Academy of Professional Sciences.

Q. What?

A. American Academy of Professional Sciences.

Q. You previously testified as an expert on questioned or disputed documents? A. Yes.

Q. And what are some of the jurisdictions in which you have [1306] so testified?

A. Well, I have testified in federal, state, military, and territorial courts. Some of the federal jurisdictions would be in this district, both federal districts in California, federal courts in Arizona, Utah, New Mexico, Montana, Nevada, Kentucky, New Jersey, Pennsylvania, Delaware, and various other states.

Q. Have you also testified as an expert witness for the government?

A. No. I have been called as a government employee. Of course, you usually testify for the government. However, I have also been called as a court witness and as a defense witness.

Q. And as a result of having been called as

(Testimony of James P. Conway.)

either a court or a defense witness, has there ever been a favorable conclusion to the defendant?

Mr. Mead: I think that is an improper question.

The Court: Until there is some challenge to his qualifications, I think this is sufficient.

Q. (By Mr. Obenour): Mr. Conway, have you had occasion to examine certain documents pertaining to this case now at trial? A. Yes, sir.

Q. And handing you Exhibits 76, 77, 78, and 79, have you had occasion to conduct an examination of those books? [1307] A. Yes.

Q. And in addition, have you made a comparison of any other documents, said comparison to be used by you in an analysis of the contents of Exhibit 76, 77, 78, and 79? A. Yes, I have.

Q. Handing you Exhibit 63, 139, and 133, for identification, the latter two for identification, I will ask you if you have used those exhibits, and the latter two exhibits for identification, for the purpose of comparison of entries made in exhibits 76, 77, 78, and 79?

A. Yes, with the exception that in respect to Exhibit 133 I was only concerned with the uppermost check.

Mr. Obenour: At this time we offer the uppermost check of Exhibit 133, also 129.

The Court: 133 has already been admitted.

Mr. Obenour: Pardon me.

The Court: In toto, if you wish to withdraw the balance you may do so.

(Testimony of James P. Conway.)

Mr. Obenour: No, sir. I misunderstood the Court's ruling.

The Court: The other numbers are what?

Mr. Obenour: 129 being the signature cards of Mr. Forman, Washington Mutual Savings Bank for April 27, 1933, and July 6, 1943. [1308]

The Court: Do you have any others?

Mr. Obenour: No, sir.

The Court: 132 is also involved, isn't it?

Mr. Obenour: Yes, sir. It would be 132.

The Court: Do you wish to make further objection?

Mr. Mead: May I inquire?

The Court: Yes.

Mr. Mead: Are they offered for this one limited purpose, your Honor? I will object to them on the grounds of materiality for any other purpose.

The Court: Yes, that is the way I understand it, but we will find out. These signature cards which were reserved; namely, Exhibits 132 and 129, are they offered for this purpose?

Mr. Obenour: Yes, sir. I believe I neglected to include 132 in the question to Mr. Conway.

Q. (By Mr. Obenour): Did you also use the documents, identified as 132 for a comparison with the contents of the diaries? A. Yes, sir.

Mr. Obenour: Offer 132 also, for the purpose of comparison, your Honor.

Mr. Mead: Counsel has not answered your Honor's question. [1309]

The Court: I think he meant by the last thing

(Testimony of James P. Conway.)

he said, for the purpose of comparison, which, I assume, is limited to that. In any case, Ladies and Gentlemen, Exhibit 129, which is two signature cards heretofore identified as being those of Mr. Forman with respect to accounts at the Washington Mutual Savings Bank, Mr. Baldwin referred to them just recently. Do you have that in mind? Also, the signature card referred to by Mr. Seelbach just a few moments ago, namely, a signature card purporting to be Mr. Forman's at the Seattle First National Bank, Metropolitan Branch.

Those exhibits are admitted solely for this purpose, namely, for the purpose of comparing the signatures of the handwriting with certain other documents that are going to be referred to. Is that clear? They have no other purpose in the case, at least as far as we are now concerned.

Are you satisfied with that admonition?

Mr. Mead: Yes, your Honor.

The Court: For that purpose, the exhibits are admitted.

(Thereupon, Plaintiff's Exhibits Nos. 129 and 132 for identification were admitted into evidence.)

Q. (By Mr. Obenour): Mr. Conway, from your examination of [1310] Exhibits 76, 77, 78 and 79, were you able to form a conclusion as to the identity of the person or persons who made entries contained therein? A. Yes.

Q. What is your opinion or conclusion, sir, as to the identity of the person or persons who made

(Testimony of James P. Conway.)

entries contained in these exhibits, Exhibits 76, 77, 78, and 79?

A. I found that Exhibits 76, 77, 78, and 79, up to May 2 in Exhibit 79, disclosed the writing of one person.

Q. May 2 in Exhibit 79 is what year?

A. 1945.

Q. All right. In other words, we are ascending from 1942 up to May 2, of 1945?

A. Yes. I found further that beginning with May 2, 1945, and through the remainder of Exhibit 79, the last date being December 27, 1945, that the writing of four people appears, one of the four being the same writer compared in 76, 77, 78, and 79 up to May 2.

Q. Who was the person you identified as having made the entries from 1942 through 1943, 1944, and up to May 2, 1945?

A. Well, I will have to refer to an exhibit which is not yet in evidence.

Q. All right, sir. What exhibit is that?

A. I have it here. [1311]

Mr. Obenour: I ask that it be marked.

The Clerk: Plaintiff's Exhibit 134 has been marked for identification.

The Witness: Exhibit 134 for identification is a four page exhibit of handwriting exemplars which I had prepared in my presence on August 7 by Mr. Scijas.

Mr. Obenour: Offer Exhibit 134.

Mr. Mead: We object to the introduction of this

(Testimony of James P. Conway.)

Exhibit, your Honor, as being a prepared document with prepared examples of signatures that were manufactured at a time, 8-7-56, which had no bearing to any of the dates involved in the documents examined by the witness, and would, therefore, not be competent or material and relevant to any issue involved in this case including the expert opinion of the witness. Only contemporaneous documents would be appropriate for examination by this expert.

The Court: Perhaps you better elaborate more fully upon the circumstances of the taking of the exemplars.

Mr. Mead: May I inquire on voir dire of the witness?

The Court: You may. [1312]

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Conway, isn't the exhibit which you hold in your hand, which is Exhibit 134 for identification, isn't that four pages of writing which were prepared by Mr. Seijas under your supervision or at your request on August 7 of this year, is that correct? A. Yes.

Q. And they were all, then, prepared at that time, and none of the writing is contemporaneous with the various exhibits that you have referred to, Exhibits 76 to 79 inclusive, which covered the period 1942 through 1945? A. That is right.

Mr. Mead: Thank you, sir.

Q. (By Mr. Obenour): Do you have another

(Testimony of James P. Conway.)

exhibit which you caused to be prepared, Mr. Conway, with you? We might as well take both together, sir.

A. Yes, I have another five page exhibit of handwriting exemplars.

The Clerk: Plaintiff's Exhibit 135 has been marked for identification.

Q. (By Mr. Obenour): Would you identify 135, please?

A. Exhibit 135 consists of five pages of handwriting exemplars prepared on August 7, 1956, in my presence by Mr. Meyers. [1313]

Q. And is that Mr. A. J. Meyers?

A. Yes, sir.

Q. Where were these exemplars taken, Mr. Conway?

A. Exhibit 135 was taken in the Postal Inspector's office in this building.

Q. And now, how did you go about taking these samples of writings of Mr. Seijas and Mr. Meyers?

A. I requested each of them to prepare from my dictation, and in the absence of any examination of 76, 77, 78, and 79, the words and numbers and phrases which appear on Exhibits 134 and 135. I told them—well, the purpose of the exemplars was to exhibit their writing habits for purposes of comparison with Exhibits 76, 77, 78, and 79.

Q. Was this done together or separately?

A. It was done separately. One was in the morning and the other was in the afternoon.

Q. And where was it done?

(Testimony of James P. Conway.)

A. Exhibit 135 was prepared in the Postal Inspector's office on the second floor of this building. Exhibit 134, which is Mr. Seijas' writing, was prepared in the Marshal's office in this building.

Q. The writing was done at your dictation, is that correct?

A. Yes. For example, the top line of page one of Exhibit 134 reads, "State 23940." I said, State 23940," and [1314] so on through the exhibit.

Q. What was the basis under which you selected the material you requested each to write?

A. Well, I had previously studied Exhibits 76, 77, 78, and 79, and isolated four writings which I was then considering as A, B, C, and D, and these exemplars were for the purpose of endeavoring to associate them, if they were associated, with my A, B, C, and D, which to that point I had not identified as to name.

Q. In attempting to identify them, identify any writing or document, what is the standard practice used for comparison, Mr. Conway?

A. Well, the standard practice is to obtain exemplars in appropriate kind and number which illustrate the habits of the writer. Now, time is a factor, but it is only one of the many factors, and where you are dealing with mature writers such as we are here, the exemplars do not have to be precisely contemporaneous.

Q. Would there be any difference which you would not be able to detect or which were affected in such a way you would not be able to reach a con-

(Testimony of James P. Conway.)

clusion from the time lapse between the contemporaneous writing or the writing obtained on August 7 and the entries in Exhibits 76, 77, 78, and 79?

A. Well, as an abstract question, there could be, but there [1315] certainly isn't in this case.

Q. In the comparisons that you made of these writings, did you ever make comparisons from contemporaneous writings obtained in your presence at the time of the comparison?

A. Well, I am not sure I understand your question, but I have many times made comparisons of contemporaneous writings, and I have many times made comparisons of writings over a span of years, and it does happen occasionally that writings are not sufficiently contemporaneous to reach a conclusion, but, again, many people are remarkably consistent over a long period of time.

The Court: In what way?

The Witness: In their writing habits. You would have to distinguish between a youngster and someone who has reached writing maturity.

Q. (By Mr. Obenour): That would be persons giving the exemplars in this instance, reach the age where their writing habits would be unaffected by the lapse of time of 1942 to 1956?

A. Yes. They are definitely mature writers. I don't think there is any question about that.

Mr. Obenour: Again we offer Exhibits 134 and 135. [1316]

Mr. Mead: We object to Exhibit 135, your Honor,

(Testimony of James P. Conway.)

on the same grounds that objection was made to Exhibit 134, that they are example of handwriting made for the purpose—almost 15 years after some of the times involved, but they are not contemporaneous examples of handwriting, and that they are incompetent and irrelevant and immaterial for any purpose in this case.

The Court: The question now of the time in and of itself is a matter of weight and not of admissibility in the face of the testimony of the witness. As far as the objection that they are made for the purpose that I have never heard that put forward before, and I am not familiar with that on the grounds of excluding exemplars and handwriting.

Mr. Mead: For the purpose of illustration, your Honor, and for that reason they are not admissible.

The Court: The objection is overruled. Exhibits 134 and 135 are admitted.

(Thereupon, Plaintiff's Exhibits Nos. 134 and 135 for identification were admitted into evidence.)

Q. (By Mr. Obenour): Incidentally, at the time these exhibits were prepared, was either Mr. Meyers or Mr. Seijas in [1317] any way given access to the documents so that they might be duplicated entries in the diaries, 76, 77, 78, and 79, would in any way be duplicated upon Exhibits 134 and 135?

A. Definitely not. I took specific pain to preclude any such possibility.

Q. Would you please describe the manner in

(Testimony of James P. Conway.)

which you compared the entries contained in Exhibits 76, 77, 78, and 79, being the diaries, with Exhibits 63, 129, 132, 133, 134, and 135?

A. Yes. I believe I already said that I first studied Exhibit 76, 77, 78, and 79 and isolated what I concluded to be four separate writers. Then using Exhibits 132, 133, 134, 135, 63, and 129, I then proceeded to ascertain whether there was an association between this group of exhibits which, if I may, I will refer to as known exhibits, with the four groups of writings which I had isolated in Exhibits 76, 77, 78, and 79, and I found that the writer who started in the beginning and proceeded to make to 1945, was Mr. Seijas. In other words, I found a complete agreement between——

Mr. Mead: If your Honor please, may we have an exception to this testimony as to his conclusions, for the reason that they are based upon insufficient evidence and are based upon these examples of handwriting [1318] which are included in these Exhibits 134 and 135.

The Court: You have that objection, and it is overruled. Go ahead.

The Witness: I found an agreement in habits both as to script, printing, and figures, in Exhibit 134 which is the writing of Mr. Seijas, and the writing up to May 2, 1945. I found further that beginning in May 2, 1945, that there are a series of, I guess you would call them slips appended to the various days. There are some sixty of them, and beginning on May 2, the listings on these slips,

(Testimony of James P. Conway.)

that like for example, on May 2, $375, $100, and so forth, and may of them are printed. Thereafter, there is also some script, but the listings beginning May 2 and continuing through Exhibit 79, are in the handwriting of Mr. Meyers based on a comparison with Exhibit 135. Now, there was one exception to those listings as they pertain to Meyers. I found that on August 5 there is a listing on one of these slips which I didn't associate with any of the known exhibits. In other words, I don't know who wrote that, but it is different than any of the others. Now, on all of these slips there are little computations down at the bottom and they read like "one-half equals $390" for example, or "one-half [1319] equals $250." There are little computations at the bottom and in some instances there are other notations such as "Jerry, $50." Now, I found that all of those computations and notations from May 2 on through Exhibit 79 were in the handwriting of Seijas as evidenced by Exhibit 134, with six exceptions. Now, those six exceptions relate to the entries of May 12, May 16, May 19, June 9, September 7, and September 12. Now, those entries, that is, those entries for those dates, perhaps I better read just exactly what they are, the first one which is May 12, at the bottom there is a division sign and the figure "2". The amount of $187.50 and another line, another figure "2," another line, and $375. Now, that is the exception that I referred to on May 12. The next date is May 16 and there is another little division computation showing "2" into

(Testimony of James P. Conway.)

$750 which is $375, and underneath that is $750 again. That is the exception for May 16. On May 19 there is a division sign, $282.50 and a "2" under that, another line, and then $575, and that is the exception there. And then on June 9 there is a division sign again and $195 followed by a dash. On September 7 there is a division sign and the amount four one five, and on [1320] September 12, there are five lines beginning with twenty-five followed by a curved line and a division sign, "2" into $565, underneath is $282.50, and then a "2", another line and then $565 again. Now, those six exceptions which I have just cited I found to have been written by the writer of the known group appearing on Exhibits 63, 129, 132, and 133. Now, perhaps I better indicate precisely the writings I am referring to on those exhibits because the writing of several people appears on some of these bank cards. That would be, if I may, the Forman group of exhibits, Exhibit 133, considering the date, the payee, Seattle First National Bank, the Amount $1550 in figures and words, and this signature.

Q. (By Mr. Obenour): The signature is what?

A. W. R. Forman, and Exhibit 63, there are nine slips, and I am considering the number "976" which appears on each of them, and the signature W. R. Forman which appears on each of them, and Exhibit 129, there are two cards. On the upper card, considering only the signature of William R. Forman and the line immediately underneath which reads "Administrator of the estate of Michael Thor-

(Testimony of James P. Conway.)

ton," and on the lower card, the address "711 Belmont Place," the signature of William R. Forman, Portland, [1321] Oregon, January 1, theatre manager, Sterling chain, Sam Lilly, only those words, and on Exhibit 132, the signature of William R. Forman, the address of 206 Palomar Theatre, 1300 Third, theatre executive, John Danz, January 29, 1937, and the two telephone numbers. Now, those Forman writings I found to agree with the six exceptions which I cited in the computations in Exhibit 79. Now, I think there was one other thing I didn't mention. There is so much it is a little confusing, the dates on these various slips in Exhibit 79 were all written by Meyers, Exhibit 135, with four exceptions, which were written by Seijas, Exhibit 134. These exceptions are the date on May 2, the correction, and the date from September 19 or 29 to September 26, the date for October 17, and the date for December 12. Those four dates were written by Seijas. Now, I believe I have covered the various items.

Q. In your analysis, Mr. Conway, did you ever determine the age of the writings? A. Yes.

Q. Are you ever called upon to determine whether or not writings are written over a series of instances or are written at one contemporaneous time?

A. Yes. That is a problem which crops up from time to time.

Q. Did you make such an analysis of Exhibits 76, 77, 78, and 79? [1322] A. Yes.

(Testimony of James P. Conway.)

Q. From your examination, what is your conclusion as to the indications as to whether the diaries are a progressive series of entries or are a composition of one contemporaneous sitting?

A. Well, I found a series of indications which weigh to the conclusion that these exhibits are a progressive running series of entries rather than a composition or a reconstruction at one sitting. Now, these various indications are first, I found a rather helter-skelter combination of script and printing. For example, the writer Seijas, sometimes he would use script and sometimes he would print with the same word. I found variations in size, that is, letter size. I found variations in pressure, that is, the pressure of the instrument against the paper. I found variations in slant. I found a number of corrections. I found several sets of writing conditions on one day. For example, where the writer would address the paper vertically, and then there would be an entry on a different angle and a different slant and different writing position. I think additionally the fact that four writers are involved plus a typewriter, plus an adding machine, is another factor, and additional factors *is* that the dates in Exhibit 79 involved two writers. The computation involved [1323] two writers. All of these things cumulatively weigh to the finding that these diaries, Exhibits 76 through 79, are a progressive running series of entries rather than a recapitulation or single or one or two sittings.

Q. When you say progressive series of entries,

(Testimony of James P. Conway.)

would you say over a time such as indicated by the dates of four years?

A. I mean just as the dates go. In other words, through the years. The variations I have cited are what you would expect to find in entries written day after day rather than on a book tailormade.

Mr. Obenour: That is all. You may examine.

The Court: Would you like to conclude tonight?

Mr. Mead: I would like to conclude in five minutes or so.

The Court: However, if you would prefer more time, I would be glad to accommodate you.

Mr. Mead: I wouldn't like to shorten it because of the hour. I would be glad to proceed, but I do have a number of questions.

The Court: How do you feel? Had we better suspend?

Mr. Mead: I would prefer that, yes.

The Court: I think that under the circumstances that is what we will do. I am sorry, Mr. Conway, [1324] that we cannot oblige you, but we will have to have you back tomorrow morning at 9:30. I think, then, with just three or four minutes left, we had better suspend for the day. Would you mind stepping down, Mr. Conway, please.

(Thereupon, the witness withdrew from the witness chair.)

(Thereupon, the Jury was admonished and withdrew from the courtroom.)

The Court: Inasmuch as the witness said that he only used the top one of the checks in Exhibit

133, I would suppose that the balance should be reserved for further indication of materiality.

Mr. Obenour: Yes, sir.

The Court: Would you keep that in mind. I would suppose that at the time they were admitted they were all to be used for whatever purpose you then had in mind, but on the testimony of Mr. Conway, they only used one. At the present time, at least, the balance are withheld until——

Mr. Obenour: They were kept together because that was the manner in which they were obtained, your Honor.

The Court: I am not being critical. I am merely indicating now why I withdraw the balance of these in that exhibit, at least as far as the [1325] present time is concerned.

Mr. Obenour: Yes, sir.

The Court: All right. Is there anything else, then, gentlemen?

Mr. Mead: Nothing, your Honor.

The Court: Very well, we will adjourn until 9:30 tomorrow morning.

(Whereupon, the court recessed to reconvene the following morning, August 9, 1956, at 9:30 a.m.) [1326]

(Whereupon, on the 9th day of August, 1956, at the hour of 9:30 a.m., the following further proceedings were had, to wit:)

The Court: Are you ready to proceed?

Mr. Mead: We are, Your Honor.

The Court: Come back, Mr. Conway.

JAMES P. CONWAY

called as a witness on behalf of the Plaintiff, resumed the stand, and testified further as follows:

Cross Examination

Q. (By Mr. Mead): I believe, Mr. Conway, that your testimony was to the effect that you have been with the United States Postal Department since 1940, is that correct? A. 1939.

Q. 1939? A. Yes, sir.

Q. And did you go to work for the department at that time? A. Yes.

Q. Prior to that time what sort of work had you been doing?

A. I was employed by the Treasury Department in the accounting division.

Q. Prior to 1949? A. Yes, in 1938 and——

Q. 1939. I am sorry.

A. Yes. In 1939, in the first three months of 1939 I was employed by the Treasury Department.

Q. And you were doing accounting work?

A. Accounting and Clerical.

Q. I take it that was about your first employment? A. No.

Q. You had some previous employment?

A. Yes. I worked for Armour and Company as an accountant for about two years in the mid-Thirties.

Q. And what formal education did you have, sir?

A. Well, elementary school and high school. I attended St. Vincent's College in Lakeville, Penn-

(Testimony of James P. Conway.)

sylvania, and the Greensville Business College in Greensville, Pennsylvania.

Q. And you went to work for Armours, the Treasury Department and the Postal Department?

A. Substantially, in the mid-Thirties it was a little rough and I had some odd jobs for a few months here and there.

Q. The purpose of my question was to inquire into your qualifications. I wasn't particularly inquisitive as to the minor positions you might have had. Then, since 1939 you have been continuously employed by the United States Postal Department right up to the present time, is that right? [1328]

A. Yes.

Q. And your work in 1939, I think you said, or 1940, was in the office of the Inspector in Washington, was that right?

A. I was employed in the Bureau of the Chief Inspector.

Q. Chief Inspector?

A. In Washington, D. C.

Q. And how long did you remain there in Washington? A. Until April of 1942.

Q. And then where were you transferred?

A. To San Francisco.

Q. You have been continuously there in the office of the Inspector in San Francisco.

A. Yes.

Q. Since that time? A. Yes.

Q. Now, Mr. Conway, when was the first occasion that you examined these photostatic copies of

(Testimony of James P. Conway.)

these diaries, of these documents described as which were marked here as Exhibits 79, I believe, 78, 77, and 76. When did you first see them?

A. I first saw Exhibits 76 through 79 on Tuesday of this week. I had theretofore done some preliminary work on identical copies, the preceding day. That would be Monday of this week. [1329]

Q. So, your first opportunity to examine these diaries, then, call them diaries, was on Tuesday of this week? A. Yes.

Q. So on Tuesday of this week you saw the exhibits for the first time?

A. Yes. As I say, I had seen identical copies the preceding day, Monday or Tuesday was the beginning of my work.

Q. Now, would you please advise us what the purpose was that you were requested to examine these documents?

A. Well, I was requested to examine them, number one, to determine if possible whether the writing of one person or several persons, or how many persons, appeared in the diaries. Second, to ascertain, if I was able to, whether there were any indications physically as to the manner and method of their preparation.

Q. Now, on the first point, Mr. Conway, and that is the subject matter of whose handwriting appears in these four documents, by the four documents I mean, of course, these so-called diaries, I believe you stated that the handwriting of one person ap-

(Testimony of James P. Conway.)

pears entirely in the first three, the documents for 1942, 1943, and 1944, is that correct? A. Yes.

Q. And the handwriting of one person appears up to what date in Exhibit 79? A. May 2.

Q. May 2? A. Yes.

Q. 1945. Would you please hand Exhibit 79 to the witness, please. So it is your opinion, then, that the handwriting of one person appears in all of these documents up to that time?

A. Up to May 2.

Q. May 2, 1945, in Exhibit No. 79?

A. Yes.

Q. Now, does the handwriting of any other person appear in Exhibit No. 79 on any of the reproductions of the original pages of that instrument, and for that purpose I mean to exclude any slip of paper, pictures of reproductions of any slip of paper or tape that has been pasted into the document. Do you follow me, Mr. Conway?

A. I believe I do. You are referring to the book pages as opposed to appendages?

Q. That's correct. In the reproduction of the original page of the instrument itself.

A. Yes. It is my recollection that the writing of only this one person appeared on the basic page.

Q. So that would apply, of course, to all of these exhibits, then, insofar as that is concerned? [1331]

A. Well, there aren't any appendages.

Q. To any of the earlier ones?

A. The first three?

Q. That's right. A. Yes.

(Testimony of James P. Conway.)

Q. Now, with respect to the photographic reproductions which appear on the pages of Exhibit 79, following the May 2 date of 1945, do you have an opinion or are you able to state whether or not these slips which appear to have been pasted in there by scotch tape or some adhesive, were put in there at one time or at various times, or would that be impossible to determine?

A. I have no opinion on that point. As a matter of fact, I don't believe that it would be possible to be certain about it. I haven't thought about it too much.

Q. You have no opinion on the subject and it is your opinon that it would be difficult, if not impossible, to determine?

A. Yes. That is my offhand impression.

Q. Now, Mr. Conway, will you please describe the method by which the age or date of entry, rather, is made upon a written document using the ink method? Would you describe that, or do you understand?

A. I don't understand your question.

Q. If you were handed a document which had, and by that I [1332] mean a piece of paper, which had entries on it in ink, and asked to determine whether or not those entries had been made in the year 1944, for instance, or had been made in the year 1953, by what method would you use to ascertain the answer to that question, using the ink method, ink analysis?

A. Solely as an ink method, I wouldn't waste

(Testimony of James P. Conway.)

much time on it because it is an indeterminate question in most instances, but there are certain tests that you might apply as an index to see how far you can get. For example, chemical tests, fading tests, the actual inspection of the ink line under the microscope sometimes tells you a few things, for example, the way it tends to break down into the paper fibers. However, determination of, say, 1944 to 1953 in ink, is a very, very speculative sort of a thing.

Q. Is it not possible by an analysis of most inks to definitely determine the approximate age of the entry? A. No, sir.

Q. That isn't possible?

A. I wish it were, but it just isn't possible.

Q. It isn't possible? A. No, sir.

Q. Well, assuming then, that you were handed a paper upon which there were entries in ink and you were asked to [1333] determine the question as to whether those entries were made in 1943 or were made in 1953, would you please describe the process by which you would make that determination?

A. You are limiting your question to a single document and a single question?

Q. I am limiting my question to a single piece of paper upon which there were those entries.

A. Well, it is an abstract question and without seeing it I don't know all that I would do, but it is entirely possible that the only avenue of attack would be ink that would not be soluble. The paper might provide some information. Sometimes print-

(Testimony of James P. Conway.)

ing on the document is helpful. The type of instrument used, for example, if I had a document dated 1943 in ball point, I would know it was not written in 1943 because there weren't any ball points at that time. There are various things of that sort that enter into it, but without seeing it, I don't know what all I would do.

Q. Well, by the writing itself, how would you ascertain from the writing itself having the original of the document?

A. Well, if it was possible to compare it with a complete chronology of the purported writer, whether they were very young or very old. Sometimes that is very revealing. [1334] In other words, someone who wasn't in the middle ages, when I say middle ages I say from 25 to 50, their writing is fairly static, but a very young person or a very old person whose writing is apt to change quite considerable, sometimes you can date documents by fitting it into the various changes in their writing. I say sometimes. You can't always do that.

Q. But not frequently?

A. Well, if it was a very old or a very young person, why I would say you could probably do it rather frequently.

Q. Do you mean by that, of course, than an old person who has an angina condition, for example, an analysis of their handwriting will give you a good index of their health condition, will it not?

(Testimony of James P. Conway.)

A. Well, I don't know whether I would say that or not. There again that gets into pretty hazy stuff.

Q. You don't put much credence in that?

A. I am very conservative about things of that sort.

Q. Now, in making a determination and arriving at the opinion that the entries in this one individual's handwriting over the period of the four instruments was made over a period of time, I think you stated that you were led to that opinion by the helter-skelter of entries, the variations in the size of the entries, [1335] the pressure applied, and the slant of the writing, is that correct, sir?

A. Well, those were — what I said was this, that I found a series of indications which weigh to the conclusion that these things were written progressively and the things you cited were some of the things I mentioned. I mentioned a few others, too.

Q. Now, I believe you stated, Mr. Conway, that you took samples of handwriting from Mr. Seijas, some four pages of them, on August the 7th which would be the day before you testified in this case, is that right? A. Tuesday, yes.

Q. Did you find any difference in the handwriting of Mr. Seijas that you took on August 7, 1956, and which you observed in these first three documents covering the years 1942, '3, and '4?

A. Well, difference, I think, is a word that has to be nailed down pretty tightly. In writing, the form varies from time to time. We all vary as to

(Testimony of James P. Conway.)

form, but I found no fundamental or substantial difference in Seijas' writing. I found the usual sort of variations that I would expect to find in form.

Q. So you found no variations in form of Mr. Seijas' writing between the writings that were in Exhibits 76, 77, 78, and 79, and the form in writing which you [1336] observed in the specimens taken on August the 7th?

A. No, that isn't what I said. I said I found the usual form variations but I didn't find any fundamental or basic difference in habit which is the test.

Q. Now, what do you mean by fundamental or basic difference of habit?

A. I mean this, that the form, that is the gross appearance, the pictorial appearance of the writing varies. All we have to do is look at our own. It varies in form but we have a basic method of executing letters and figures, punctuation, and that is the fundamental thing.

Q. Is it not true, Mr. Conway, that over a period of 15 years the handwriting of individuals can change? A. Can change?

Q. Yes, sir. A. Yes.

Q. And that you are able to distinguish differences in their handwriting made 15 years ago and the handwriting made 15 years later?

A. Well, that is sometimes true, and again I am particularly referring in that respect to the very

(Testimony of James P. Conway.)

young or the very old, and there are exceptions in other people, but some writers have a remarkable constancy.

Q. Now, did you find any differences in the variations of the [1337] handwriting, then, in these exhibits that were reproduced of the original pages, and a handwriting that you took on August 7 of this year?

A. No fundamental—again, no fundamental changes or differences in habit, but the usual sort of variations which I would expect. Now, I see first we have '42, '3, '4, '5, which gives us a rather good cross section of habit, and it is not like a single document in '42 as opposed to a single document in 1956. You have a progression of four books with a lot of pages in and a lot of writing, and it is possible to get a very good cross section of the writers habits.

Q. When you say first we have the handwriting for 1942, '3, '4, and '5 in these exhibits, are you assuming that the handwriting was made over that period of time?

A. No. Perhaps my answer might have misled you. I meant the volume. I didn't assume anything when I looked at these books.

Q. You didn't assume that?

A. I didn't assume anything. I started out to ascertain if I could.

Q. All right. Now, how many individual entries on the pages that have been reproduced of the origi-

(Testimony of James P. Conway.)

nals, and excluding the slips that have been reproduced, photographic copies of the slips, are there in these four exhibits? [1338]

A. Oh, I don't know exactly. I didn't count them, but there are a great many.

Q. There are three or four or five hundred, are there not? A. Yes.

Q. Now, assuming that an individual wanted to make these entries, it would take some time to make them, would it not? It could not be made at one sitting?

A. I guess it could be, but it would take some time, certainly.

Q. But by that I mean they could be made over several days and over several weeks even, could they not? A. Sure.

Q. And if they were made over several days or made over several weeks, these hundreds of entries that are in here, rather than over four years, you would except to find variations in size, a variation in pressure, variations in slant, and these various things that you have described, would you not, sir?

A. Yes, I should think that there would be some.

Q. There would be some? A. Yes.

Q. That would be true particularly if the individual had set out to make these exhibits appear to have been written over four years?

A. Yes. It would depend on his capability to do that, but [1339] it is something that would have to be considered, certainly.

Mr. Mead: Thank you, sir.

(Testimony of James P. Conway.)

The Court: Anything further?

Mr. Obenour: Yes, sir.

Redirect Examination

Q. (By Mr. Obenour): You stated that you would be unable to form an opinion, Mr. Conway, as to when the slips were appended to the document itself, Exhibit 79, do you recall?

A. Yes. Actually, I haven't given it much thought, but I should think offhand from Exhibit 79 itself it would be an extremely difficult point to determine.

Q. In your experience have you ever encountered documents that would have any appendages with scotch tape as in Exhibit 79? A. Yes.

Q. Have you ever been able to form an opinion as to the appearance of the scotch tape as indicative of age?

A. Yes. Scotch tape does undergo a change after it is removed from a roll and placed on a document. They are rather gradual and it depends on storage, but it tends to become brittle. It tends to become darker in color. That is to say, it gets darker than the original sort of amber color. It tends to pick up dirt around the edges near [1340] where the tape joins the paper itself. It tends to pick up dirt and sometimes it travels a little bit and you have a little ridge, particularly where you have one of these metal things that have a cutting edge, a jagged edge. They sometimes tend to fill up with a sort of lint or whatever you might want to call it, after a period of time. Those are some

(Testimony of James P. Conway.)

of the things that happen to scotch tape on a document.

Q. Would that change in appearance be capable of detection by photostatic copy? A. No.

Q. So that from Exhibit 79 and the photostats, would you be able to form any opinion as to the age of the scotch tape?

A. No, I don't think so.

Q. If you had the original documents would it be possible to have detected the change in the appearance that you have described and so form an opinion as to the age of the scotch tape that was in the original document?

A. Well, it is certain you could work at it, but you are precluded from making proper exploration.

Q. Would you have an opinion, then, that anyone who had seen the original documents would be able to describe the indications of appearance which you have described?

A. Yes, I think you could if he was observant, [1341] depending on how much attention was paid to it.

Q. And one of the changes that you have described, indicative of age, and by "age" I refer to the time of removal from the roll to its subsequent use as appending the slips to the paper, one of the changes would be indicative, would be a change in color, a darkening in color? A. Yes.

Q. Have you described the change you expect in the form of Mr. Seijas' writing in the 15-year

(Testimony of James P. Conway.)

interval or the interval from the—that would have resulted had those been written in the dates indicated, to the present date, and the basic patterns which remained unchanged. Would you please, sir, describe what you mean, and indicate, if you would, in the diaries, Exhibit 79 or in the others, what is the example—what would be examples of the changes and similarly, the basic patterns that remained unchanged from the Exhibit 79 and the sample you took?

A. I think I understood your question. It is primarily a question of the over-all form of a letter as opposed to the way it is made or the way it is executed, and those variations occur not only over a period of time but they occur from day to day. For example, this man Seijas,—well, this [1342] man Seijas at times when he writes the word "dock", why he will print block characters and other times he will write it in script with a capital "D". Again, he may write in in script with a small "d". The form of the "k" in "dock" varies somewhat on the buckle or the final part of the "k". Now, that is the form, but his basic method after you get to know his printing and his script and his upper and lower case also, all agree with these variations. I hope I have made myself clear.

The Court: I think the question calls for examples of both items.

Q. (By Mr. Obenour): Yes. If you could, what you have described from memory possibly you might show.

(Testimony of James P. Conway.)

A. Could I have Exhibit 134? Well, I have an example here which I think illustrates the point. On May 8 in Exhibit 79, the word "Goldie" appears twice.

The Court: "Goldie"?

The Witness: "Goldie"—G-o-l-d-i-e. Now, just to look at one letter for a moment, the "G" in the upper "Goldie" is closed and it is rather long, and the final stroke is almost parallel to the line of writing. The second "Goldie" tends to be opened and the connecting stroke is not exactly parallel to the line of writing. Now, referring to Exhibit 134, [1343] on page 3, line 3, why considering the word "Goldie" there, and the word "Goldie" on the third written line of the last page of 134, you get the same series of conditions.

Q. (By Mr. Obenour): That is the same change between what you have described as open and closed?

A. The same range of variations, yes. Now, that is just one of many instances of this. To plot them all would take quite a length of time, but looking at these, you can see what I mean. In addition, you can see the printed form of "Goldie" on Exhibit 134 which also appears several places in these books.

Q. Now, what would be the similarities or the points that the basic patterns that remain unchanged?

A. Well, here you have a combination and actually it is more important if a man has a little

(Testimony of James P. Conway.)

range in his repertoire, you might say, you have him doing several things with one letter and his basic habit to begin the "g" rapidly and as he turns to make the top of the "g" the exact place where his pen engages the paper varies a little bit. Now, that is the basic thing. He engages the "g" rapidly and doesn't always put his pen down at the same point. You find that in the book and when you get over to Exhibit 134, you find the same thing.

Q. Would that, then, sir, be the similarity of [1344] form that you would expect to find in writing that was entered over a period of time and at the time indicated in the diaries themselves, Exhibits 76 through 79, beginning from '42 through '45 as compared to Exhibit 134 which was taken August 7 of this year?

A. I am not sure that I understand your question exactly.

Q. Is that the same similarity as to basic pattern that you would expect to find over the range of years that would be here present?

A. Well, I wouldn't attempt to compress Seijas' variations timewise that way because his writing has not undergone violent change over this period of time. It is an indication of his habits, but I would not endeavor to compress the variations timewise in that way. I don't think it would be technically sound.

Q. Did you make such an analysis of Mr. Forman's writing as to a time lapse from Exhibits

(Testimony of James P. Conway.)

132 dated January 29, 1937, Exhibit 133, which is November 27, 1955, Exhibit 63, which are entry slips in 1948, and the six entries you have indicated were written by Mr. Forman in Exhibit 79?

Mr. Mead: That is objected to as improper redirect examination.

The Court: Well, I think it is not redirect. However, I think under the circumstances I will [1345] permit it. You can cross examine on this, of course.

Mr. Mead: Thank you.

The Witness: Yes, I considered that, and Mr. Forman's writing, actually, is a remarkable illustration of the way writing habits persist over a long period of time. The earliest specimens, Forman specimen, is dated 1933, and the last is dated 1948, and his writing is remarkably consistent and a vivid illustration of the fact that not much change takes place in the writing of some people over — well, that would be 15 years.

Q. (By Mr. Obenour): And what would be the points that you would consider or did consider in determining that there was a remarkable similarity for continuance of pattern on Mr. Forman from the earliest sample to over the time lapse that was exhibited through the exhibits?

A. Well, I might just mention a couple that are very obvious and rather subtle. The position of the letter "L" as it relates to the line of writing, here on Exhibit 132 which is dated 1937, and this check, 133, which is dated 1945, we find this writer tend-

(Testimony of James P. Conway.)

ing to drop the "L" below the line of writing. It is just an unconscious move in his writing. Might I have Exhibit 129? Exhibit 129 which shows two [1346] cards, the lower contains the word "theatre" and it is dated 193-, and now, using that same word which appears on Exhibit 132, the word "theatre", particularly the formation of the "h", it is a singular formation and it is made in precisely the same fashion with very remarkable agreement over that period of time. Now, this sort of thing comes right up through his writing, and the figures too, are made in remarkably the same manner over a long period of years.

Q. What would you expect to find in a fictionized document, if Exhibits 76 to 79 had been prepared at a single time or assuming that it would take a matter of several days as counsel stated, what would you expect to find in such documents?

A. Well, usually in that sort of a thing, I have seen a good many of them, there is a sameness about them. By that I mean it is evident that the writer was in the same writing position for, well, for one of four bunches of the entries. You find that the pressure does not change a great deal, and by that I mean the pressure of the instrument on the paper. Where you have the original documents, sometimes you even find a telltale ink pattern where a fountain pen is being used, you can just see it running out of ink, and then it gets a new fill, or if a steel pen is used, you can [1347] almost tell where it was dipped into the

(Testimony of James P. Conway.)

ink supply. The relation of the entries to the page, that is, their position on the page, usually has a sameness about it. Sometimes there is an exaggerated effort to make it appear that they were written in the regular course. That stands out. Those are some of the things that you run into. Many times there are other glaring mistakes, but those are some of the things.

Q. Did you find anything that would indicate that these documents, 76 to 79, were fictionized or made up at a single time in order to fictionize originality of entry?

A. No. I looked at them critically for that purpose, and I didn't find any physical indications, and that is all I confined myself to, that stood out to me as indications of a made-up series of entries.

Q. What were the evidences in the document that caused you to conclude they were made over a prolonged period of time in the normal course of business rather than fictionized?

Mr. Mead: He has gone into that three or four times.

The Court: Yes, it has been covered.

Mr. Obenour: Three or four times? I think it was possibly covered once. [1348]

The Court: I think three or four times is a little overstatement, but they have been covered.

Q. (By Mr. Obenour): Was there any cross-reference—entries of cross-reference in the documents?

A. Yes. I noticed several days where there

(Testimony of James P. Conway.)

seemed to be a reference from one day to another. Now, I don't purport to know what all this stuff means, and I didn't inject myself to that, but there were dates where there was a reference from one day to another or where the entry was dubbed in as another day, things of that sort. I remember in Exhibit 79 there were several of those things. I believe there were other points, but I remember those specifically, February the 14th and the 26th as cross-reference.

Q. Were there slips that contained more than one person's writing? A. Yes.

Q. What combinations of writing were there on the slips appended to the diary for 1945 after May 2?

A. Well, you have Meyers and Seijas on some of the slips, and then you have Meyers-Forman on some of the slips, and then you have this unidentified fourth writer and Seijas on one slip.

Q. Were there slips which contained the date entered in handwritten form by more than one person? [1349]

A. Well, the dates on the slips were all Meyers' writing with four exceptions. For example, on December 12 the date was written by Seijas rather than Meyers. There are three others but I don't have all these dates exactly in my mind. That is one. There was one where Meyers put the date in first and then Seijas changed it. It is on the printed page for September 26.

Q. Were there entries in these diaries for the

(Testimony of James P. Conway.)

same dates or rather on the same page of a given date which were actually made at different times and under different circumstances?

A. Well, the only way I can answer that, there were entries on single pages which had a different set of writing conditions indicating that they were not all written at one time. I don't see one offhand, but, for example, February 14, there is a listing which shows the date "2-19" and above that it reads, "George came in but just signed the checks." Now, that was written with a different pressure and a different position on the page than these listings underneath indicating certainly, two different sittings.

Q. Do you have an opinion as to the capabilities of a person fictionizing these four documents so as to create all of the evidence as you have discussed as the basis of your conclusion, and omitting [1350] any evidence of fiction? Do you understand that question?

A. Well, I think I do. As I said before, I confined myself just to the physical things, and I think that the physical indications make it very remote that anyone could fictionize these things and inject the physical variations and changes that I found.

Mr. Obenour: That is all, your Honor.

Recross Examination

Q. (By Mr. Mead): I gather from your statements, Mr. Conway, that if you have the originals of these documents, of course, there would be many

(Testimony of James P. Conway.)

things that you could do as to ascertain the answers to the questions that have been propounded to you that you haven't been able to do from a photostatic copy reproductions of the originals?

A. Referring to continuity rather than the identification, part if quite clear on the photostatic copies. The other question, there are avenues of exploration that could be made on the originals that can't be made on copies.

Q. And, therefore, in the determination whether these entries were made at one time or over a period of several days or several weeks, or made over a period of four years, you are handicapped in that [1351] determination by not having the originals?

A. Yes. You can't explore certain other possibilities which you could on the originals.

Q. Now, there is no writing in any of these exhibits that you have identified as Mr. Forman's other than some figuring notations on the reproduction copies of slips that have been pasted in here?

A. Yes, that is right.

Q. There is no writing?

A. There is no script or printing. It is all figures.

Q. All figures. That is my point. Of course, figures are writing. I didn't mean to mislead you, but there is no writing of names or anything other than figures, no words, perhaps would be better?

A. That's right.

Mr. Mead: I think that is all. Thank you, sir.

The Court: That is all, Mr. Conway, and you may leave whenever you wish.

(Witness excused.)

The Court: Call another witness. [1352]

EDWARD O. RENSTROM

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Edward O. Renstrom, R-e-n-s-t-r-o-m.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Renstrom?

A. 2311 McGilvra Boulevard, Seattle.

Q. What is your occupation?

A. Licensed Public Accountant.

Q. How long have you been so engaged?

A. About ten years.

Q. And how long have you been in accounting?

A. Oh, about 25 years.

Q. How long in Seattle? A. 26 years.

Q. And you have practiced accounting in Seattle, then? A. Yes.

Q. And do you know Army Seijas?

A. Yes.

Q. And when did you first meet Mr. Seijas?

A. I first met him in November of 1943.

Q. Do you know Mr. Forman? [1353]

A. Yes, I know Mr. Forman.

(Testimony of Edward O. Renstrom.)

Q. When did you meet Mr. Forman?

A. I met Mr. Forman at the same time.

Q. And how did you become acquainted with Mr. Seijas and Mr. Forman?

A. I wasn't doing anything at that time of the year, and someone told me that Mr. Forman was looking for a bookkeeper to keep records.

Q. What did you do?

A. I went up to see Mr. Forman about it.

Q. And what happened then?

A. Well, Mr. Forman took me into Army Seijas' office and talked it over, and they hired me.

Q. And what were you hired to do?

A. To keep the books for four amusement companies.

Q. Where did this take place, the interview that resulted in your employment?

A. 1812 Smith Tower, Seattle.

Q. What was the business of the four amusement companies?

A. Well, they were pinball machines, pinball companies.

Q. And the names of the companies were what?

A. United Amusement Company, United Amusement Company of Bremerton, American Amusement Company and Bremerton Amusement Company.

Q. And who owned these companies? [1354]

A. Well, United Amusement Company was owned by Seijas and Forman. The Bremerton and American Amusement—or United Amusement Com-

(Testimony of Edward O. Renstrom.)

pany of Bremerton and American Amusement Company were owned by Seijas, Forman and Heberling Brothers.

Q. What were their shares?

A. I think Seijas had a quarter, Forman a quarter, and Heberling Brothers 50 per cent.

Q. Bremerton Amusement Company?

A. Well, that was Seijas and Forman and other parties unknown now.

Q. How did you carry the partnership interest on the books you kept?

A. For which particular company?

Q. For Bremerton Amusement Company.

A. Well, Seijas and Forman paid all of the taxes on all of the profits.

Q. Pardon?

A. Seijas and Forman paid the taxes on it.

Q. Well, what were the—you said persons unknown. What was that entry? How was that handled in your book?

A. I don't remember now, to tell you the truth.

Q. What was the shares of the various partners?

A. I don't remember that either.

Q. Where are the books, Mr. Renstrom? [1355]

A. I haven't the least idea.

Q. When did you last see them?

A. Oh, somewhere between 1946 and 1949.

Q. Where did you see them?

A. Well, that was when I was keeping records in the books.

(Testimony of Edward O. Renstrom.)

Q. Did the Heberlings have an interest in the Bremerton Amusement Company?

A. I don't remember.

Q. Did Forman have an interest in the Bremerton Amusement Company?

A. Forman did. Seijas did.

Q. And anyone else?

A. Well, I don't remember. Like I say, there was supposed to be a Tacoma interest in there, and I don't know who it was.

Q. Was it in the Bremerton Amusement Company that there was a Tacoma interest?

A. That is right.

Q. You didn't know who it was, by name or what?

A. No, I didn't know. I had no idea.

Q. On your books did you show any distribution to the Tacoma interest?

A. Not of profits, no.

Q. And how was the profit distributed in the Bremerton company? [1356]

A. I think it was—I don't remember, but I think it was distributed between Forman, Seijas and Heberling Brothers. I don't remember whether Heberling Brothers were in it or not.

Q. How many sets of books did you keep?

A. Four.—Excuse me, three.

Q. And were any of the company's books combined into one set?

A. That was United Amusement Company of Bremerton and American Amusement Company.

(Testimony of Edward O. Renstrom.)

The Court: Would you speak up a little louder. We can hear, but there is just a little effort to hear you.

Q. (By Mr. Obenour): And were your books changed after September 1, 1946?

A. That was when Henry Morin bought into the pinball company, I think, wasn't it?

The Court: Would you please keep your voice up, Mr. Renstrom? You speak so low. Speak up, please.

Q. (By Mr. Obenour): The books were changed September 4, 1946, Mr. Renstrom, for what reason?

A. Mr. Forman sold out his partnership to Henry Morin. It's hard to remember unless I have something to look at, but it's around that time that [1357] Mr. Morin bought into the company as I remember it.

Q. After Mr. Morin bought into the company, how were the partnership shares shown on your book?

A. Well, it showed then that Army Seijas had a 51 per cent interest and Henry Morin had a 49 per cent interest.

Q. After that time, did Mr. Forman show on the books that you maintained as having any interest in the company? A. No.

Q. After that time, did you have any knowledge or were you in any way informed by either Seijas or Forman that Mr. Forman had any remaining interest in any of the companies?

A. No, I was not informed of it.

(Testimony of Edward O. Renstrom.)

Q. Now, the United Amusement Company was the county route as it was called?

A. That is the county route.

Q. And did it change partnership interest at any time you were keeping books?

A. No, that company was later sold. I don't think that there was any change in partners there.

Q. However, during the time you kept books for it, who constituted the partnership for United Amusement Company?

A. Seijas and Forman.

Q. And on what basis? [1358]

A. 50-50.

Q. And it was sold, do you recall, approximately when?

A. Well, approximately in '45, but I couldn't be certain.

Q. What books did you keep for these companies, Mr. Renstrom?

A. Oh, we kept a check register, a cash book, ledger, journals.

Q. And you kept three sets of books, these books you have described, in other words, for each set of books you kept individual ledgers, journals and cash books? A. That is right.

Q. How long did you keep the books for these companies?

A. From November 1943, and I think it was until March or April of 1949.

Q. Where did you keep these books?

A. In the Smith Tower.

(Testimony of Edward O. Renstrom.)

Q. And what particular room did you office?

A. Well, at one time I was in 1811 and another time I was in 1812, and another time I was in 1806.

Q. Where were these offices in relation to Mr. Forman and Mr. Seijas' office?

A. Well, they were all in the same floor; 1811 would have been next door to 1812, although you had to go out into the corridor to go from one office to another.

Q. From whom did you receive your instructions [1359] on your work for these businesses?

A. It was mostly routine work, very few instructions. I could receive instructions from either one if there was anything in particular, but it wasn't very often.

Q. Either one being whom?

A. Mr. Forman or Mr. Seijas.

Q. And these businesses, were they all partnerships? A. They were all partnerships.

Q. Were partnership returns prepared for these companies during the period of your employment?

A. Yes, I prepared all of the partnership returns.

Q. What did you do with your partnership returns?

A. Well, this was signed by one of the partners and notarized, and a copy was sent in to the Internal Revenue, as far as I know, and a copy given to each of the partners.

Q. And by whom were these copies of the partnership returns given to the partner?

(Testimony of Edward O. Renstrom.)

A. I probably gave them to him.

Q. And did you also include copies for Mr. Forman as long as he remained in the business?

A. Yes.

Q. And after he sold his interest to Mr. Morin, did he any longer receive copies from you?

A. No. [1360]

Q. What was the reason for which you furnished these partnership returns to the partners?

A. Well, they would need the information for their individual returns.

Mr. Obenour: I ask this be marked, please.

The Clerk: Plaintiff's Exhibit 136 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 136, Mr. Renstrom, can you identify those documents, please?

A. This is a partnership return for the Bremerton Amusement Company for the year 1944. The next one is a partnership return for United Amusement Company of Bremerton for the year 1944. The next one is a partnership return for the United Amusement Company for 1944. The next one is a partnership return for United Amusement Company of Bremerton for 1946. The next one is a balance sheet as of August 31, 1946, of the United Amusement Company of Bremerton. The next one is a profit and loss statement of the United Amusement Company of Bremerton for the period from September 1, 1946, to December 31, 1946. The next one is a balance sheet for United Amusement Com-

(Testimony of Edward O. Renstrom.)

pany of Bremerton on December 31, 1946. The next one is a copy of a previous one here, United Amusement Company of Bremerton profit and loss statement for a period from September 1 to December [1361] 31, 1946. The next one is a copy of a balance sheet for United Amusement Company of Bremerton on December 31, 1946. The next one is a partnership income tax return for United Amusement Company of Bremerton for the year 1947. The next one is a profit and loss statement for United Amusement Company of Bremerton for the year 1947. The next one is a balance sheet for United Amusement Company of Bremerton as of December 31, 1947.

Q. Those were prepared by whom, Mr. Renstrom? A. Prepared by me.

Q. And were copies of each of those documents furnished to the partners at the time you prepared them? A. They were.

Q. And were originals of those partnership returns filed with the Bureau of Internal Revenue?

A. I suppose it was. I didn't always mail them in. Mr. Seijas might have mailed some of them in.

Q. However, they were copies of the returns prepared by you at the respective dates indicated?

A. That is right.

Mr. Obenour: We offer Exhibit 136.

Mr. Mead: We have no objection.

The Court: Exhibit No. 136 is admitted. [1362]

(Whereupon, Plaintiff's Exhibit No. 136 for identification was received in evidence.)

(Testimony of Edward O. Renstrom.)

Q. (By Mr. Obenour): Handing you Exhibits 16 through 20, Mr. Renstrom, can you tell me who——

A. This is a partnership return for United Amusement Company of Bremerton for the year 1945.

Q. I think these have all been entered previously, Mr. Renstrom. I will ask you if you would look at Exhibits 16, 17, 18, 19 and 20, and can you tell me who prepared those?

The Court: 21?

Mr. Obenour: Pardon me.

The Court: I think so.

Mr. Obenour: Yes, sir, 21 also.

The Court: Just glance through them. This is for the purpose of whether this witness prepared them or not?

Mr. Obenour: Yes, sir.

The Court: Do that quickly.

The Witness: How do you want me to identify——

The Court: Just go through them to yourself and satisfy yourself as to whether or not you prepared each and all of those items. That is all that is required at this moment.

The Witness: I didn't prepare all of them.

The Court: Indicate the ones you did not.

The Witness: I didn't prepare the partnership return for United Amusement Company for 1948 and 1949. I am not sure about this one for 1947

(Testimony of Edward O. Renstrom.)

for United Amusement Company of Bremerton, but the rest of them I prepared.

Q. (By Mr. Obenour): Which ones are those by exhibit numbers, sir?

A. The ones I prepared are 16, 17 and 18. One I am not sure of, it is 19, and the ones I didn't prepare is 20 and 21.

Q. Were you keeping the books of the United Amusement Company of Bremerton for the year 1947? A. I think I was, yes.

Q. And the United Amusement Company in 1948?

A. I am sure I kept the books that year, but I didn't prepare that return.

Q. By whom was this return prepared?

A. C. B. Gustafson.

Q. That is Exhibit 21 for '49, and how about '47 and '48? A. '48, he prepared too.

Q. Gustafson prepared?

A. Gustafson prepared.

Q. '47?

A. '47, I probably did, but my signature isn't on there. [1364]

Q. In '48 there is a profit and loss statement and a balance sheet. In that year did you prepare a profit and loss statement and balance sheet for United Amusement Company?

A. I don't remember.

Q. Did you prepare a balance sheet and profit and loss statements for these companies during the period that you kept the books?

(Testimony of Edward O. Renstrom.)

A. During the period that I kept the books, I practically did all the time.

Q. Were you keeping the books during '47, '48 and '49?

A. In 1947 I—see, in '48, why, those figures would come out in '49. That is the time it would be in preparing them, so it's doubtful whether I did or not for '48.

Q. When did you cease preparing the books in '49?

A. I don't remember exactly. I think it was in March sometime.

Q. From what information would the balance sheet be prepared for the year '48?

A. It would be prepared from the books that I kept that year. I suppose they would be. I imagine they would be.

Q. How were the amusement companies operated in relation to the books that you kept, Mr. Renstrom?

The Court: Excuse me. I think we will take [1365] the recess now. That might take a little time, and we better have a recess now.

(Whereupon, a short recess was had.)

Q. (By Mr. Obenour): Mr. Renstrom, how were the records kept by you associated with the individual amusement companies?

A. Well, the companies, of course, operated pinball machines. The collector would go over to Bremerton, take the money out of the pinball machines, make out receipts showing the distribution of the

(Testimony of Edward O. Renstrom.)

taxes and et cetera, bring the money and the receipts back to me, and I would reconcile them and see that they agreed and enter the figures in the books.

Q. All right, sir. Now, did you distinguish the individual routes by companies in your books?

A. The United Amusement Company was separate. The Bremerton Amusement Company was separate, but the other two may have been combined.

Q. All right, sir, and to your knowledge, did each of the companies represent a separate route?

A. That is right.

Q. Did the collector in the information furnished you segregate the receipts by routes?

A. He would.

Q. And what would be the information furnished you by the collector? [1366]

A. At the time he turned in the money he would turn in the receipt which would show the location. It would show the amount taken out of each machine and show the amount of tax due on each slip and show the amount of——

Q. Handing you Exhibit 84, do you recognize that document?

A. Yes. This is a receipt form that they used.

Q. And it's that type of receipt you would receive from the collector? A. That is right.

Q. Now, who were the collectors during the period you worked for the company?

A. Jerry Meyers did most of the collecting ex-

(Testimony of Edward O. Renstrom.)

cept that George Heberling, as I remember, collected from a couple locations.

Q. All right, sir. Now, the information you would get, then, on this receipt form would contain what?

A. It would show the number of the machine, the location, the amount taken out of each machine and how much was city taxes, how much for state taxes, what was left to divide, and show the split between the operator and the location.

Q. Now, were these receipt forms segregated by routes and companies? A. Yes. [1367]

Q. How were they segregated? In other words, how were they contained?

A. Well, he would bring them over in an envelope with the money along with it, and——

Q. What money would you receive with the receipts? A. Do you mean what form?

Q. No, sir—all right, sir, what form.

A. Well, it would be mostly in checks. There was some currency and a little silver.

Q. And how would the amount of money contained in the envelopes correspond to the amounts shown on the receipt forms?

A. It would usually agree right down to the penny, except once in awhile there would be a dollar or two over, once in awhile a dollar or two short.

Q. Now, would you receive the money shown to be due the state and city taxes? A. Yes.

Q. What money would you receive as the receipts for the partnership?

(Testimony of Edward O. Renstrom.)

A. Well, the money would all come together, and I would add up how much of it was for taxes, hold out that amount but deposit it in a separate bank account.

Q. And the balance would be what?

A. The balance would go into the partnership [1368] bank account, the general bank account.

Q. And would that amount you received then equal the taxes due the state and city plus the partners' share of the receipts shown on the receipt form? A. That is right.

Q. And how many bank accounts did you maintain?

A. For United Amusement Company of Bremerton we maintained four bank accounts; besides the tax account and the general account, there was a payroll account and a payroll tax account. For the other two companies there was just a general account and a tax account.

Q. And how would you handle the amounts due city and state for taxes?

A. The amounts due the state and city for taxes, I would put that in a separate account. When the tax became due, I would make out a check for it, the report would go in.

Q. Who would actually give you the envelopes containing these receipts and money?

A. Jerry Meyers.

Q. Did you ever receive it from Mr. Heberling?

A. Yes. Heberling had a couple locations or so he collected from.

(Testimony of Edward O. Renstrom.)

Q. Who would have prepared these receipts that you would receive? [1369]

A. Jerry Meyers prepared most of them. Heberling prepared those that he collected.

Q. How would you then handle the information you so received here on these receipts in regard to the books you maintained?

A. I would—on the books it would show how much cash was received for taxes, how much was received for the company, you might say, and——

Q. What would be your entries, your posting entries, of the amounts shown as the gross receipts from the receipt forms given you?

A. We would show the total amount of gross receipts.

Q. And the basis of the information you would show as the gross amount would be what?

A. The amount that I received which was also the same amount entered on these slips.

Q. Did you keep a cash book? A. Yes.

Q. And you kept a ledger and a journal?

A. That is right.

Q. And how often would you post the information you would receive from these receipts?

A. Well, I would post them every week as the money came in. Of course, the posting in the ledger would only take place once a month. [1370]

Q. What was your record on the books you kept of the income of the companies?

A. I don't quite understand your question.

(Testimony of Edward O. Renstrom.)

Q. What was the record you maintained of the income received by the respective companies?

A. Well, the income received would show in the cash book and in turn be posted to the ledger.

Q. And that ledger would be your record on your books of each of the companies for the receipts of the respective companies?

A. That is right.

Q. And how would the amounts shown as the income of the respective companies compare to the receipts received by you from the collector?

A. They would be exactly the same.

Q. And how would you then use the receipts shown on your books in the preparation of the partnership tax returns?

A. Well, at the end of the year the books would be closed out, the total amount would be shown as gross receipts, and taxes paid to the city and state would be shown as expenses.

Q. And would the figures shown as gross receipts of each of the four companies whose books you kept, would be income shown on your partnership returns be the same as the income reported [1371] on your books? A. Exactly.

Q. Did Mr. Seijas or Mr. Forman ever give you any of these business receipts which had been collected and prepared by Meyers?

A. Not by Meyers. On rare occasions they may have given one from Heberling.

Q. What would be such an occasion?

A. Well, if I wasn't in the office at the time

(Testimony of Edward O. Renstrom.)

or Heberling showed up at an unusual time of the day, or something.

Q. How would you handle the information receipts shown from the monies collected by Heberling?

A. The same way. The receipts and the money would balance out exactly. They would be entered on the books.

Q. And handled exactly the same way as you have described for the money collected and reported by Meyers? A. That's right.

Q. Did Mr. Forman and Mr. Seijas ever give you any money collected from the machines in excess of that money for which receipts had been given? A. No, they didn't.

Q. Did you report at any time on any books or partnership returns prepared by you, any money collected from the machines in excess of the money reflected on the receipts?

A. No, I didn't. [1372]

Q. Prior to 1952 did you have any knowledge that there was money collected from the machines operated by the companies?

A. No, I had no knowledge of that.

Q. Pardon me. Did you have any knowledge prior to 1952 that there was any money collected from the machines which was not reported on the receipts furnished you?

A. No, I have no knowledge of that.

Q. Prior to this time, did you have any knowledge that Jerry Meyers was not reporting on his

(Testimony of Edward O. Renstrom.)

receipts all of the money that he was taking from the machines?

A. I had no knowledge that he was except that he was turning in all the money he collected from the machines.

Q. And did you have any knowledge that Mr. Meyers or Mr. Heberling was getting any money in excess of that reported to you directly to Seijas or Forman? A. No, sir.

Q. Did you keep any books other than the business amusement companies for Seijas and Forman?

A. I think I set up books on a building out in West Seattle.

Q. That was known as the Forman-Seijas partnership? A. That's right.

Q. Did you in any way report on any partnership books or tax returns any money not reflected on the receipts furnished to you but given [1373] by Meyers or Heberling to Seijas and Forman?

A. I did not.

Q. Did the manner in which you reported the business operations of the amusement companies as to collection information and money received differ in any manner between the partnership of Seijas and Forman during the period '42 to '45 and the partnership as you knew it, of Seijas and Morin of 1946 to 1948?

A. Idon't understand your question.

Q. Did your manner of keeping books in reflecting the operation of the partnership differ in any way between the partnership operation of Forman

(Testimony of Edward O. Renstrom.)

and Seijas from '42 to '45 period and the partnership of Seijas and Morin in 1946 to 1948?

A. No. We used the same system in keeping the records.

Q. After September 1, 1946, from whom did you receive instructions on the operation of the business?

A. What little instructions I received would be from Seijas and Morin.

Q. I may have covered this, but, did you give partnership profit and loss and balance sheets for '46 and '47 to the partners? A. Yes.

Q. And to whom did you give them?

A. If that was the year Seijas and Morin were [1371] partners, they were the ones that got the copies of the partnership returns.

Q. And did you furnish any information thereafter to Mr. Forman? A. No.

Q. Did the pinball business have any partnership draws while Mr. Morin was a partner?

A. Yes, they had draws all during those years.

Q. And how would they be handled? How did they occur?

A. Well, they would just write a check out of the general account and the partners would usually take the share they were entitled to.

Q. And the partners were whom?

A. Are you talking about '46 to '47?

Q. Yes, sir.

A. That would be Seijas and Morin.

Q. '46 and '47? A. Seijas and Morin.

(Testimony of Edward O. Renstrom.)

Q. And to whom would the checks be made out?

A. They would be made out to Army Seijas and Henry Morin.

Q. And were there any checks issued to Forman for any portion of these draws?

A. Not from the pinball company.

Q. Were there any checks issued to Mr. Forman?

A. Not from the pinball company. [1375]

Q. Were there any issued from any other company or any other check?

A. There were checks in Army Seijas' checkbook, but——

Q. Did you have access to Army Seijas' checkbook and legal books and records?

A. Well, I did because he asked me to go through his checkbook and pick out expense items because he wanted the pinball machines to pay half of his office expenses.

Q. All right, sir. And did the pinball business pay half of his office expenses?

A. The pinball business paid half of the office expenses.

Q. And during what period?

A. Oh, that would cover quite a period of time That was the same practice before Morin bought into the business, to some extent, but it was definitely the practice after he bought.

Q. And on these occasions when you would examine his books, would you find checks drawn on Mr. Seijas' personal account to Mr. Forman?

(Testimony of Edward O. Renstrom.)

A. I would.

Q. And how would these checks correspond to the checks drawn to Seijas from the amusement companies?

A. Well, in some cases it looked like they were about half of the amount that Seijas had drawn.

Q. How would they correspond as to time?

Mr. Mead: That is objected to, your Honor. He is talking about exhibits. There are documents in evidence and reference should be made to those documents, and I move the answer be stricken.

The Court: That may be done. The general fact that the witness observed that there were such checks may stand, but as far as anything else about it, that will be dependent upon what the record shows, I beg your pardon, I mean what the written documents show.

Q. (By Mr. Obenour): Handing you Exhibit 106, did you have access to this document at the time that you were keeping the books for the amusement companies?

A. It says "Army Seijas' personal account." Now, if this is the same checkbook he used for his office account, I had access to it.

Q. Would you refer to checks number 37 and number 38?

A. I see some of my writing in here, so I have had access to this checkbook, all right.

The Court: That answers the question.

Q. (By Mr. Obenour): And how would the dates correspond for these entries you would ob-

(Testimony of Edward O. Renstrom.)

serve in 106 to the dates of which draws would have been made on the amusement company?

A. Did you say check——? [1377]

The Court: Referring to checks to Forman in there.

The Witness: Oh, here is a check number 57 to William R. Forman for $3,287.14.

Q. (By Mr. Obenour): Now, referring to those checks that you observed, how would the dates of those checks correspond to the dates on which draws had been made to the partners from the amusement company?

A. I wouldn't know unless I could see the checkbook that the partners used for their drawing.

The Court: That has all been covered previously anyway, I think, counsel.

Mr. Obenour: Yes, sir.

Q. (By Mr. Obenour): Did you ever ask either Mr. Seijas or Mr. Forman why these checks were being drawn by Seijas to Forman?

A. No, I didn't. I thought it was their own business and if they felt I should know they would probably tell me.

Q. Did Mr. Forman ever tell you anything concerning any interest he had in the business after Morin bought him out?

A. He never said anything about any interest in the business. In fact, he said several times that he was out of the pinball machine business.

Q. Did you ever know of any statement Mr. [1378] Forman made to that effect to Mr. Morin?

(Testimony of Edward O. Renstrom.)

A. To Mr. Morin?

Q. Yes, sir.

A. If I remember correctly, Mr. Morin thought he was being mistreated in his partnership deal and he would go in to see Mr. Forman and Mr. Forman would say that he was all through with it because a little later on, I may have happened to go by Mr. Forman's office, and he would say, "Well, Mr. Morin was in here again complaining and I have told him time and time again that I am through with the pinball business," and that was what you might say he was not interested in it.

Q. Did you ever go over to Bremerton with Mr. Forman or Mr. Seijas during the period of '42 to '45? A. A very few times.

Q. And have you ever gone over with Mr. Forman?

A. Not alone. Mrs Seijas was along.

Q. What would be the occasion that you would go over with Mr. Seijas and Forman?

A. I don't remember the exact occasion why we went over now. It is so long ago. That was back in 1943.

Q. What occurred, then, on that occasion, to the best of your recollection?

A. Well, we stopped in front of a location, I forget the name of it, I am not positive, and they [1379] were partners or in this location with someone else, as far as I know, but Mr. Forman said that he didn't—cautioned me not to tell anybody

(Testimony of Edward O. Renstrom.)

that he was the partner in it because he didn't want it known.

Mr. Obenour: I believe that is all. You may inquire.

The Court: Cross examination.

Cross Examination

Q. (By Mr. Mead): Mr. Renstrom, the last testimony that you just gave that Mr. Forman cautioned you he didn't want it known he was a partner in this particular business at that time, when was that? Was that during the time he was in the partnership—in the business in Bremerton and before the sale to Morin?

A. This particular business wasn't a pinball business that I am referring to. It was a smoke shop or a tavern or something over there. Some separate business entirely.

Q. So it had nothing to do with pinballs?

A. Had nothing to do with the pinball business.

Q. And when was this statement, or when was this occasion? Was that during the time that Seijas and Forman were in the pinball business?

A. That's right. It was back in 1943, if I remember right. [1280]

Q. And before the sale to Morin?

A. Yes, that's right.

Q. Now, Mr. Renstrom, when did you first go to work for this business? Could you fix the date?

A. Well, it was late November of 1943.

Q. And when did you leave the employment of this pinball venture?

(Testimony of Edward O. Renstrom.)

A. It was shortly after the first of the year in 1949. I don't remember the month even.

Q. So up to the time that Mr. Forman then sold his interest in the city routes to Mr. Morin, you were working for Seijas and Forman and Heberling, is that right? A. That's right.

Q. At various times? A. That's right.

Q. Is that right?

A. Well, I was working for them all the time.

Q. Yes. Now, do you recall the date that Mr. Forman sold his interest in the pinball business to Morin?

A. I am not sure, but I think it was September 1st, 1946.

Q. Now, after that time, after the date of September 1, 1946, did Mr. Forman on any occasion ever give you any instructions with regard to the pinball business? A. No, sir.

Q. Who gave you your instructions?

A. It really wasn't necessary to give any [1381] instructions, but what little there might have been would be given to me by Seijas or Morin.

Q. Did Mr. Forman after September 1, 1946, have anything to do with the pinball business, to your knowledge?

A. Not to my knowledge, no.

Q. And you were in the office there continually until 1949 keeping the books and records of this "pinba" business?

A. Well, when you say "in the office," I was in

(Testimony of Edward O. Renstrom.)

a separate office, but I was there keeping the records.

Q. Yes. Now, let's get this office arrangement straightened out a little if I can, Mr. Renstrom. I think you said that the offices that were maintained in the building were number 1811 and number 1812, is that right?

A. That's right. I think I made a mistake when I said 1812. 1810 is the one I occupied. I occupied 1811 for a while and 1810 for a while, and 1812 was Mr. Seijas' and Mr. Forman's office.

Q. And the office you were in was a separate office? A. That's right.

Q. And was that connected in any way to these other offices?

A. There was a door, but there was so much furniture in this office, there was a desk up against the door. There wasn't any other place to put it, and so you had to go out into the corridor to get into his office.

Q. From one office to another? [1382]

A. That's right.

Q. Now, after September 1, 1946, did Mr. Forman ever request any information from you about the pinball business? A. No.

Q. And didn't engage in any conversation with you about it as he had formerly, is that right?

A. That's right.

Q. Did Mr. Morin consult with you about the business after that time?

A. Yes. He consulted quite frequently.

(Testimony of Edward O. Renstrom.)

Q. Now, after Mr. Forman's sale to Mr. Morin, was there some change in Forman's office arrangement there?

A. I think it was about that time that Mr. Forman moved to the next office which was, probably, 1814.

Q. About that time Mr. Forman moved into other offices, the next office as you described it, and that was 1814? A. That's right.

Q. And that was a move, then, from the office that he had occupied during the time he was engaged in these pinball ventures with Mr. Seijas, is that right? A. That is right.

Q. And it was on about that time?

A. That is right. I don't remember the exact time, but it was about that time.

Q. Now, did he continue, then, to occupy those [1383] offices, as far as you know, while you were employed there? A. At 1814, yes.

Q. The new offices? A. Yes.

Q. Following the sale to Morin?

A. That's right.

Q. Now, after the sale to Mr. Morin, I think you stated that the same general practice or manner of keeping the books and the same bookkeeping system was continued, is that right?

A. That's right.

Q. Did you make a change, however, in the capital account of the partnership?

A. Yes. There was a change made. Mr. For-

(Testimony of Edward O. Renstrom.)

man's name was taken out and Mr. Morin was put in as the other partner.

Q. Did you set up a new book for the new partnership?

A. Yes, sir, I think there were new books set up for the new partnership because at that time I had a new entry when I changed partners.

Q. And was Mr. Forman's interest in *any* reflected on the books of this new partnership?

A. Not after the new partner was taken in.

Q. Was there occasion, Mr. Renstrom, to make some changes in the new setup with respect to the depreciation of the equipment? [1384]

A. Well, Army Seijas wanted—most of the machines had been fully depreciated. He wanted to revalue the machines at $250 a piece and set them up on the books at that amount, and I disagreed with him on it and we had a disagreement for about three weeks, and I finally had to follow his instructions and we revalued the machines. Now, it probably would have been all right if he had paid a capital gains tax on it, but he didn't.

Q. In any event, you had some discussion with Mr. Seijas and he instructed you to set up a new depreciation schedule after the sale to Morin?

A. That's right.

Q. And that was done? A. That's right.

Q. And you had some argument with him about whether that was the correct bookkeeping situation? A. That's right.

Q. And that went on over two or three weeks?

(Testimony of Edward O. Renstrom.)

A. That's right.

Q. And finally I think you said you followed his instructions? A. That's right.

Q. Did Mr. Forman in any way engage in any in any of those conversations or have any interest in that discussion? A. No, he didn't.

Q. Now, Mr. Renstrom, I think you stated that [1385] you had occasion to look at Mr. Seijas' checkbook from time to time for the purpose of determining whether half of the expenses of the office were charged to this pinball venture?

A. That's right.

Q. And I think you stated that was particularly true after the sale to Mr. Morin, is that right?

A. That's right.

Q. Did you prepare any of Mr. Seijas' income tax returns in addition to the partnership information returns?

A. At that period I don't think I did. I don't remember.

Q. You don't recall that, sir? A. No.

Q. I know considerable time has passed, Mr. Renstrom, since this matter has been discussed or considered by you, but in order to refresh your memory, first, I would ask you, you testified in the case against Mr. Seijas last year in this court, did you or not? A. That's right.

Q. And I think you were called by the government as a witness, were you, sir, on that occasion?

A. That's right.

Q. I will ask you whether or not to refresh your

(Testimony of Edward O. Renstrom.)

memory that you testified in this way with respect to these questions, "Question: And did you [1386] prepare any of the personal returns for Mr. Seijas? Answer: I might have helped prepare the returns for 1943 and 1944, but that would probably be all of them, and I am not too sure about those." Is that about right? A. That is about right.

Q. Now, will you please hand the witness Exhibits 1, 2, 3, and 4. Those exhibits have been identified, first, No. 1, as Mr. Seijas' Federal return for 1944. In examining that return, is there anything about it, sir, that would refresh your memory one way or another about whether you prepared it or ever saw it or had anything to do with it, or not?

A. I don't know. I see I have prepared the schedule of gains and losses. That is in my writing here.

Q. That is on the return?

A. That's right.

Q. That would indicate that at least you had something to do with it, whether you prepared it or not, is that right? A. That is right.

Q. Is that typewritten?

A. It is a typewritten return.

Q. Do you know whether or not you prepared just that statement that is appended to the return or whether you prepared the whole return? [1387]

A. I couldn't say offhand because there are several partnerships included in this return here and some of those partnership returns I have had nothing to do with.

(Testimony of Edward O. Renstrom.)

Q. I understand that. I think your testimony was to the effect that you prepared some of the partnership information returns for several of these years covering the pinball venture, is that right?

A. That's right.

Q. And, of course, that is not an income tax return but merely an information return?

A. That's right.

Q. Now, looking at the exhibit which is Exhibit 2, what is that exhibit, sir?

A. That is the individual tax return of Army Seijas for 1945.

Q. Is there anything about that exhibit that would refresh your memory as to whether you had anything to do with it, or not?

A. I can't tell from this exhibit. It is all typewritten, and I wouldn't remember.

Q. You wouldn't remember that? A. No.

Q. Now, with regard to Exhibit 3, what is that return?

A. That is Betty L. Seijas for the—individual income tax return for the year 1945. [1288]

Q. Is there anything about that exhibit that would refresh your memory as to whether you had anything to do with it or not?

A. Again, it is all typewritten. I am not positive.

Q. You are not positive about it? A. No.

Q. Would you hand the witness Exhibit 76 and 77, please—that is not the right exhibit. I think it is 75.

(Testimony of Edward O. Renstrom.)

The Court: That is an agent's report. You have got the wrong number again. However, it is not surprising what with the large number of exhibits.

Mr. Mead: I think we had some confusion in some of these numbers.

Q. (By Mr. Mead): Exhibit 75 was an agent's report concerning Seijas' return for 1943?

The Court: My record shows that that has not been admitted in evidence, I am not trying to interfere, is that correct?

The Clerk: Yes, your Honor. That is my record also.

Q. (By Mr. Mead): Is there anything about any of those exhibits, Mr. and Mrs. Seijas' income tax returns, to refresh your memory whether or not you had some connection in preparing them?

The Court: You are going back to Exhibits 1 to 4? [1389]

Mr. Mead: Yes, sir.

The Witness: You never asked me about 4 here, but Exhibit 4 is signed by another accountant.

Q. (By Mr. Mead): That is signed by Jacobsen? A. That's right.

Q. The other exhibits or any of them?

A. I wouldn't remember.

Q. You wouldn't remember? A. No.

The Court: There is nothing about them that stirs your memory about it, is that it?

The Witness: There is nothing about them.

Q. (By Mr. Mead): Did you make a practice, if you did prepare any income tax returns for a

(Testimony of Edward O. Renstrom.)

taxpayer, individual returns, of putting your initials or your signature on the return, sir?

A. I couldn't say for sure at that time whether I always did that or not.

Q. In other words, at this time you have no independent recollection of having prepared any income tax returns for Mr. Seijas, any individual returns?

A. I may have helped prepare several of his returns for a few years in there, help to prepare part of it. The information would come from different sources, different partnership information [1390] returns, but in the final analysis he finished the returns, most of them, himself, to my knowledge, although I see another accountant's name down here.

Q. So that insofar as your connection with it, then, Mr. Renstrom, it is your recollection that you may have prepared some of the schedules and furnished him with some of the information that he requested, but that he prepared the returns themselves, is that right?

A. To some extent that is right.

Q. Insofar as your connection with it is concerned, at least? A. Yes.

Q. Did you ever have any discussions with Mr. Forman or did he ever request information from you with regard to Mr. Seijas' individual returns?

A. No, he never did.

Q. And did you ever give him any information about Seijas' individual returns?

(Testimony of Edward O. Renstrom.)

A. Not his individual returns.

Q. You did furnish Mr. Forman with copies of the partnership information returns so long as he was a partner in this pinball venture, did you?

A. That is correct.

Q. In the various companies?

A. That's right.

Q. And after the sale to Mr. Morin of [1391] the interest of Mr. Forman and this pinball venture, did you ever furnish him with any copies of the information returns?

A. I never furnished Mr. Forman with any information after Mr. Morin bought in.

Q. After the sale to Morin, who was the person mostly responsible for directing your operations in connection with the pinball venture up to the time you left?

A. My work was more or less routine and really no instructions were necessary. The collector would bring in the money and I would make the proper entries and deposit it in the bank, and there really weren't any instructions.

Q. In other words, Mr. Renstrom, the situation is that you were merely the bookkeeper and you just kept the records and had no discussions with them generally about the business operation, is that right? A. That is right.

Mr. Mead: That is all.

The Court: Is that all?

Redirect Examination

Q. (By Mr. Obenour): Mr. Renstrom, during

(Testimony of Edward O. Renstrom.)

the time that you were there keeping the books of the amusement companies, were your books and records subject to audit by Internal Revenue agents? A. Yes, they were. [1392]

Q. And on those occasions what was the procedure followed by which the records were made available for the agents to audit?

Mr. Mead: That is objected to as improper redirect.

The Court: Well, it appears to relate to an exhibit which you referred to, if I am not mistaken, is that correct?

Mr. Obenour: Yes, your Honor.

Mr. Mead: There was no question about it. It was not introduced in evidence.

The Court: I tried to follow it rather closely, and I thought you had invited it. Maybe I am mistaken.

Mr. Obenour: I would ask to reopen, your Honor, on this subject.

The Court: Well, to avoid any question about it, I will allow you to reopen and then you can cross on it, Mr. Mead. I thought you had referred to that exhibit even though it had not been admitted even after I called it to your attention, but you may not have intended that and I may be mistaken. However, in any event, we will allow you to reopen and you can cross on it. [1393]

Q. (By Mr. Obenour): What was the procedure followed whereby your records were made available, if they were, to the agents for audit?

(Testimony of Edward O. Renstrom.)

A. If the agents came in, the records were all made available to them. They could look at whatever they wanted to.

Q. Who would refer the agent to you?

A. Mr. Seijas or Mr. Forman.

Q. And do you recall any conversation whereby either Seijas or Forman referred any of the agents to you for information?

A. I don't recall any conversations about it.

Q. Do you recall having the agents referred to you, though, by either Seijas or Forman?

A. Yes.

Q. On those occasions what records would you make available to them?

A. Anything they wanted to see.

Q. And would these be the same books and records you have just described in your testimony?

A. Exactly.

Q. And handing you Exhibit 75, September 13, '44, is that date correct? A. November 15th?

Q. September 15th, 1944. [1394]

A. Oh, yes, the report is dated.

Q. And you were working for the company at that time? A. That's right.

Q. And do you recall the occasion when that agent was in to examine your records in order to submit that report?

A. I don't recall when he was there, and I don't remember whether I have ever seen this particular report or not.

(Testimony of Edward O. Renstrom.)

Q. Were you furnished copies of reports after the audits had been made?

A. I don't remember whether I was always furnished copies of them.

Q. As a matter of practice, Mr. Renstrom, do you know what the practice of the agents is as to giving the taxpayer copies of reports submitted?

Mr. Mead: That is objected to, your Honor, as not a question as to what was the practice but what was done in this instance.

The Court: Sustained.

Q. (By Mr. Obenour): At any time the books were subject to audit, Mr. Renstrom, did you ever tell the agents that the books kept by you and shown to the agents did not reflect all of the receipts of the respective companies during the periods indicated on the books so shown?

A. What was the first part of the question.

The Court: The question was, at any time [1395] did you ever inform any agent that the books did not disclose all of the income?

The Witness: No. As far as I know, the books disclosed all of the income.

Q. (By Mr. Obenour): And was that the condition which the books were represented to the agents? A. That's right.

Q. And would that apply to all of the audits made by the agents from the period of September 15, 1944, through the period of your employment at the amusement companies?

(Testimony of Edward O. Renstrom.)

A. That is right. Now, on this particular report here, this is for the year——

The Court: There is no question about that at the moment. That exhibit has not been admitted in evidence, so the contents are not to be discussed.

Mr. Obenour: We offer Exhibit 75, your Honor.

Mr. Mead: We have the same objection, your Honor, on the grounds of materiality.

The Court: It still hasn't been sufficiently identified. The objection is sustained. As I finderstand the last question and answer, Mr. Renstrom, on each and every occasion when an audit was made, as far as you know anything about it, the same representations were made to the government agents [1396] to the effect that the books and records kept by you accurately reflected the income of these pinball businesses, is that right?

The Witness: That is correct.

Q. (By Mr. Obenour): Do you know a man by the name of Hugh Fortner?

A. I recall an agent being up there.

Q. Do you recall an agent by the name of Fortner examining your books and records for an audit of those books and also the tax liability of Army Seijas? A. That's right.

Q. And do you recall at that time what books and records were made available to him?

A. All of our books were made available to him.

Q. And do you recall what were the years in question which Mr. Fortner was examining?

(Testimony of Edward O. Renstrom.)

A. I don't remember exactly, but it probably was 1944.

Q. If that would be the time he was there?

A. I would be there then, that's right.

Q. I mean that was the date he performed the audit?

A. No. The audit was probably in 1945. I don't remember exactly.

Q. Was he there on more than one occasion?

A. When I was there he was only there on one occasion. He might have been there more than one day, but—— [1397]

Q. On the occasion of Mr. Fortner's audit, was he furnished the same books and records which you have been describing? A. He was.

Q. Do you recall the result of his audit as to whether or not there was a deficiency?

A. If I recall correctly, the only thing that he criticized was an item put down for legal expenses which he disallowed.

Q. Do you recall whether or not there was questioned the sale of an interest in a company to a third partner? A. No.

Q. Do you recall an inquiry into a tavern known as the Town Tavern?

A. I don't know anything about it.

Q. Did his examination result in the finding of a deficiency or not?

Mr. Mead: I object to that, your Honor, as calling for a conclusion of the witness from a report that he states he is not familiar with.

(Testimony of Edward O. Renstrom.)

The Court: It isn't a question of the report, it is a question of whether Mr. Renstrom remembers there being a deficiency. I think he can say whether he remembers or not.

The Witness: There probably was a small deficiency on the legal expense. [1398]

The Court: We are not speaking as to what it probably was, but what your memory is. Do you have a memory of it?

The Witness: I don't remember.

The Court: All right.

Mr. Obenour: I believe that is all.

The Court: Anything further?

Mr. Mead: Yes, sir.

Recross Examination

Q. (By Mr. Mead): Mr. Renstrom, there was some inquiry made about books and what you showed the agents when they came there. What books did you keep?

A. We kept the cash book, a check register, a journal, and a ledger, and also these receipts that were brought over by the collector.

The Court: Do you mean these receipt slips?

The Witness: That is correct.

Q. (By Mr. Mead): You kept these receipt slips, cash books, a journal, and a ledger?

A. That's right.

Q. Now, your journal and ledger were the permanent records of the business, were they, sir?

(Testimony of Edward O. Renstrom.)

A. They were all more or less permanent records. [1399]

Q. And you maintained them there?

A. That's right.

Q. And I think you stated that you left there in 1949? A. I think that is the date.

Q. Were the journals and ledgers and cash books all there when you left there?

A. To the best of my knowledge.

Q. And they reflected the records that you had kept during the period of time that you were employed by the company? A. That's right.

Q. Did you see the journals or the ledgers here in this court last year on the occasion of Mr. Seijas' trial? A. No, sir.

Q. They were not brought to your attention at that time? A. No, sir.

Q. You stated, Mr. Renstrom, that insofar as you knew, all of the income of these partnerships was reported in the records that you kept there?

A. That's right.

Q. Did you have any knowledge at any time, any personal knowledge, that all of the income was not reported?

A. No, sir. I have no knowledge of any unreported income.

Q. So you had no knowledge at the time you made those entries nor do you have any knowledge now?

A. That's right, I have no knowledge. [1400]

Q. I think you stated that upon the occasion of

(Testimony of Edward O. Renstrom.)

Mr. Fortner, is that the name, Fortner's inquiry, the agent?

A. I seem to recollect that was the name.

Q. That he was inquiring into the matter of the expenses, that you recall?

A. That is right. There was only one item that he questioned that I remember.

Q. Did he have any occasion to ask you specifically whether or not all of the income was reported in the books at that time?

A. I don't remember if he did or not. He probably did.

Q. You don't remember of any such specific request, though? A. No.

Mr. Mead: I think that is all. Thank you, your Honor.

The Court: I believe that is all, Mr. Renstrom. You may leave whenever you wish.

(Witness excused.)

The Court: We are going to take our noon recess at this time. Will you return at 1:30? Keep in mind my admonition.

(Thereupon the Jury withdrew from the courtroom.)

Mr. Billinghurst: Before adjourning, your Honor, Exhibit 121, the capital account prepared by Mr. Rockwell concerning the Dock Concessions—— [1401]

The Court: Yes, that was a matter that I reserved on. Excuse me, Mr. Mead, Exhibit 121, Rockwell's transcript from the records, do you re-

call, the accountant Rockwell, and I was going to give you an opportunity to examine the original.

Mr. Mead: We examined the journal, or the ledger I guess it was, and discussed it with Mr. Rockwell. We have no further objection on the matter of identification, your Honor.

The Court: Very well. Therefore, Exhibit 121 is admitted into evidence.

(Thereupon, Plaintiff's Exhibit No. 121 for identification was admitted into evidence.)

The Court: Recess for lunch.

(Thereupon, a noon recess was taken.) [1402]

After Recess

(Thereupon, the following proceedings were held in the chambers of the Honorable George H. Boldt, to-wit:)

Mr. Mead: We have a matter which we thought should be taken up with the Court before resuming this afternoon to avoid the possibility of error and to advise the Court with regard to the situation which we anticipate may develop.

The Court: Yes, do so.

Mr. Mead: The Government has subpoenaed as a witness in this case William Meyer. Meyer is a certified public accountant who has offices in Portland, and who during the years 1942, at least through '52, prepared the personal income tax returns of William Forman. Meyer has been subpoenaed and had served upon him a subpoena duces tecum requiring him to produce the work sheets that would pertain to copies of Forman's income

tax returns for the years 1942, I believe, through '48, is that right?

Mr. Obenour: I don't know. I didn't know what was coming up.

The Court: For the purposes of the point now in question, it doesn't make any difference.

Mr. Mead: That is correct, your Honor. Meyer has advised the Government and signed an affidavit to the effect that he does not have those returns [1403] in his possession and that he does not have the work sheets in his possession, and the testimony will develop that he has released that information to the taxpayer sometime in 1953.

The Court: Following the indictment?

Mr. Mead: No, in advance of the indictment, I believe, your Honor.

That those documents are now in my possession and have been since about the middle, I believe, of 1953, and that I have them here, however, in the courtroom and in my possession. Now, we would then be forced, if that subject is inquired into, to exercise the privilege against self-incrimination in the production of these documents, and it would be damaging and harmful to the Defendant to have it developed to that point. This matter, you will recall, your Honor, was discussed in a very brief way as Mr. Obenour mentioned that there was such a problem upon the occasion of our filing a motion to quash a subpoena directed to Mr. Forman's partner, his brother, Al Forman, and I think your Honor has stated that that matter was not then before the Court and wouldn't care to go into it,

quite probably so, and I think I mentioned [1404] at that time that this matter had been the subject of a recent opinion by Judge Murphy in San Francisco which was filed only on the 11th of last month, and we have a copy of this opinion—furnished a copy to Mr. Obenour who would like to submit a copy to your Honor.

The Court: I am glad that you brought the matter up in advance so that I can give some thought to it in advance.

Mr. Mead: And we suggest, your Honor, that in order to avoid the possibility of error that we be permitted, at least, to take up this matter in chambers following the production of Mr. Meyer as a witness and that it not be permitted, the inquiry, to go to the point where it would then be forced to inject at a time which might be detrimental to the Defendant.

The Court: Do you have any other authorities other than Judge Murphy's opinion on it?

Mr. Mead: Not on this sole question. That refers just, of course, to the testimony of Meyer and the documents that he is directed to produce.

The Court: Have you had an opportunity, Mr. Obenour, to consider this problem, and do you [1405] have any authorities you want to submit?

Mr. Obenour: Yes, sir. At the time that the matter was presented to the Court in Seattle——

The Court: On the motion to quash?

Mr. Obenour: On the motion to quash, I had spoken to Mr. Mead, and he said he would furnish a copy that I just now received. We have a cita-

tion. I didn't know whether it was this matter——

The Court: But the conference now, it was about——

Mr. Obenour: I do not have it with me.

The Court: Here is what I have in mind doing. I want to read Judge Murphy's opinion and also inquire and consider the matter carefully before we are confronted with it in the trial and before the Jury. Accordingly, I suggest you withhold calling this witness until you have had time to give yourself an opportunity to submit any memoranda or citations that you may wish and also to consider the position that you wish to take with respect to calling the witness.

In any case, I direct that you should not call this witness until Counsel have had an opportunity to make an appropriate record on it in the absence of the Jury until such time as I have had [1406] an opportunity to consider what the ruling would be, and I might say that my offhand impression is that the work papers and records of an accountant are not privileged. I think there are a good many cases to that effect, and the situation of an accountant surrendering documents to the Defendant prior to the trial, I think as far as I know, has never been ruled on unless Judge Murphy rules on it here.

It presents an interesting question. I have read some articles in which that situation was postulated, but I think it's a matter we ought to give very careful consideration to before we proceed, so——

Mr. Obenour: Your Honor, on that score—excuse me for interrupting—but we are at a point now where I contemplated there is not much we can do. We are within a point where we would come close if we did not, in fact, conclude today.

The Court: Well, is the nature of the balance of your testimony such that it is dependent upon the testimony of Meyer, this witness we are talking about?

Mr. Obenour: In this light, your Honor, I might state there are three witnesses who occupy [1407] the same position. Only one surrendered records to the defense. Three have all taken the same position which I propose to call as adverse witnesses, and they are Thelma Endersby, who is an employee of Forman's brother, a brother, Al Forman and Meyer, and I think there is only one or possibly two short matters that would be presented before we would be at that point where we propose to call him.

The Court: It's apparent on the face of it that you would be able without much question, to finish the Government's case as far as presentation of evidence, tomorrow even if we adjourned over now, and what I think is a matter of mechanics or proceedings with trial, you can serve time and all other things, that I would like you to present, if you have any additional evidence, not dependent upon this evidence, or with the same situations presented, that you would go ahead and put that in and we will see how much time we have remaining, and I might conceivably adjourn for the day and then carefully consider this question as to how to prevent

it and be prepared with a ruling on it and go ahead and finish the government's case tomorrow. [1408]

Mr. Obenour: It might be, your Honor, other than his statement that to the point of how far to proceed, it well might be that the question would not arise. I would propose to show the facts surrounding attempts to interview the three persons, and the facts of subpoena, what statements had been made to us prior to trial, and it is not now proposed that we would do anything more than to show where they were, and that in fact as of to time, there has been no government agent or representative who has had access to any of the documents in question requested in any of the subpoenaes to the three. However, there would be certain questions put to them as to matters within their knowledge and apart from the documents themselves.

Now, I would suggest in that light that possibly we might proceed on the only question, and that would be as to the only question Mr. Mead raises as to any privilege. I don't think that we would stop short of causing such a claimed exercise.

Mr. Mead: Of course, if the questions did not develop along the line of document, I can't see that this issue would arise. [1409]

The Court: As I understand your position, the only point you make is that you claim that the documents are privileged, the documents that the witnesses have been subpoenaed to produce?

Mr. Mead: This particular witness, and we will discuss another.

The Court: I am only talking about Mr. Meyer now, that the documents that he at one time had and later rendered either to you or to Mr. Forman in mid-summer of 1953, that having relinquished the possession of them prior to this time, that there is an immunity by reason of the privilege from not only demanding production of the documents but of showing the fact that he had at one time did have possession of them, is that your position?

Mr. Mead: No, your Honor.

The Court: Maybe you had better state very specifically what your position is.

Mr. Mead: Our position is that if this witness were called and testified, that he had these documents and that the documents were turned over to the defendant in 1953, that that would be—that at that point we would be put in the position where there at least would be the implication that [1410] the defendant should produce those documents which would be equivalent to a demand upon him to testify against himself.

The Court: In other words, then, you do not take the position that there is anything objectionable about the government showing that at one time this witness did prepare certain returns, that he did certain work and had certain work papers with him, but that he does not now have those papers?

Mr. Bischoff: That is not objectionable.

The Court: I can't conceive how that would be objectionable, but I want to be sure. Your only point is when he gets to that point you think that it would be error for the government then to go

further and show that he had been subpoenaed to produce them and didn't have them, and so on?

Mr. Mead: That is my personal opinion. I see that Mr. Bischoff is not entirely in agreement with me.

Mr. Bischoff: No, I am not. My view, your Honor, that since the government counsel now knows that we intend to challenge the right to the production of these documents, that the question with respect to the existence of them and disposition, [1411] even to that point, would *a* violation of the constitutional right of the defendant and would be equivalent to calling upon the defendant to produce evidence against himself. There are times when counsel not knowing what the facts are, may proceed to assert a point that will develop the right to invoke our constitutional guarantees, but now in the face of it, we submit that it would be prejudicial to the defendant and a violation of his constitutional right to inquire into the question in the presence of the Jury even to the point of determining whether there were records and what has happened to them, and while I am speaking, to supplement the extent of the objection to the documents themselves and that is that they constitute not only a violation of the privilege between attorney and client in connection with the use of the documents submitted to the attorney in connection with the advice of the client, but it amounts to an unlawful search and seizure, in law, and a violation of the Fifth Amendment against incriminating the defendant.

The Court: Well, my thought about it, Mr. Bischoff, is, it has been repeatedly held that there is no privileged relationship between an [1412] accountant and a client as far as the production of documents is concerned, and it has also been repeatedly held, I think, and you can correct me if I am wrong, that an accountant who has prepared a particular taxpayer's return may be called as a witness to testify to anything then within his knowledge concerning it and to produce his own work papers or anything that he has then in his possession. It is my impression that up to that point any objection to the matter would be without merit, and I think I should permit that.

Now, the only question that I am in doubt about, the government should be permitted to go further and demand production of the documents or offer proof that the documents have been subpoenaed, and so on. The only thing, as I understand it, that is privileged, is the documents themselves. I don't think that the fact that the witness once had them and that he made up papers and that he worked on the tax returns, and all that, I cannot conceive of any basis where that would be excluded. Have you any authority to indicate that?

Mr. Bischoff: No, I haven't. It implies it in Judge Murphy's decision, and he discusses that the procedure and the technical development of the production of the papers, as well. It implies [1413] it in his decision that the very bringing to the attention of the Jury of the existence would itself be equivalent to calling upon the defendant to interim-

inate himself, and particularly when it is known that the objection has been made. Now, it is not based upon the theory that the accountant has surrendered the documents. They are no longer his and they are the property of the taxpayer, and in the possession of his attorney and the possession of the taxpayer.

The Court: Well, I am not going to permit, until I consider the question further, any demand to be made in court in the presence of the Jury or any reference in the examination to subpoena for these documents, or anything of that kind, beyond merely the fact that the witness is an accountant and that he did the accounting work for the taxpayer and prepared his returns, or whatever he did, and in connection with that of course, he made computations and had data that he does not now have, and up to that point, I cannot conceive of any objection being made, valid objection being made, although I see you will make an objection.

Mr. Bischoff: Up to that point the evidence would be wholly immaterial unless you conclude it [1414] is going to create the impression that those documents are available and are being withheld.

Mr. Obenour: I have a citation directly in point, either 222 or 223, where the court required the attorney to produce the documents.

The Court: I haven't seen the case, and I want you to give me any authority bearing on it. I don't want to argue the matter because I must read what Judge Murphy said about it, and until I can intelligently discuss his opinion, all I want to do is con-

sider the mechanics of proceeding from here, whether we are going to adjourn and go on a picnic or go on with the case. That is all I am worried about at this moment.

If I were to permit you to go to that extent that I have indicated, would that solve your problem as far as proceeding with the evidence this afternoon is concerned?

Mr. Obenour: We have some matters we could present. Apart from that, I don't think it would take the entire afternoon unless there is the matter, I would like to submit information or reference to the fact, first of all, showing that any time for the purpose of showing copies we simply show that the originals are in the possession of the [1415] defendant. Secondly, for the purpose of showing the nature of the adverse witness, it would be necessary to show an attempt had been made by the government to interview this witness and to each and attempt to prepare for the trial, refusing to talk to government counsel.

The Court: Here is another suggestion, now I am trying talk still about the mechanics. If your response to my question is that you feel you cannot proceed with that understanding, then, I think the best next thing is to have the bailiff advise the Jury there has been a delay and that I am attending to a matter, and you will get busy and get your citations now and I will read Judge Murphy's decision.

Mr. Mead: May I inquire, Mr. Obenour, haven't you got about five or six witnesses waiting in the witness room now?

Mr. Obenour: I say that there are some that could be presented now.

The Court: Let us present everything you can without in any matter whatever touching on this question even to the extent that you have indicated thus far. Put on everything that you can and we will see how the time goes. It may well be that delays [1416] will occur that will bring us down to late in the afternoon and we can let the Jury go and we can then thoroughly examine this question and have a decision ready so that we can go ahead with the balance of the trial tomorrow. I think it is of sufficient gravity, and out of deference to counsel who have presented it, as they have a right to do, I should be careful to examine the question carefully before we proceed.

Now, I think that is what we will do. You go ahead and put in whatever other evidence you can without touching on this question. Keep the witnesses in attendance. We will see how the time goes. If it is late enough, I will let the Jury go, and then we will spend the balance of the afternoon considering this question. If it is still too early to let them go and in the meantime I have had an opportunity even on the bench to examine this opinion sufficiently to feel that we can reach a conclusion this afternoon, we will take the afternoon recess, make it a little longer than usual, decide the question, and proceed.

Mr. Meade: May I make another observation at this time. This opinion, of course, does not deal with an exactly similar situation where this [1417]

matter was presented before a jury, but it deals with exactly the same question we have.

Now, we have a second point, your Honor, and that is with respect to the subpoena duces tecum directing Albert Forman to produce certain partnership records. We filed a motion to quash that. Your Honor has ruled on the motion, and in obedience to the subpoena, Mr. Forman is here, Albert Forman, and he has with him the records which Mr. Obenour states he intended to have produced; namely, the records of this partnership which show the investment capital, and the like, which were outlined to your Honor.

Now, we have somewhat a similar problem. I don't see any benefit in arguing it at length because your Honor has already ruled on the motion to quash, but we wish to call that matter, at least, to your Honor's attention at this time too.

The Court: What you have in mind is to renew the position you took on the motion to quash and making it plain that you are standing on the same position? There is nothing to be added to what you have presented to me at that time on that question?

Mr. Mead: That is correct.

The Court: The record should show that you [1418] raised the same position with respect to the witness Albert Forman and production of documents from him, and that the court adheres to the ruling made on the motion to quash, and your objection is overruled. You are allowed an exception to that ruling.

Mr. Mead: The objection would be considered as having been made at the time the witness is required to produce these documents?

The Court: Yes. In order to avoid any problem about it in the presence of the Jury, that is satisfactory to me, and I assume it is to you, Mr. Obenour?

Mr. Obenour: With the exception that it would be desirous of making a record, if any of the records have been divulged to any representative of the government and all, he might have appeared subject to the subpoena, they have remained in the possession of the persons bringing them, however it may be, and they have not been in any way reviewed and the contents are exempt.

The Court: That has nothing to do with the motion to quash.

Mr. Obenour: Except that if the question should be raised some subsequent time, that it would then become moot as of this time in that they have [1419] not yet been divulged or made known.

The Court: You merely want the record to show that none of these witnesses have permitted any private examination of any of these documents that are in question?

Mr. Obenour: At this time, even though they have answered the subpoena the government has at no time had in their possession, examined them, or seen the contents in any way.

The Court: I am sure you would be willing to accept Mr. Obenour's statement to that effect.

Mr. Mead: I think that applies to certain of the records, not all of them.

The Court: If you think there is anything you want to make exception to, you can call it to our attention.

Mr. Bischoff: We also take the position that evidence of the character Mr. Obenour stated would be in our view, objectionable, and we would object to the materiality.

The Court: That I will rule on when we come to it. However, for now, the only question is a matter of the motion to quash, and your response to the effect that the data called for has not been examined by any representative of the government. [1420] Apparently Mr. Mead thinks there are some exceptions with respect to some of the documents. However, we will have to let him call it to our attention at a later time.

Mr. Mead: My memory is not adequate enough to give you a detailed account of it, but my point is that certain of these documents were requested by the Bureau a year or so ago, and they were produced, and they were either photostated or they have the originals.

Mr. Obenour: That would also be included in the record we would make at the trial of Seijas, these same persons appeared under subpoena accompanied by Mr. Mead who was in attendance at the Seijas trial, and I would establish that this subpoena at that time was answered by Albert Forman who indicated that he was without knowledge of the contents, and so, his employee, Thelma

Endersby, appeared and gave certain testimony to the knowledge of the partners Forrean Brothers, and at such time they were accompanied by Mr. Mead who had previously been——

The Court: It is obvious that you are going to have to make the record by the witnesses on this either within or without the presence of the Jury.

It is apparent you cannot agree on it, not that there is any lack of confidence in each other, but simply that the circumstances are of a character that you cannot stipulate about it, and the record will have to be made on it.

Mr. Mead: I would be happy to stipulate, but I couldn't remember if my life depended on it, the exact exhibits that were produced. I don't remember.

The Court: My remark wasn't intended to that.

Mr. Mead: I know it was not.

The Court: Well, now, do you want a moment to consider how you are going to reframe, or are you ready to go?

Mr. Obenour: We could proceed.

The Court: Let's go, then. Keep in mind strict adherence to this. We will suspend when you indicate that you have reached a point where you have nothing else to offer this afternoon excepting this material, and then we will suspend and determine accordingly how we will proceed from there.

(Thereupon, the further following proceedings were had in the courtroom, to-wit:)

The Court: Are you ready to proceed?

Mr. Obenour: The inquiry was completed as to Mr. Renstrom. [1422]

The Court: Yes. Mr. Renstrom was excused at the morning session.

Mr. Billinghurst: Mr. Schneiderman, please.

HARRY SCHNEIDERMAN

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name, and spell your last name.

The Witness: Harry Schneiderman, S-c-h-n-e-i-d-e-r-m-a-n.

Direct Examination

Q. (By Mr. Billinghurst): Where do you live, Mr. Schneiderman?

A. 4511 East Forty-first, Seattle.

Q. What is your occupation?

A. Furniture wholesale distributor.

Q. What company?

A. Evergreen Wholesale.

Q. How long have you been in that business?

A. About four years.

Q. What did you do prior to that time?

A. I was in the amusement business.

Q. And what kind of an amusement business?

A. Pinball.

Q. When did you go into the pinball business?

A. November of 1945.

Q. And where were you located?

(Testimony of Harry Schneiderman.)

A. In Kitsap County.

Q. Was this pinball business you mentioned your own operation, or were you associated with someone else in the business?

A. I was in partnership with someone else.

Q. And who was that?

A. Heberling Brothers.

Q. And their names again?

A. Heberling Brothers.

Q. How did you happen to get into the pinball business?

A. Well, I was looking for something else to do, and I heard that that was a lucrative business.

Q. And what business were you in prior to your entry into the pinball business?

A. Service station business.

Q. Are you acquainted with Mr. William Forman? A. Yes, I am.

Q. And when and where did you first meet him?

A. I have known him for many years through the family and school.

Q. Do you recall what decided you to go into the pinball [1424] business?

A. I guess I just wanted to go into the business, and I was encouraged to. I started going into punchboard, and I was encouraged to go into the business by Fred Cohen.

Q. And did Mr. Cohen make any suggestions to you as to the availability of any particular pinball business?

A. I don't understand what you mean.

(Testimony of Harry Schneiderman.)

Q. Did he make any suggestion to you as to the availability of any particular pinball business?

A. Yes. He suggested maybe there would be a chance for me to go into the pinball business.

Q. Any particular pinball business? I am referring to an established business.

A. Do you mean to buy some business?

Q. Yes. A. Yes.

Q. What business was that?

A. That was the United Amusement Company.

Q. As a result of that suggestion, what did you do?

A. Well, the opportunity came. Mr. Forman said he wanted to sell his business, and there was a chance for me to buy in, and we had discussed it, and the time came that he wanted to sell, and I purchased the business.

Q. When did this conversation take place?

The Court: With Forman?

Mr. Billinghurst: Yes.

The Witness: That had taken place at various times down at the service station, or I, perhaps, had gone to his office and asked him for it.

The Court: About when was it?

The Witness: About the beginning of 1945.

Q. (By Mr. Billinghurst): Had you known Mr. Forman prior to that time? A. Yes.

Q. And how long?

A. I would say maybe 40 years.

Q. Forty years prior to——

A. Well, I mean 35 years or so.

(Testimony of Harry Schneiderman.)

Q. Who operated the United Amusement Company at that time, if you know?

A. Mr. Forman and Mr. Seijas.

Q. Now, as a result of those conversations with Mr. Forman, did you make any decision concerning entering that business?

A. Yes. I made a decision to buy the business.

Q. And did you do so? A. Yes.

Q. Did you have any other persons associated with you in [1426] that purchase?

A. Yes, Heberling Brothers.

Q. When was the purchase of the business made?

A. In November, 1945.

Q. What was the purchase price of the business?

A. Forty-four thousand dollars.

Q. And who put up the money?

A. I put up half, and Heberling Brothers put up half.

Q. What was your share of the partnership?

A. Just half.

Q. To whom did you pay the money?

A. We paid it to the United Amusement Company.

Q. After you purchased the route, did you have any connection with the operation of it?

A. Yes.

Q. What did you do?

A. I managed the route.

Q. What did your duties consist of in managing it?

A. To make the route and to make the collections

(Testimony of Harry Schneiderman.)

and decide about moving machines and so forth.

Q. Were you familiar with the various locations of the route before you purchased it?

A. In a way, yes.

Q. Who, if anybody, showed you around the route and familiarized you with the operation of the business? [1427]

A. Well, the first time I was shown the route in each location was by Mr. Meyers.

Q. Now, how were the proceeds of the business distributed after you bought into it?

Mr. Mead: That is objected to as immaterial and having no bearing on issues involved here and involving another partnership which this Defendant had no interest.

The Court: Overruled.

The Witness: What was the question?

The Court: How did you divide the proceeds of the business after you got into it?

The Witness: Well, we would go with the customer and make the collection, and generally the mechanic would be with me, the mechanic who worked with me, and we would count up the money, and then we would, if I remember right, we had invoices that showed the state tax and some places another additional tax, and then there was a net, and what the net would be we would show half and half.

Q. (By Mr. Billinghurst): And then, I gather, you received the half share of the profits of the business, is that correct? A. That is right.

(Testimony of Harry Schneiderman.)

Q. After the expenses? [1428]

A. That is right.

Q. What did the route consist of in the way of assets and equipment?

A. They consisted of a number of machines, 40 or 45 machines.

Q. Where were they located?

A. In the various locations.

Q. Where, within the city or county or both?

A. In the county, in the southern end of the county, and also in the City of Port Orchard.

Q. How long did you retain your interest in this company, Mr. Schneiderman?

A. Just a little over two years.

Q. And during the time that you were interested in this concern, do you know whether or not anyone other than you and the Heberling Brothers had an interest in the route? A. No one else.

Q. No one else as far as you know? A. No.

Mr. Billinghurst: You may question.

Cross Examination

Q. (By Mr. Mead): Mr. Schneiderman, I think you said you bought this county [1429] route from Scjas and Forman in November of 1945, is that correct? A. Yes.

Q. Could you fix the time, approximately the time of the month? A. The time of the month?

Q. The time of the month.

A. I happen to have the bill of sale with me so I know.

(Testimony of Harry Schneiderman.)

Q. Would you refer to any document you may have with you to refresh your memory?

A. Yes, I did.

Q. Will you do that, sir?

A. Dated the 5th day of November, 1945.

Q. November 5, 1945. Is that the bill of sale which was—— A. The bill of sale.

Q. Given to you by Seijas and Forman on the purchase of this business? A. Yes.

Mr. Mead: I am wondering if I may have the exhibit marked for identification.

The Clerk: Defendant's Exhibit 504 has been marked for identification.

Q. (By Mr. Mead): Exhibit 504 which you have just produced, Mr. Schneiderman, is the bill of sale which covered your purchase of this business, is that right? [1430] A. Yes, that is right.

Q. I notice, Mr. Schneiderman, that there is an assignment appended to this agreement, is that correct?

A. An assignment—do you mean an assignment to Heberling Brothers?

Q. Yes, sir.

A. Yes, sir, I presume that is the legal——.

Q. What was the purpose of this assignment, sir?

A. I presume that through the legal method that that was to make Heberling Brothers and I partners.

Q. So the bill of sale to you, and you assigned half interest in it to Heberling Brothers, is that it?

(Testimony of Harry Schneiderman.)

A. I feel that is right.

Q. Now, what is the date of the bill of sale, sir, the date that it was executed?

A. The 10th day of November, 1945.

Q. And what is the date of the assignment?

A. The 5th.

Q. So you actually assigned a half interest in this business to Heberling before the bill of sale was delivered, is that right?

A. Yes, but here the 5th was scratched out, and the 10th was put over it on the bill of sale (indicating).

Q. I see, so do those papers, then, refresh your memory to the effect that the 10th was the date that you took— [1431] Did you take possession at the same time the bill of sale was delivered or did you take possession prior to that time?

A. I don't know.

Q. You don't know? A. No, I don't know.

Q. When did you pay the money, the purchase price?

A. The money was paid, if I remember rightly, in the office of Lenihan and Ivers.

Q. Were they attorneys?

A. They were the attorneys for Heberling Brothers, and that is where the meeting was held.

Q. And were they located in Seattle?

A. Yes.

Q. So that the deal was closed, then, in Heberling Brothers' attorney's office in Seattle?

A. Yes.

(Testimony of Harry Schneiderman.)

Q. Who kept the books and records of this partnership between yourself and Heberling Brothers?

A. Heberling Brothers had a bookkeeper for their other routes, and the same bookkeeper kept the same records.

Q. Kept the same routes? A. Yes.

Q. Kept the books on the same routes?

A. Yes. [1432]

Q. Do you know what his name was?

A. At that time it was a woman.

Q. Do you know what the name was?

A. I don't recall.

Q. Where was their office located?

A. The office was located on Western Avenue.

Q. Was that in Seattle?

A. In Seattle, 3200 Western Avenue in Seattle.

Q. Now, after the purchase of this business in 1945, did you state that you did the collecting, sir?

A. I did the collecting.

Q. And I think you stated that a mechanic usually accompanied you?

A. Yes, he did, for the simple reason I didn't know much about the machines from the mechanical end of it.

Q. Were the machines serviced at the same time you made the collections?

A. Generally serviced and so forth.

Q. So you went together, did you? A. Yes.

Q. I think you stated that Mr. Meyers showed you around and showed you where the locations were and introduced you to the different accounts,

(Testimony of Harry Schneiderman.)

did he? A. Yes.

Q. I think you stated, Mr. Schneiderman, that the money [1433] you collected was divided up, one-half to the operator, who was yourself and Mr. Heberling, or Heberling Brothers, rather, and the other half was turned over to the owner of the location.

A. Owner of the location.

Q. Were there any funds that were withheld and not turned over to the operator of the location?

A. The only time funds were withheld after we got started, we worked out a system in order to pay the taxes, and it wouldn't become a burden. We used to hold out funds—that was marked on every ticket how much was to be held. That was to make it easier for the accounts. In other words, if the license was to be $100 in November or whatever date, we used to take out the money and put it on both tickets how much would be held on that so it wouldn't be a burden on the account when license time came.

Q. Was that designated a hold out for licenses?

A. No, it was no holdout.

Q. Well, that was held out?

A. It was held out, but it was after the collections was made.

Q. Yes, I understand, but that was held out and not divided, that amount was held out for the purpose that you have described and not divided with the location, [1434] is that correct?

A. I don't really get your question.

(Testimony of Harry Schneiderman.)

The Court: He doesn't like to use that term. Couldn't you suggest some other?

Mr. Mead: It does have a bad connotation.

The Witness: If I may explain it, after we had made out the slips, and this dawned upon me, we used to mark on our tickets for the accounts that we would hold for them, say, $20 or $10 or $5.

Q. (By Mr. Mead): How would that be indicated on the ticket?

A. It would be marked on the ticket, on every ticket.

Q. How would you mark it or designate it, or what designation would you use?

A. County license or federal license, whatever it may be.

Q. You put down "license?"

A. Yes, through the carbon.

Q. And what was the practice with regard to the location owner, would they be there when you went there to make the collections and to count the money? A. Ninety-five per cent of the time.

Q. And would you then take the proceeds after the division with the location owner and turn it into the bookkeeper, or someone who was responsible for the funds? A. Into the bookkeeper.

Q. And this is the lady who worked for Heberling that you mentioned? A. At that time.

Q. When you say "at that time," I assume you are talking about November, 1945? A. Yes.

Q. Was there some change made at a later time?

A. Later on it became a man bookkeeper.

(Testimony of Harry Schneiderman.)

Q. What was his name?

A. I know it very well, but I can't think—he is still working for Mr. Heberling. Earl. His first name is Earl.

The Court: The first name is Earl?

Q. (By Mr. Mead): He was employed by Heberling Brothers? A. Yes.

Q. And then you turned the proceeds into him?

A. Yes.

Q. And the man is still employed by Heberling Brothers? A. Yes.

Q. Now, anytime after November 10, 1945, that you took over these county routes, was there any money withheld that was not turned in or not divided with the location owners, to your knowledge, in any of these locations? A. None whatsoever.

Mr. Mead: Thank you, sir. [1436]

Mr. Obenour: No further questions.

The Court: There is nothing further, Mr. Schneiderman. You are excused.

(Witness excused.)

Mr. Mead: This exhibit was not introduced. We didn't offer it.

The Court: There being no objection, Exhibit 504 may be withdrawn.

(Whereupon, Defendant's Exhibit No. 504 for identification was withdrawn.)

HENRY T. MORIN

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

(Testimony of Henry T. Morin.)

The Clerk: Please state your full name and spell your last name.

The Witness: Henry T. Morin, M-o-r-i-n.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Morin?

A. I live at 6727 Thirty-sixth Northwest, Seattle.

Q. And what is your occupation?

A. I am a food processor at the present time.

Q. And what is the name of the company with which you are associated?

A. Green Garden Food Products.

Q. And what is your interest in this company?

A. I am owner at the present time.

Q. How long have you been in the food processing business? A. About 23 years.

Q. Have you been in that business continuously?

A. No.

Q. And during what period were you not in the food processing business?

A. From 1946 to 1949 or to 1950.

Q. All right, sir, what did you do in regard to the food processing business in 1946?

A. I didn't hear you.

Q. What did you do in regard to the food processing business in 1946?

A. Well, in 1946 I found a buyer, and I sold out the business.

Q. Do you know William R. Forman?

A. Yes.

(Testimony of Henry T. Morin.)

Q. Do you know Army Seijas?

A. Yes, I do.

Q. When did you first become acquainted with either or both of those gentlemen? [1438]

A. I got acquainted with them in 1946,

Q. Do you recall approximately when?

A. Sometime in July.

Q. How did you meet them?

A. Well, I met them through my brother-in-law.

Q. What is his name?

A. His name was Matt McCusker.

Q. How did you meet them through your brother-in-law?

A. Well, my brother-in-law knew that I was looking around for reinvesting the money that I had, and he thought probably that I might be interested in the pinball business, so he one day took me down and introduced me to Seijas, Army Seijas.

Q. And did you talk to Mr. Seijas about the pinball business at that time on that occasion?

A. Yes.

Q. What did you tell Mr. Seijas?

A. I told him I was looking around for a business, and I would think it over and I would see him later.

Q. Did you talk to Mr. Forman?

A. Not at that time.

Q. Did you talk to Mr. Forman? A. Yes.

Q. When?

A. Well, the next time I went into the office, I believe [1439] I talked to him then.

(Testimony of Henry T. Morin.)

Q. Could it have been the same day?

A. I don't remember.

Q. What did you talk to Mr. Forman about?

A. I asked him a little bit about the business, and I asked him about the business and why he was selling out.

Q. What did Mr. Forman tell you?

A. Well, he said that he thought that he would get out of the business and go into the theatre business.

Q. Did he tell you anything about how the business was going, the condition of the business?

A. Well, not too much. I talked to Mr. Renstrom about—went to see the bookkeeper and looked over the books to see approximately how much profit it was making.

Q. Did you find out?

A. Yes. I asked him to see the books, and at that time it was making a profit.

Q. And in your talk with Mr. Forman, did he make any statement to you concerning the return you would get on your investment?

A. I don't remember that. It's either one of the two.

Q. One of the two of what?

A. Either Mr. Seijas or Mr. Forman that it was brought up at that time, and I don't recall what the profit was.

Q. At what time? [1440]

A. The time before I bought the business out.

Q. What were you told by either Mr. Seijas or

(Testimony of Henry T. Morin.)

Mr. Forman concerning the return you could expect for your investment?

A. Well, it was no better than the average business.

Q. Were you told whether you could expect a return for your investment? A. Yes.

Q. Were you told the price that they wanted for the business? A. Yes.

Q. How much was that?

A. Thirty thousand.

Q. And what exactly were you told you were buying for $30,000, Mr. Morin?

A. Well, I was buying—I don't recall, it was either 75 machines on location or 105 machines total with part of them working.

Q. Pardon?

A. With part of the machines working and part in the shop.

Q. All right, sir, what was the name of the business? A. It was the United Amusement.

Q. What kind of a business was it?

A. Pinball operation.

Q. How many routes were there? [1441]

A. There was four.

Q. And how many machines were there on a route? A. I don't—it could have been 35.

Q. Thirty-five? A. Yes.

Q. There were four routes?

A. Yes. Well, I don't know. You can strike that. I don't know how many machines on the route.

(Testimony of Henry T. Morin.)

Q. Well, were there 35 machines on a route?

A. I don't know.

Q. How many persons were in this business at the time you inquired—— A. Two.

Q. And they were who?

A. Mr. Seijas and Mr. Forman.

Q. What was the interest of each in the business?

A. As far as I know, I was told that they both owned this business.

Q. Was their shares equal?

A. Yes, 50 per cent shares, equal.

Q. What were you told that you would buy in the nature of an interest in this business for your $30,000?

A. I was supposed to buy 50 per cent, half.

Q. Whose interest were you buying?

A. I was buying Mr. Forman's interest. [1442]

Q. How soon after you first contacted Mr. Seijas and Mr. Forman did you, in fact, buy the business?

A. I don't recall. It could be a week or ten days or less.

Q. At the time you talked to them, had you already determined as to whether or not you were interested in purchasing a pinball business?

A. I beg your pardon?

Q. At the time you talked to Mr. Forman and Mr. Seijas, had you already determined that you were interested in purchasing a pinball business?

A. Yes. I was not only looking at pinballs, I was looking at photographic routes, too.

(Testimony of Henry T. Morin.)

Q. At the time you first began your conversation with either Mr. Seijas or Forman, did you have any conversation about buying the entire route as distinguished from a half? A. No.

Q. How much money did you have to invest in this business? A. I had $30,000.

Q. And what was the price that you were told the business was? A. For the full amount?

Q. Well, yes, sir. A. Sixty.

Q. And were you told this in your conversation with Mr. [1443] Seijas and Mr. Forman at that first time? A. That it was worth 60?

Q. Yes, sir, and that was at the same time you were offered half for $30,000?

A. I was offered half at that time.

Q. What were you offered?

The Court: He said he was offered half at that time.

Q. (By Mr. Obenour): I am sorry, I misunderstood you. Did you subsequently purchase an interest in this business?

A. Yes, I purchased half, and Mr. Seijas gave me the difference for one share. I ended up with 49 shares.

Q. First of all, what did you pay first for the business, your interest in the business?

A. I paid $30,000.

Q. To whom? A. To Mr. Forman.

Q. And how? A. By check.

Q. And you gave that to Mr. Forman?

A. Yes, sir.

(Testimony of Henry T. Morin.)

Q. And what interest did you subsequently then finally have?

A. I had 49 per cent of the business.

The Clerk: Plaintiff's Exhibit 137 has been [1444] marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 137, Mr. Morin, can you identify that document?

A. Yes.

Q. What is it, sir?

A. This is a receipt for my $30,000 for this pinball route.

Q. Whose signature is on it?

A. William R. Forman.

Q. And from whom did you receive it?

A. I received this from Mr. Forman.

Mr. Obenour: I offer 137.

Mr. Mead: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 137 for identification was received in evidence.)

Mr. Obenour: May I ask to read it, your Honor?

The Court: Go ahead.

Mr. Obenour: "For and in consideration of Thirty Thousand and no 100 Dollars ($30,000.00) this day received from Henry Morin, the undersigned does hereby assign all of his right, title and interest, amounting to forty-nine per cent (49%) of the amusement device business in Enierton, Washington, operated under the names and style of [1445] the United Amusement Company of Bremerton, the Bremerton Amusement Company, the

(Testimony of Henry T. Morin.)

American Amusement Company and the Peninsula Amusement Company;

And the undersigned, for and in consideration of Ten Dollars ($10.00) and other valuable consideration does hereby assign to Army Seijas the remaining one per cent (1%) of his interest in the above-described businesses."

Signed "William R. Forman, August 8, 1946."

Q. (By Mr. Obenour): When did you take over your interest in this business, Mr. Morin?

A. It was about August 9 or—I am not sure.

Q. Did you actually take over any interests in the business before the 1st of the following month?

A. It could have started September 1.

Q. In any event, after that time that you did take over an interest in the business, what was your participation in the business? A. Nothing.

Q. Where was the office located?

A. It was in the Smith Tower.

Q. Where? A. On the 18th floor.

Q. Who else's offices were there?

A. There was two offices in that office. [1446]

Q. And whose offices were there?

A. There was Seijas' office at one end and Mr. Bill Forman in the other.

Q. Did he continue to have his offices after he sold his interest to you? A. Yes.

Q. And were there any employees of his working in the office?

A. There was one or two girls there.

Q. And they worked where?

(Testimony of Henry T. Morin.)

A. They worked right in the entrance of the office.

Q. Who paid the office rent, Mr. Morin?

A. Mr. Seijas paid the office rent—expenses did you——?

Q. Yes.

A. Well, we paid the rent and the expense.

Q. Who is "we"?

A. United Amusement.

Q. And were you paying any of the office expense of Mr. Forman and Mr. Seijas in this way?

A. I do not know.

Q. Had United Amusement Company — were they paying all of the office expense or do you know?

A. I know that at the end of the month we would take—he would take, Mr. Seijas would take, the wages and the new typewriters, whatever was necessary, and he would [1447] cut that in half, and half of the amount, United Amusement would pay for half.

Q. Did you have any conversation with Mr. Seijas as to why the expenses were paid by the United Amusement Company? A. Every month.

Q. What was your conversation concerning the payment of these expenses by the United Amusement Company?

A. Well, I didn't think it was right. I told them that the expense was so high, that is why there was no money at the end of the year—six months—to take out. It was eaten all up by the office expense.

(Testimony of Henry T. Morin.)

Q. What did he say?

A. He said that is the way it is, and that is the way it was going to be, period.

Q. Were you getting anything for the expenses?

A. For the expense?

Q. For the money you paid, what were you receiving? A. I was receiving nothing.

Q. Were you receiving any legal work?

A. Legal work?

Q. Were you receiving any?

A. Well, there is always a certain amount of legal work to be done in any business. I was, yes.

Q. Did you have any conversation with Mr. Seijas concerning the payment for this legal work?

A. Yes. It was pretty high, and I questioned it every now and then, every month or so.

Q. Did you put any additional money into the business?

A. Yes. We had to buy some new machines, and I put in an extra two thousand at one time.

Q. Did you put it in more than once?

A. I believe I put it in twice, and then I believe I got it back.

Q. Did you ever go out on the route?

A. No.

Q. After you purchased Mr. Forman's half interest, did Mr. Forman have anything more to do with the business to your knowledge?

A. At that time I never knew that there was anything being done.

Q. By whom? A. By Mr. Forman.

(Testimony of Henry T. Morin.)

Q. At that time. At any time did you ever learn that Mr. Forman did anything at all after you bought in concerning the operation of the business?

A. No.

Q. As far as you knew, when you bought out Mr. Forman's interest, did anyone other than you and Mr. Seijas have an interest in the business?

A. Never, as far as I know. [1449]

Q. As far as you knew what?

A. As far as I know, I was the only one, and Mr. Seijas.

Q. And what was your understanding of the makeup of this partnership? What interest?

A. Well, at all times I thought that I had 49 per cent, but it didn't do me any good.

Q. And who had the remainder?

A. Mr. Seijas was supposed to have had 51 per cent.

Q. And did you get out of the business?

A. Yes.

Q. When? A. In '49, 1949.

Q. And during the time you were in the business, did you ever receive any money from it?

A. Yes. The first year when I bought it, the books showed like it was making a profit, and the first year, it was good.

Q. What did you get out of it altogether?

A. It could be—I don't remember right. I would have to look it up, but it could be five or six thousand, maybe more, maybe six thousand five hundred.

(Testimony of Henry T. Morin.)

Q. How did you receive that money, Mr. Morin?

A. By check. Well, the way we received it, Seijas would write a check for himself and one for me, and I would sign his check, and he would sign mine. [1450]

Q. And was that a draw on the business?

A. A draw on the business.

Q. Well, now, you received a draw on the business through the years '46, '47 and '48?

A. No. The only time I drew anything out of there was the first year that I was in.

Q. Did you receive your draws at any other time than when Mr. Seijas received a comparable draw?

A. No, never drew anything else. He drew. That was what the fight was about as he would be drawing office expense, and I wasn't drawing nothing.

Q. Did Mr. Forman ever receive any money from the company to your knowledge? A. No.

Q. After the first year, did the company ever show a profit? A. No.

Q. Do you have any knowledge of the receipts reported by the pinball business?

A. Yes, I did take a look at them, and they were all signed, and I checked the amounts and the posting, and that is as far as I checked.

Q. What was signed?

A. The return slips from the taverns.

Q. And did you receive any information periodically from [1451] the bookkeeper?

(Testimony of Henry T. Morin.)

A. Yes. I would go in there every once in awhile and meet with them and talk to them.

Q. And when you first bought into the business, who was the bookkeeper?

A. Mr. Renstrom was the bookkeeper at the beginning.

Q. And after that, who was it?

A. And then towards the last of it, I think it was the first part of '49, the business was going down to where we couldn't support the bookkeeper because Mr. Seijas was eating it all up by the office expense.

Q. Who kept the books after that?

A. Well, that is about the end. That is all I know. I don't know the fellow's name that took care of it.

Q. Are you familiar with a man by the name of Gustafson?

A. Yes. I think he is the one that was it.

Q. Pardon?

A. Mr. Gustafson was the one that would make out the returns, partnership returns at the end of the year.

Q. And would you receive a copy of those?

A. Yes.

Q. And who was Mr. Gustafson?

A. Well, I haven't met him, and he has offices in town there someplace.

Q. Do you know if he was doing work for anyone else at that [1452] time that he was associated in their office?

(Testimony of Henry T. Morin.)

A. As far as I know, I don't know.

Q. Did you know whether or not Mr. Gustafson was doing any work for Mr. Forman at the same time he was preparing the partnership returns for United Amusement? A. I don't know that.

Q. After Mr. Renstrom quit, what information you received came from Mr. Gustafson?

A. Yes, but it was always a couple months behind, but I didn't get it from Mr. Gustafson, though, I got it from Mr. Seijas.

Q. Handing you Exhibit 20, a partnership return for United Amusement Company, I will ask if you can identify the signature on the back of it, Mr. Morin. A. Yes. That is my signature.

Q. And that is your signature? A. Yes.

Q. And you signed that 1948 partnership return for United Amusement Company?

A. Yes, I did.

Q. And who prepared that return?

A. Mr. Gustafson. I didn't know until now. I see his name here.

Q. And at that time or at any time did you have knowledge of any monies being received or being taken from the [1453] company in any way other than what was reported on the partnership returns and the draws of which you know? A. No.

Mr. Mead: I object to his question as immaterial, incompetent, and it relates to a year much later than this Defendant had connection or relationship with the business.

The Court: Overruled. The answer will stand.

(Testimony of Henry T. Morin.)

Mr. Obenour: That is all.

Cross Examination

Q. (By Mr. Mead): Mr. Morin, I think you said you became acquainted with Mr. Seijas first in connection with this purchase of this business, is that right, sir? A. Yes.

Q. And you were introduced to Mr. Seijas by Mr. McCusker? A. Yes.

Q. And what was the relationship between you and Mr. McCusker?

A. Mr. McCusker is my brother-in-law.

Q. He was your brother-in-law?

A. Brother-in-law.

Q. And you are married to his sister? [1454]

A. He would come up in the evening and talk it over.

Q. Prior to that time, you had been in some other type of business, had you, sir?

A. Yes, I was in the food business.

Q. Is that a wholesale line or retail?

A. Wholesale line.

Q. You had just sold your business, had you, sir?

A. I just sold the business. I wanted to get out of it, yes.

Q. And do you recall about the time that you were introduced to Mr. Seijas by Mr. McCusker? When I say "about the time," I mean the month.

A. No, I don't, but——

Q. How long prior to the time that you bought

(Testimony of Henry T. Morin.)

your interest in this business, were you introduced to Mr. Seijas? Could you fix it that way?

A. How many days it was?

Q. Yes, approximately, or weeks, whatever the situation was.

A. That I bought the business?

Q. Yes, sir.

A. Well, it could be two weeks or less.

Q. Two weeks or less? A. Yes, ten days.

Q. Now, during that time, did you have some conversations with Mr. Seijas before you met Mr. Forman? When did you [1455] first meet him?

A. No, I met him sometime in July of '46.

Q. And how long was this after you had been introduced to Mr. Seijas?

A. After I made up my mind that I was going to go ahead with it, and I wanted to meet the partner.

Q. So after you made up your mind that you were going to buy the business, then you met Mr. Forman, is that right, sir? A. Yes.

Q. So is it a fact, then, that the negotiations you had for the purchase of this business were with Mr. Seijas? A. Yes.

Q. And when you met Mr. Forman, you had decided to buy into the business, is that right?

A. Yes, but with a few more questions that I wanted to ask Mr. Forman, yes.

Q. How many days after you met Mr. Forman, approximately, did you close the deal and pay your money and get this bill of sale?

(Testimony of Henry T. Morin.)

A. Within a week.

Q. Within a week of that time? A. Yes.

Q. Now, I think the office arrangement you stated at that time was on the 18th floor of the Smith Tower Building, [1456] and Mr. Seijas had one office, and there was a reception room, and then Mr. Forman had another office, is that right?

A. Yes.

Q. At that time was there another lawyer by the name of Ringold or Rinegold?

A. Ringold. He came in later.

Q. He came in later? A. Yes.

Q. How much later did he come in after you purchased the business?

A. Oh, probably 13 or 14 months after.

Q. After you purchased this business, Mr. Morin, is it not a fact that Mr. Forman moved to Room 1814 on the same floor of the Smith Tower Building or do you know?

A. Yes. After Mr. Ringold came in, he moved, that is correct.

Q. After he came in, he moved?

A. Yes, and then Mr. Ringold took that office.

Q. And so it is your recollection that it was not until Mr. Ringold came in that he moved?

A. That is true.

Q. And your best estimate of that is about how many months after you bought the business?

A. Well, I don't know really. I would be guessing. [1457]

Q. So you wouldn't say that it was 18 months, it

(Testimony of Henry T. Morin.)

was sometime after that, is that right, sometime after you purchased the business, Mr. Ringold came in the office, and Mr. Forman moved to Room 1814?

A. It could be a year or over.

Q. A year or over, and it could be a year or under? A. Probably. I am not sure.

Q. You are not sure? A. No.

Q. In any event, then, sometime afterwards Mr. Forman moved? A. Yes.

Q. Now, you have mentioned the fact, Mr. Morin, that you had conversations with Mr. Seijas after you purchased the business and in which you had expressed a dissatisfaction of the fact that his charges for legal services and office rent were eating up the profits of the business, is that right?

A. Yes. It helped.

Q. And you made the statement that when you complained he said, "This is the way it is, and this is the way it's going to be." Were you talking about Mr. Seijas? A. Yes, Mr. Seijas, definitely.

Q. And that was a conversation which took place with Mr. Seijas after you had bought into the business and you [1458] were his partner?

A. Yes.

Q. And you were complaining about his treatment of you? A. Yes.

Q. Now, I think you stated, Mr. Morin, that you remained in this business until 1949? A. Yes.

Q. During the period after your purchase in 1946 of this partnership interest up until the time

(Testimony of Henry T. Morin.)

that you got out of it in 1949, did Mr. Forman have any connection with it at all to your knowledge?

A. Not to my knowledge.

Q. What did you finally receive upon liquidation of this business from Mr. Seijas, if anything?

A. I didn't receive nothing. It cost me 23 hundred dollars to get out.

Q. So after your association with Mr. Seijas from 1946, I believe in August, up to 1949 when you got out, it cost you some $2,000 to get out, and you didn't receive anything from him in the way of accounting for the profits from this business or upon liquidation of the business?

A. No. I hired myself an attorney to get out of this. I didn't do it myself.

Q. In other words, in addition to getting out with $2,000, [1459] you paid a lawyer to assist you in getting out?

A. Plus the $2,000 was for city tax, excise tax and social security for the help.

Q. Did you ever get an accounting from Mr. Seijas up to the present time for any proceeds for the sale of this business?

Mr. Obenour: Objection, if your Honor please. There has been no testimony this business was ever sold.

Mr. Mead: He got out in 1949, and he certainly——

The Court: Go ahead.

Q. (By Mr. Mead): Did Mr. Seijas ever make

(Testimony of Henry T. Morin.)

an accounting to you as to whatever happened to your interest in this business?

A. He said that it was the end.

Q. He just said it was the end?

A. Now I don't know if he is still in or not.

Q. And that was the accounting that you got?

A. Yes. I hired an attorney to get out a legal way so I wouldn't be responsible for any more tax.

Q. Now, during this period of time after you got into the business, Mr. Morin, was there any holding out of any funds from the collection of the pinball machines that was not reported on the income tax returns as far as [1460] you know?

A. None.

Q. You know of no so-called hold outs?

A. No, I am just learning it now.

Q. You are just hearing about it now for the first time? A. Yes.

Mr. Mead: Thank you, sir.

Redirect Examination

Q. (By Mr. Obenour): You talked to Mr. McCusker for a period before you saw either Mr. Seijas or Mr. Forman? A. Yes.

Q. Before you ever saw Mr. Seijas or Mr. Forman, and had you been told by Mr. McCusker about the pinball business?

A. Yes, I was told by Mr. McCusker.

Q. And what was your understanding of the pinball business before you ever talked to Mr. Seijas and Mr. Forman?

(Testimony of Henry T. Morin.)

Mr. Mead: I object to that, what his understanding was, your Honor.

The Court: Yes, and it's not redirect I think.

Q. (By Mr. Obenour): Prior to seeing Mr. Scijas or Mr. Forman, had you made up your mind as to desire to acquire a pinball route? [1461]

Mr. Mead: I think that is also objected to, whether he made up his mind is incompetent and it's immaterial, your Honor.

The Court: That particular thing he can answer. Had you made up your mind to go into this business before you saw either Forman or Scijas?

The Witness: No.

Q. (By Mr. Obenour): Was there any reason why you wanted to go from the business you were in to the pinball business?

A. Well, I was sold out, and I was looking around for several businesses.

Q. What kind of a business were you looking for?

A. I was looking for a business that wouldn't have anything to do with perishables.

Q. Anything else? A. No.

Q. Were you looking for any kind of business that might be easier or harder than what you had been in before?

Mr. Mead: This is objected to.

The Court: I think it is not redirect.

Q. (By Mr. Obenour): What was the total lapsed time, Mr. Morin, from the time you first saw Mr. Scijas until you paid Mr. Forman his check?

(Testimony of Henry T. Morin.)

A. Within a week. [1462]

Q. Within a week, the total of the transaction?

A. Yes.

Q. And how many times had you seen either or both of them?

A. Well, I was dealing with Seijas only, see? I saw Mr. Forman very rarely, at the very most, three times.

Q. As a matter of fact, could it be, Mr. Morin, that you never saw any of them more than three times?

A. It couldn't be, no.

Q. The first time you saw Mr. Seijas, did you tell him that you wanted to talk to your wife?

Mr. Mead: This is improper redirect, your Honor.

The Court: Well, I think probably it is. It is pretty well covered on direct.

Q. (By Mr. Obenour): Could it have been, Mr. Morin, that you had seen Mr. Forman and Mr. Seijas the same day?

Mr. Mead: Objected to as improper redirect.

The Court: Overruled.

The Witness: It could be.

Q. (By Mr. Obenour): And concerning the 23 hundred dollars that you paid to get out, do you know what happened to the 23 hundred dollars, Mr. Morin?

A. Yes. It went towards the bills that were past due, towards the business.

Q. To whom did you give it? [1463]

A. I gave it to Mr. Diamond.

(Testimony of Henry T. Morin.)

Mr. Obenour: That is all.

The Court: Diamond?

The Witness: Yes. That was my attorney.

Mr. Mead: I have nothing further.

The Court: That is all, Mr. Morin. You are excused, and may leave whenever you wish.

(Witness excused.)

HARRY W. CARLSON

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Harry W. Carlson, C-a-r-l-s-o-n.

Direct Examination

Q. (By Mr. Billinghurst): Where do you live, Mr. Carlson?

A. At 1715 East Twenty-third, Eugene, Oregon.

Q. What is your occupation?

A. Internal Revenue Agent.

Q. How long have you been an Internal Revenue Agent? A. Since 1942. [1464]

Q. Where were you located as an internal revenue agent in 1945?

A. In Portland, Oregon.

Q. And how long had you been there at that time?

Q. Do you recall at some time during your tour

A. I came to Portland, Oregon, the first of March of 1944.

(Testimony of Harry W. Carlson.)

of duty in Portland, Oregon, whether or not you had an occasion to audit the personal income tax account of Mr. and Mrs.—William R. and Dorothy Forman? A. I do.

Q. When did that audit take place?

A. Well, that audit, according to my daily records, was submitted on the 4th of November, 1944, so it was just prior to that date.

Q. And by just prior, what in terms of the length of time did the audit require?

A. The audit itself must have taken place in one day.

Q. What is the type of an audit to which you refer, Mr. Carlson?

A. Well, the type of audit—most any income tax audit is verification of the income tax returns with the available records of the taxpayer.

Q. And is that how this audit took place?

A. Yes.

Q. What was the reason for the audit, if you know? [1465]

A. Well, as nearly as I can remember, this is 11 or 12 years ago, the return was assigned to me through the Portland office as a result of an audit just recently completed of another partnership return which the taxpayer was a member.

Q. Do you recall the name of the partnership?

A. Well, I believe it was the United Amusement Company.

Q. After you received your assignment to conduct this audit, Mr. Carlson, what did you do in or-

(Testimony of Harry W. Carlson.)

der to accomplish your purpose? In other words, to complete the audit?

A. Well, the ordinary procedure was, and to the best of my recollection, I went to the only address that——

Mr. Mead (interrupting): I object to his testimony as to what the ordinary procedure is.

The Court: He corrected it, and said he went to.

You must relate what you did on this occasion, Mr. Carlson. Go ahead. You went to the address——

The Witness: I went to the only address that we had where any available records would be kept.

Q. (By Mr. Billinghurst): And what happened when you arrived there?

A. Well, I examined whatever records were there and found [1466] nothing different from the returns.

Q. Do you recall the nature of those records?

A. Not precisely, no.

Q. Do you recall generally what they were?

A. I believe that they were records pertaining to amusement devices of some kind.

Q. Do you recall the nature of these records? How would you describe them?

A. No, sir. I couldn't say. They were the available records, whatever they were there, if they were in book form or work papers.

Q. You don't know whether they were books or work papers or what they were at this time?

A. I would not, sir.

Q. From whom did you receive these records?

(Testimony of Harry W. Carlson.)

A. Well, I received them from whoever was in charge of the office. There was a lady there, and there was also a man there whom I believed to be Mr. Forman.

Q. What request for records did you make?

A. All records that would pertain to that return, 1942 and '43.

The Court: You must keep your voice up, Mr. Carlson. You drop your voice a little. Go ahead.

Q. (By Mr. Billinghurst): Mr. Carlson, as a result of the [1467] —I beg your pardon—first, for what period of what year were the tax returns of Mr. and Mrs. Forman of which you were then concerned relate? A. To 1942 and '43.

Q. As a result of your audit, Mr. Carlson, was any adjustment made in the taxpayer's liability to the United States for payment of taxes?

A. Yes, there was.

Q. Approximately how much?

A. According to my daily records, there was 15 hundred dollars and 50 odd dollars each for Mr. Forman and Mrs. Forman deficiencies.

Q. During the course of your audit, Mr. Carlson, did you make any inquiries as to whether there was income received by the United Amusement Company which was not reflected on the income tax return of Mr. and Mrs. Forman or in the records which you examined at that time?

A. I would have inquired in the regular course as to whether there was any other income to be reported.

(Testimony of Harry W. Carlson.)

Mr. Mead: I object to that answer.

The Court: Did you do it in this instance? That is the question.

Mr. Mead: I move the answer be stricken, your Honor.

The Court: Well, it will depend on what [1468] his answer now is.

The Witness: That was 12 years ago, but I believe I did.

The Court: Go ahead.

Mr. Billinghurst: I think that is all. You may question.

Cross Examination

Q. (By Mr. Mead): Mr. Carlson, you are a Revenue Agent now located in Eugene, Oregon?

The Court: There may be another matter. Do you want to wait for that?

Mr. Billinghurst: Just one more question.

Direct Examination—(Continued)

Q. (By Mr. Billinghurst): Were you told anything about such a sum as $165,000 that may have represented profits of this company?

A. No, sir.

Mr. Billinghurst: That is all.

The Court: Go ahead, Mr. Mead.

Cross Examination—(Continued)

Q. (By Mr. Mead): Mr. Carlson, you are a revenue agent in Eugene, Oregon? [1469]

A. Yes.

(Testimony of Harry W. Carlson.)

Q. And what do you do there in connection with your duties, sir?

A. Auditing income tax returns.

Q. And were you doing that kind of work in 1944 and 1945? A. Yes, sir.

Q. And have you been doing that kind of work since then? A. Yes, sir.

Q. And these returns that you audit, Mr. Carlson, are generally referred to as routine returns, are they not, sir? A. That is right, sir.

Q. And in connection with these audits, about how many audits did you make a month?

A. Oh, that depends, 12, 15, 20.

Q. And to arrive at a yearly number, you would multiply that by 12, would you, sir?

A. Possibly.

Q. So you would make 140 audits a year, is that right? A. It could be. That is not exact.

Q. And at the time that you called there in Portland was in August of 1944, is that right, sir?

A. Yes.

Q. How do you fix the time?

A. I fix the time by the time that I submitted my own [1470] report and according to my records, and this is all in evidence here. That bears the date of November 4 as being the date that I submitted my report. The auditing date, I think, that you refer to there is the date that the return might have been assigned.

Q. I see, and when was this date that you called at the office to inquire with respect to the return?

(Testimony of Harry W. Carlson.)

A. Well, as nearly as I can remember, it would be just shortly before that November 4 date, probably within a week or ten days or something like that. We don't always complete our reports immediately.

Q. By referring to your report, could you refresh your memory as to the time that you called there?

A. Not any closer than I have already stated.

Q. You couldn't determine that? A. No, sir.

Q. What was the office address of the place you called?

A. I can't remember that for sure either. I have been trying to. It seemed to me it was somewhere in the neighborhood of Eleventh Street in Portland, but for the life of me, I couldn't remember.

Q. Was it in an office building or private home?

A. It was a business building. It strikes me that it was in a sort of an old store building.

Q. You think it was in an old store building?

A. Something of that description, yes, sir.

Q. All right.

A. It opened right off the street, and the office that I have in mind was in the backward part of it.

Q. Had you talked to a man whom you think was Mr. Forman? A. Yes.

Q. Mr. Forman, Mr. William Forman is sitting at the end of the counsel table. Have you ever seen him before, sir?

A. As far as I know, he was the man that was there.

(Testimony of Harry W. Carlson.)

Q. As far as you know, he was the man?

A. As far as I know, but I am on oath, and I can't be absolutely sure.

Q. You can't be absolutely sure? A. No.

Q. Is it not a fact, Mr. Carlson, that there were a large number of audits in the time involved, some 12 years ago, that you have no definite recollection about anything that transpired except what may be in your report, and you have no personal recollection of anything that happened at that time?

A. Well, I do have a vague recollection, yes. I can't be absolutely sure because the case was not too important at that time.

Q. So you are not, then, absolutely sure about any of these [1472] very important things that you have testified to?

A. I am sure of the date that the return or the report was submitted and the amounts contained therein.

Q. Yes, sir, but as to whether you made specific inquiries that you have testified to, you cannot be sure about that, can you, sir?

A. I would just base that upon our regular routine.

Q. So you are basing that upon what you might customarily do? A. Yes, sir.

Mr. Mead: In view of that response, your Honor, we move that all of the testimony of this witness about conversations and his recollection of it be stricken.

The Court: Denied.

(Testimony of Harry W. Carlson.)

Q. (By Mr. Mead): Did you make any notation in your report as to who you talked to?

A. I do not have the report.

Q. Where is the report, sir?

A. I don't know.

Q. Where are——

A. (Interrupting) They were submitted to—I beg your pardon. Then it was submitted to Portland where in turn it was submitted to Seattle.

Q. So you never have seen the report, then, since the day [1473] you made it?

A. Yes, I saw it last year.

Q. I beg your pardon?

A. It was sent down to me at the time prior to the time this trial should have taken up.

Q. Where is the report now, do you know?

A. It was sent back to Portland.

Q. But it hasn't been made available to you now? A. They don't find it.

Q. Do you know where the report is at this time? A. No, sir.

Q. Who had it the last time you saw it, sir?

A. I did.

Q. And what did you do with it?

A. I sent it back to Portland.

Q. Have you made any attempt to get the report? A. Yes, sir.

Q. And you haven't been able to get it?

A. That is right.

Q. So all the recollection that you have of what transpired on this occasion is what you would cus-

(Testimony of Harry W. Carlson.)

tomarily do, and what notes you may have put into this report which you are not now able to recollect nor do you have the report?

A. I do not have the report. [1474]

Q. And you are not able to state the contents of the report?

A. Not anything besides the amount that was involved and agreed to.

Q. But you remember the amount that was involved and that was $50?

A. Yes, because I did have that in my own daily record.

Q. And that was $50, the amount?

A. No, $1,550 each.

Q. And the other contents of the report of whether you noted whom you talked to and the like, you have no definite recollection of that?

A. The stock phrase that is used in a report of that kind is that the adjustments were discussed with the taxpayer or were not discussed with the taxpayer as the case may be.

Mr. Mead: I move that be stricken as not being responsive.

The Court: The question was rather general, did you have any knowledge of the contents of the report. Now, are you stating what your knowledge of the contents of the report is or what are you stating now? I will strike the answer. Re-ask the question, please.

Follow the question closely, Mr. Carlson.

Q. (By Mr. Mead): Is it customary to state in

(Testimony of Harry W. Carlson.)

these reports [1475] that adjustments were discussed and agreed to by the taxpayer or were not and so forth? A. Yes, sir.

Q. And you don't recall what the entry was that you made in this particular report?

A. No, I couldn't say for sure just exactly what that is. I know the returns or the reports were agreed to.

Q. Do you know there was an adjustment but you don't know what was in the report? A. No.

Mr. Mead: Thank you, Mr. Carlson.

The Court: Is that all? Anything further?

Mr. Billinghurst: Nothing further, your Honor.

The Court: That is all, Mr. Carlson. You are excused and may leave when you wish.

(Witness excused.)

The Court: We will take the recess now.

(Whereupon, a short recess was taken.)

The Court: Go ahead.

Mr. Billinghurst: Mr. Clodfelter.

WARREN CLODFELTER

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Warren Clodfelter, C-l-o-d-f-e-l-t-e-r.

Direct Examination

Q. (By Mr. Billinghurst): Where do you re-

(Testimony of Warren Clodfelter.)

side, Mr. Clodfelter? A. Bellevue, Washington.

Q. What is your profession?

A. Attorney at law.

Q. And where do you practice?

A. Seattle, Washington.

Q. How long have you been in practice?

A. Three years.

Q. What did you do prior to that time?

A. I was in practice as a certified public accountant and attended law school.

Q. Have you ever been employed by the Internal Revenue Bureau? A. Yes.

Q. When?

A. February 1947 to September of 1950.

Q. Are you acquainted with Mr. William R. Forman? A. Yes. [1477]

Q. How did you get acquainted with him?

A. When I was with the Bureau, I was assigned the 1945 federal income tax of Mr. Forman for investigation.

Q. What was the nature of that investigation?

A. Routine examination.

Q. What nature?

A. I was assigned for the investigation of the returns to determine the corrected return and also to pick up changes in the income as reported by Revenue Agent Riedel on some of the partnership income tax returns which were reported by Mr. Forman's return.

Q. And as a result of that investigation, did you make any kind of a report? A. Yes.

(Testimony of Warren Clodfelter.)

Q. I will ask you to examine document Exhibit No. 51 and ask you to—pardon me, 41, and ask you to identify it.

A. This is the report which I submitted to the revenue agent in charge on the 1945 income tax of William Forman.

Q. Now, in conducting the investigation or the audit, what was your procedure?

A. I contacted Mr. Forman personally first and set an appointment, and upon meeting him personally, I asked for his retained copies of the partnership income tax [1478] returns for the partnership shown on his return.

Q. To what partnership do you refer?

A. There were approximately six partnerships, I believe, reported on his return as income.

Q. Were you interested in any particular one of them?

A. No. I believe approximately three of them had already been examined by Agent Riedel, and it was my duty to verify the correctness of the remaining partnerships.

Q. Now, which partnerships did you investigate at that time?

A. I don't recall the names of them. I do know——

The Court: If you wish, you may refer to your report to refresh your recollection if you need.

The Witness: A. A. Seijas and W. R. Forman was one. Green Parrot Theatre was another. Dock

(Testimony of Warren Clodfelter.)

Concessions was the third one. I made no change in any of their incomes.

Q. (By Mr. Billinghurst): Did you have occasion at that time to examine the accounts of the United Amusement Company?

A. Not on my initial investigation.

Q. Well, as a result of your examination of the A. A. Seijas and W. R. Forman account, Green Parrot Theatre account and Dock Concessions account, what report did you make? [1479]

A. Only the picking up the additional income from the partnership returns which had been examined by Revenue Agent Riedel.

Q. What do you mean by "additional income"?

A. I don't recall the exact nature of the income, just the additional income which was shown on the reports of Agent Riedel.

Mr. Mead: We object to any testimony, further testimony along the line of what report he made, your Honor, as being incompetent and immaterial.

The Court: Not with respect to the report itself, what he found?

Mr. Mead: And further that the income tax returns of William Forman are not an issue in this case.

The Court: Overruled on that ground.

Mr. Mead: May we have a continuing objection to that, your Honor?

The Court: Go ahead.

Q. (By Mr. Billinghurst): After your initial

(Testimony of Warren Clodfelter.)

investigation, what, if any, additional investigation did you make?

A. After I submitted my report to the office, it was returned to me for investigation of the type of assets which were sold on United Amusement [1480] Company of Bremerton—re-examination of the reports previously submitted by Riedel.

Q. Was that United Amusement Company of Bremerton or United Amusement?

A. I believe United of Bremerton.

Q. Can you refer to your report and refresh your recollection?

A. United Amusement Company.

Q. And as a result of that re-examination, what happened?

A. I found that no money had been paid or a nominal sum had been paid for the agreement not to compete, which was the purpose of my re-examination, but I also by checking through the records of the United Amusement Company, I noticed that there were some assets in there, primarily licenses for pinball games, which I determined to be part of the assets sold and short term—they had been held less than six months for a short term capital gain and could not be reported as a long term capital gain.

Q. Refer to the income tax returns of Mr. and Mrs. Forman. For what years were those returns reported? A. I didn't hear the question.

Q. For what year were the returns reported that you were investigating at this time?

(Testimony of Warren Clodfelter.)

A. I believe 1944 and '45 together, at the same time. [1481]

Q. And as a result of your second investigation, was any adjustment made in the income tax liability of the Formans? A. Yes, sir.

Q. And what was that adjustment?

A. It was increasing his income primarily for my adjustment of approximately $2,000 for a long term capital gain and picking up the income—previously an adjustment made by Riedel for approximately 28 hundred 70 dollars.

Q. Now, does this adjustment relate to or result from unreported income of any kind, or is it an adjustment of tax liability concerning income which had been reported?

A. My adjustment reported capital gains. It was not additional income.

Q. There was no additional income disclosed to you at that time, is that right? A. Right.

Q. Did you make any inquiry concerning whether or not the United Amusement Company had during the years in question received income which was not reported and reflected on the books and records which you examined? A. No.

Mr. Mead: May I have that determined [1482] as to who he made inquiry of, your Honor?

The Court: Make that plain, then.

Mr. Billinghurst: Perhaps I should lay the groundwork.

Q. (By Mr. Billinghurst): In conducting your investigation and audit, what data did you use?

(Testimony of Warren Clodfelter.)

A. In making my audit of Mr. Forman's return?

Q. Yes.

A. Primarily, a retained copy of the partnership return retained by the taxpayer, Mr. Forman, and from there into the ledger and journals of the United Amusement Company.

Q. And from whom did you obtain the ledger and journals of the United Amusement Company?

A. Mr. Seijas referred me to Mr. Renstrom, both of them in his office.

Q. Who was Mr. Renstrom?

A. He was represented to be the accountant who had prepared the books for United Amusement Company.

Q. And what data did you ask for?

A. As I recall, I just asked for the ledger and the journals supporting the ledgers.

Q. What journals?

A. For the year 1945 for United Amusement Company.

Q. What items did the journals cover? [1483]

A. Cash receipts and disbursements and the general journal.

Q. Now, with respect to this audit, you used the ledger and the journals and the partnership returns, is that correct? A. Yes.

Q. Did you have any other data from any other source? A. No.

Q. Do you know whether or not that the ledger and journals that you mentioned represented all of

(Testimony of Warren Clodfelter.)

the records of the United Amusement Company?

A. I do not know.

Q. Did you ask for all the records of the United Amusement Company?

A. No, I doubt if I did.

Q. Do you know whether or not the United Amusement Company may have had income during those years which were not reflected on the books and records which you received and which may not have been reported on the partnership returns? A. I was not aware of any.

Q. Did you make any inquiry as to that effect?

A. No.

Q. I believe you mentioned that you had been referred by Mr. Army Seijas to Mr. Renstrom. You are then acquainted with Mr. Seijas? [1484]

A. Yes.

Q. Now, during the approximate same time, I will ask you whether or not you had an occasion to conduct a similar audit of Mr. Seijas' tax accounts?

A. No, I could not investigate Mr. Seijas' income tax return, but I could make increases to his income resulting from my investigation of the partnership return.

Q. I will ask you to identify Exhibit No. 42 which has just been handed you, Mr. Clodfelter.

A. This is a copy of my report on the 1945 income tax return of Army Seijas.

Q. Is that report based on the same investiga-

(Testimony of Warren Clodfelter.)

tion which you mentioned in connection with Mr. Forman's report?

A. Yes, they were both made at the same time.

Q. On your re-examination of the account of the United Amusement Company, did the books and records you examined, the ledgers and journals—did the partnership books and ledgers and journals you have mentioned refer to the sale of the United Amusement Company?

A. Did the books refer to the sale of the United Amusement Company? I can't recall now just what the books did relate according to the sale.

Q. Did you receive any data during the course of this audit concerning the sale of the United Amusement Company? [1485]

A. Yes, I recall examining a copy of the contract of sale.

Q. Where did that contract of sale come from?

A. I believe I got it from Mr. Seijas.

Q. Did you have any conversations with Mr. Forman during the course of the audit?

A. Not very many. Most of them were with Mr. Seijas. I know I talked to Mr. Forman initially and later on in explaining the changes to his income tax return.

Q. And later on, you are referring to Mr. Forman or Mr. Seijas? A. Mr. Forman.

Q. Were you able to determine from conversations with either Mr. Forman or Mr. Seijas how the sale price of the company was established?

A. There was quite a bit of difficulty in deter-

(Testimony of Warren Clodfelter.)

mining how it was established, but I think it was primarily Mr. Seijas. He indicated it was primarily from the revenue obtained from each machine's location, capitalized earnings from each location.

Q. Now, using that standard of value for the company, were you able to determine whether or not the sale price of the company corresponded to approximately the book value of the assets?

A. As I recall, it was quite a discrepancy and couldn't be shown exactly what assets were sold [1486] for what price individually, but the total could be allocated down to any particular assets.

Q. Do you wish to refresh your recollection on it before you do that? Did you come to any conclusion as to what the approximate fair market value of the machines was?

Mr. Mead: Object to what conclusions he may have come to as the fair, cash market value of the machines as being improper.

The Court: Yes, I think so.

Q. (By Mr. Billinghurst): Were you provided with any information concerning the approximate fair market value of the machines?

A. I can't recall now.

Q. Do you wish to refresh your recollection, sir?

A. According to my report, I could not set any definite value on any particular machines that were sold.

Q. Were you able to set a fair market value on the total of the machines, all of them?

(Testimony of Warren Clodfelter.)

Mr. Mead: Objected to as incompetent and immaterial, your Honor.

The Court: Yes, the form of the question is objectionable but there was a value established. What the taxpayer accepted that would be something else, of course.

Q. (By Mr. Billinghurst): Was there a value established, Mr. Clodfelter? [1487]

A. For what?

Q. For the value of the machines? A. No.

Mr. Billinghurst: You may question.

Cross Examination

Q. (By Mr. Mead): Mr. Clodfelter, this audit was a routine audit that you made?

A. Yes, sir.

Q. What was the purpose of the audit, Mr. Clodfelter?

A. It was initiated because of the changes in the partnership income to these various partnerships which Agent Riedel had made.

Q. I understood you to say that the purpose of the examination was with respect to the agreement not to compete.

A. That was the subsequent re-examination.

Q. Oh, and what do you mean by that? What did you check into?

A. There was approximately, I think, a sales price on the route which was $44,000, and the reviewer, my immediate boss, referred the case back to me to see if any portion of that $44,000 had

been paid for an agreement not to compete. If there [1488] had been, it would have been ordinary income to the partnership rather than capital gain.

Q. Did that result in adjustment by reason of that situation that you made?

A. I found a nominal sum had been made for the agreement not to compete and had no bearing on the principal sale price.

Q. And how about the first adjustment that was made by reason of the license fees paid?

A. Well, that was made as a result of my inquiry into what type of asset was sold, whether any sum was paid for the agreement to not compete and also indicated what I should find out, what other assets were sold also, and I found that there were licenses sold together with the machines, locations and any goodwill that could be found.

Q. And did you make an adjustment by reason of the licenses that were paid? A. Yes.

Q. And why was that adjustment necessary?

A. I found that the licenses had been deducted in full as an expense, and they were still valuable when sold and had been held less than six months and were part of the assets transferred as such. The gain in the sale of those licenses was a short [1489] term capital gain rather than long term capital gain.

Q. So that adjustment then resulted in an increased tax, did it, for that purpose? A. Yes.

Q. I think you said that you contacted Mr. Seijas and Mr. Forman, and you also contacted the

(Testimony of Warren Clodfelter.)

bookkeeper, whoever had charge of the books and records, and you had access to the journal and to the ledger, is that right, sir? A. Yes.

Q. I think the question was asked you, Mr. Clodfelter, whether or not you asked either Mr. Seijas or Mr. Forman whether or not all of the revenue was reported. Was that question asked?

A. Yes.

Q. What was your answer to that?

A. No, I did not.

Q. You did not ask that question? A. No.

Q. Was that reason because you were there to investigate only the things that you described?

A. Yes.

Q. And you made those adjustments as a result of the matter that you investigated?

A. Yes. Mr. Forman's return was very simple—just had partnership income and didn't require [1490] the investigation of any personal businesses.

Q. And so your investigation, then, and discussions were limited to that subject matter?

A. Yes.

Mr. Mead: That is all.

Redirect Examination

Q. (By Mr. Billinghurst): Did you go over the adjustments with Mr. Forman?

A. I believe I did explain it to them personally.

Q. When—Mr. Clodfelter, had it had come to your attention that some, perhaps, $165,000 in unreported earnings had been made by the United

(Testimony of Warren Clodfelter.)

Amusement Company, would you have taken any action on that information?

Mr. Mead: That is objected to as a hypothetical question, your Honor, and calls for a conclusion of the witness and does not take into account the realities of the situation that existed, and therefore is objected to.

The Court: I think it's proper. Answer.

The Witness: If I had known there was unreported income, I certainly would have taken an interest in it and investigated much more thoroughly.

Q. (By Mr. Billinghurst): And you were not [1491] told then that there was such a sum or any other sum of unreported income in United Amusement Company? A. That is correct.

Mr. Billinghurst: That is all.

Mr. Mead: No further questions.

The Court: You are excused, and you may leave whenever you wish.

(Witness excused.)

ARTHUR MAURICE RIEDEL

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Arthur Maurice Riedel, R-i-e-d-e-l.

(Testimony of Arthur Maurice Riedel.)

Direct Examination

Q. (By Mr. Billinghurst): Where do you reside, Mr. Riedel?

A. 373 Grenola Street in Pacific Palisades, California.

Q. What is your occupation?

A. Occupation is sales office manager with the Semi-Conductor Sales Division of Hughes Aircraft Company.

Q. How long have you been with that concern, Mr. Riedel? [1492]

A. I am on my fourth year.

Q. What did you do prior to that time?

A. Prior to that time, I was with the Treasury Department in Seattle, Washington.

Q. In what capacity? A. As field agent.

Q. For the Internal Revenue Bureau?

A. For the Internal Revenue Bureau, right.

Q. Are you acquainted with either Mr. William Forman or Mr. Army Seijas, Mr. Riedel?

A. Yes, I am, through my examination in 1947.

Q. And to what did that examination relate?

A. Well, that related to an audit for the years of 1944 and 1945 which included partnership interests in the United Amusement Company of Bremerton and several other partnerships. I can't recall them just at the present time.

Q. Mr. Riedel, before you go ahead, will you identify Exhibit No. 43 which was handed you?

A. Yes. I identify this as my report covering

(Testimony of Arthur Maurice Riedel.)

the years 1944 and 1945 which indicates a deficiency of some $1,000 total for the two years.

Q. What is the nature of the audit that you conducted, Mr. Riedel?

A. It was the audit covering this personal income for those two years, an examination [1493] covering the income and expenses as reported by them on their returns for those years.

Q. Now, in connection with this audit, how did it start?

A. Well, that is going back quite a few years. As I recall, I think the partnership return was assigned to—the partnership of the United Amusement Company of Bremerton was assigned to me, and in making that examination, of course, the personal returns of Mr. Seijas and Mrs. Seijas had to be picked up to take care of the tax deficiency for those years.

Q. When did you conduct the audit?

A. Well, according to this report, the report is dated February 28, 1947.

Q. Well, is that the day on which the audit was conducted?

A. No, that would be the date of the report, and it would be sometime prior to that. That is within that general time area.

Q. What did you do in order to conduct the audit?

A. Well, in order to conduct the audit, it was necessary for me to make my contacts with Mr.

(Testimony of Arthur Maurice Riedel.)

Seijas in his office, which, I think, at that time was in the Smith Tower Building and——

Q. What was your purpose in contacting Mr. Seijas?

A. Well, my purpose was to inform them of my examination. [1494]

Q. Did you ask——

A. (Interrupting): And it would be necessary for me to examine the books of the partnerships to be sure that I could verify all of the income, all of the expenses, to completely audit.

Q. And did you make such a request?

A. I made such a request. I can't recall whether it was Mr. Forman directly or to Mr. Seijas or both of them at the same time. I think I met Mr. Forman first, and later on, of course, I did meet Mr. Seijas.

Q. Did you receive the books which you requested?

A. I asked for all of the books, documents, memoranda, or what have you that would substantiate all of the figures as reported on the tax returns, and I might add that I have always made that a general practice.

Mr. Mead: I object to that.

The Court: The general practice we are not concerned with. Go ahead.

Q. (By Mr. Billinghurst): What books were you given to examine or what books did you have access to in order to conduct this audit?

A. Well, as I recall, I was given the partner-

(Testimony of Arthur Maurice Riedel.)

ship books of the United Amusement Company of Bremerton.

Q. And what did these partnership books consist of?

A. Well, as I recall, there were several books. [1495] I mean there were probably the income ledger and the expense ledger. It's quite possible this was all in one ledger. That is quite a few years ago, and I can't remember the particular books.

Q. Now, in checking those books, Mr. Riedel, what do you mean checking them against what?

A. Well, the point is this, I checked them against the figures as shown on the partnership returns to verify the items of expense taken as tax deductions. The items of income were taken as income, reported income, and then, of course, it would be necessary to get into the personal returns of Mr. and Mrs. Seijas in connection with the partnership income. Now, I do recall an adjustment, I think, that may have been picked up from a related return, something to do with a disallowance of legal expense which I was not sure I had all the information on, and I think I disallowed the legal expense on the basis that possibly it was legislative expense.

Q. What do you mean by "legislative expense"?

A. Well, the payment made in the interest of keeping the firm alive, keeping it in operation, a political expense, so to speak.

Q. And what do you mean by "political expense"?

(Testimony of Arthur Maurice Riedel.)

A. Well, you might call it a legal expense [1496] which would be used in such a way to influence the——

Mr. Mead (interrupting): I object to conclusions of the witness. He should state the facts, your Honor, not conclusions.

The Court: Yes.

The Witness: As I say, this was my opinion, and that is the reason for——

Mr. Mead: I move that be stricken.

The Court: Just the fact that it was disallowed for that reason is sufficient.

Q. (By Mr. Billinghurst): Did you make any adjustment of the taxpayer's income liability as a result of this investigation?

A. Yes. I see by the report that this was picked up, and reading the report, "that all items of income and expense were verified and found allowable with the exception of the understatement of partnership income due to disallowance of deductions for legislative and political expenses to the partnership in which taxpayer is interested, United Amusement Company of Bremerton, and United Amusement Company, capital gain on sale of taxpayer's interest in the United Amusement Company in November of 1945 is correctly reported and was verified from bill of sales and books of vendee and vendor."

Q. Well, now, Mr. Riedel, as to the adjustment [1497] based upon this legal or legislative expense, did you discuss the adjustment with the taxpayer?

(Testimony of Arthur Maurice Riedel.)

A. Yes, I did.

Q. Did the taxpayer agree to that item?

A. I understand that it was an agreed case.

Q. And what is meant by that?

A. That Form 870 was signed as an agreed case.

Q. And the taxpayer then made no protest over adjustments?

A. According to my report, that is correct.

Q. Did you make any inquiry as to whether or not the company involved, the United Amusement Company, had received income not reflected from the books which you examined, that is the partnership books, and not reported on the partnership returns?

A. My recollection of that, which was in the initial contact, in which I asked them for all records to substantiate the returns that they had signed and submitted to the Government.

Mr. Mead: I move the answer be stricken as not responsive, your Honor.

The Court: Well, no, it is not responsive. Do you mean to say you made no inquiry other than that? Is that what you answer to this question?

The Witness: Well, again, I will have to——

The Court: Please repeat the question. [1498] Let the witness listen attentively and then answer it.

Q. (By Mr. Billinghurst): Did you make any inquiry concerning whether the United Amusement Company had received income which was not re-

(Testimony of Arthur Maurice Riedel.)

flected in the books which you examined and also not reflected on the partnership returns?

A. The answer to that question—I have to rely on my memory. I would say that I did raise that question, maybe not in just your words, but I would say that that point was developed during the examination very definitely.

Q. And as a result of that question, what were you advised?

A. I was advised that I had the complete records for the partnerships.

Mr. Mead: I move to strike that as not being responsive when he said he had no independent recollection of it, your Honor.

The Court: Denied.

Q. (By Mr. Billinghurst): Neither Mr. Forman nor Mr. Seijas advised or mentioned to you that United Amusement Company may have received income amounting to as high as $165,000 which was not reported on the income in the partnership returns and not reflected in the books?

A. I was not advised.

Q. Which taxpayer were you referring to when you answered my inquiry about the taxpayer? I think I made several inquiries. In the agreed case, who was the taxpayer?

A. I would say Mr. Seijas.

Mr. Billinghurst: That is all.

The Court: Go ahead.

(Testimony of Arthur Maurice Riedel.)

Cross Examination

Q. (By Mr. Mead): Mr. Riedel, when did you leave the Bureau? A. In June of 1949.

Q. In June of 1949? A. Yes.

Q. And how many audits were you making approximately a month from the time you made this report in 1947, the early part of the year?

A. How many per month?

Q. Yes, sir.

A. Well, I don't recall what I was doing at that particular time. Now, I had some very difficult cases and——

The Court: The question is just how many were you doing per month.

Mr. Mead: Yes, sir.

The Witness: That would have to be a guess.

Q. (By Mr. Mead): You couldn't answer it?

A. I mean some months you would turn in a very high production. Other months, depending on the length of the case and the difficulties involved, you may turn in two one month and another month you might do twenty.

Q. You remember the name of one additional taxpayer that you audited the same month you made this audit? A. Do I remember?

Q. The name of one taxpayer that you audited besides this one in this particular month?

A. No, I could not answer that without seeing my records, which I do not have in my possession.

Q. Actually, Mr. Riedel, this has been nine to ten years ago? A. Correct.

(Testimony of Arthur Maurice Riedel.)

Q. And your entire recollection of this transaction is what is contained in this report, is it not?

A. Well, that is what we are concerned with here, isn't that correct?

The Court: Just answer the question, Mr. Riedel. We will get on so much more rapidly. Please answer the precise question.

Mr. Mead: Would you like to have the question read, sir? Could we have the question read, your Honor? [1501]

The Witness: Will you repeat that, please? I don't quite get the connection between that question and the question that you just asked me.

The Court: Restate the question. Now listen attentively, Mr. Riedel, to the question.

Q. (By Mr. Mead): Mr. Riedel, is your entire recollection of what transpired at the time of this audit what is contained in this report?

A. Yes, I would say that is.

Q. You have no independent recollection of what transpired upon this occasion whatsoever, do you, sir?

A. I would rest on my report, what is stated in that report.

Q. Now, there is no notation in this report, and if you need to have it I will hand it back to you —it's Exhibit 43—to the effect that you asked the taxpayer at this time whether or not all of the income was reported in the books which you examined? There is no notation in this report to that effect, is there, sir?

(Testimony of Arthur Maurice Riedel.)

A. Well, again, it was not my custom to——

The Court: Just answer the question, please. Answer the question and then make an explanation if you want. Answer the question.

The Witness: I would say I did raise that question. [1502]

The Court: That is not the question, sir. The question is, is there any reference to it in the report. Mr. Riedel, please give attention.

The Witness: I would like to see my reports. I would like to see it again.

The Court: Very well.

The Witness: I do not see a direct reference to it in my report other than this statement about all items of income and expense were verified.

Q. (By Mr. Mead): As a matter of fact, there is no reference to it, is there, sir, in your report?

A. Not directly.

Q. There is no reference to it?

A. I don't see——

The Court: He just read something that he says——

The Witness: It says "All items of income and expenses were verified."

Q. (By Mr. Mead): Were verified?

A. Yes, to the best of my knowledge. That is what I understood at the time that I had seen every document, every book of income and expense which I requested on my initial contact with these two gentlemen.

Q. Now, actually, Mr. Riedel, this was what

(Testimony of Arthur Maurice Riedel.)

[1503] we call a routine audit, was it not, sir?

A. Yes.

Q. And what you did was to request the books, the books were made available to you, and you examined the income shown upon the books and compared it to the income shown upon Seijas' tax returns? A. That is correct.

Q. That is the procedure, isn't it?

A. That is the procedure.

Q. And that is what you did? A. Yes, sir.

Q. Now, among the items of expense of this business, you ran across several items of attorney fees and the like which you disallowed?

A. That is right.

Q. And that was the only adjustment that you made? A. That is correct.

Q. And the increase of income results from that disallowance? A. Correct.

Q. Therefore, if the adjustment was discussed with the taxpayer, that would have been the adjustment that was discussed?

A. That is correct.

Q. And you have no other independent [1504] recollection of the transaction other than this report that you have? A. That is correct.

Mr. Mead: Thank you, sir.

The Court: Anything further?

Mr. Billinghurst: Nothing further, your Honor.

The Court: That is all, Mr. Riedel. You may leave whenever you wish.

(Witness excused.)

The Court: We only have five minutes of the day remaining which probably would be too short to summon a witness, and I think we will recess at this time. I think, Ladies and Gentlemen, there is another matter that I will have to attend to in the morning which may delay our opening slightly, so to give you the benefit of the doubt and not keep you waiting here, since I can foresee it, I will request you to return tomorrow morning at 10 instead of 9:30. Will you do that, please? Keep in mind my admonition to you, won't you, please? I look forward to seeing you again tomorrow at 10 a.m.

(Thereupon, the Jury withdrew from the courtroom.)

The Court: If it does not press you too greatly, Gentlemen, I would like to be here at 9 or [1505] shortly thereafter in order that we may consider more fully the matter discussed in chambers earlier in the day.

If you have any additional authorities you wish me to look at, or anything of that kind, I would be glad to have them. Also, I would suggest that the witnesses be instructed to be here at that time; namely, 9 o'clock. It may be that I will wish to examine them in the absence of the jury as a preliminary to a ruling on the matters that have been suggested to me. So please inform the witnesses that are involved in the matter referred to, to be here at 9 o'clock and available, and promptly at 9, please.

Summon them now and I will directly tell them to return.

(Thereupon, witnesses, William Meyer, Thelma Endersby, and Albert Forman, entered the courtroom and were duly instructed by the Court to return at 9 a.m. August 10, 1956, and then retired from the courtroom.)

Mr. Obenour: I would suggest that the position of the government, your Honor, in answer to the position of the defendant previously stated, that it would be relevant to show the availability of the records requested or their non-availability, [1506] the access or non-access previously furnished to the government, the existence or non-existence of copies of tax returns of William Forman filed and under the testimony of the government custodian of those original returns that the originals have been destroyed, to show their present whereabouts, if such copies exist, and to show the circumstances of prior inquiries of the government to the witnesses for the purpose of establishing if such exists and the adversity of such witnesses to the government.

The Court: I will keep those matters in mind in pondering the matter, and in the meantime, as I say, you should be prepared to give me the benefit of your views and contentions in the morning at that hour and we will try to get the matter disposed of prior to 10 o'clock so that we can resume the evidence.

Is there anything else you wish to say? If not, we will recess until 9 o'clock tomorrow morning.

(Thereupon, the court recessed to reconvene the following morning, August 10, 1956, at 9 o'clock a.m.) [1507]

(Whereupon, on the 10th day of August, 1956, at the hour of 9:30 a.m. the following further proceedings were had, to-wit:)

The Court: Good morning, gentlemen. We are concerned at this time with the matter of the production of the witnesses Meyer, Endersby, and Albert Forman, and the material required to be produced by the subpoenaes duces tecum which were served upon them.

It occurs to me that an orderly way of approaching this question would be for the government to make an offer of proof with respect of these witnesses, and each of them, and then I will consider whether or not it be desirable to interrogate the witnesses prior to hearing your argument. Will you do that, please?

Mr. Obenour: The offer of proof, your Honor, cannot be made in the normal light because these witnesses have each refused to talk to me on an attempt to interview them, and——

The Court: You have no information from them, any of them?

Mr. Obenour: I don't know what they are going to say.

The Court: How do you propose to interrogate?

Mr. Obenour: Call them as adverse witnesses, each of them establishing the facts that they were subpoenaed to appear and to produce certain records. I would show that in the case of each of

them that whatever records they had remained in their possession and control and had been observed by no one under the action of the subpoena.

The Court: Do you mean no one on behalf of the government?

Mr. Obenour: No one on behalf of the government; that in no way have they revealed any documents or the contents of any documents in their possession, if in fact they complied with the subpoena, and that such any question of production up to now would be moot.

I would then interrogate the witnesses concerning the, taking it first by Endersby, establishing that on a prior trial she did appear in the Seijas' trial answering——

The Court: It is a portion of the present case?

Mr. Obenour: Yes, sir; that Albert Forman was subpoenaed for certain records of the party——

The Court: I should say a portion of the present indictment. [1509]

Mr. Obenour: Yes, sir. That in the Seijas' trial a subpoena was served on Albert Forman for records of the partnership of the Green Parrot and First Avenue Theaters, that on that occasion we were advised that Albert Forman while a partner actually could not explain the contents, and Thelma Endersby, their bookkeeper and employee, did answer the subpoena and did produce certain records of the Green Parrot and the First Avenue Theaters which she received on that occasion, were kept by her in the office in Portland; that in connection with her work that the documents—rather,

the records she produced were not introduced, but rather instead she made a transcript which, if I recall correctly, consisted of a certain capital account, particularly of Seijas, and it may have been both the Formans also, I do not recall, and also of certain draws made by the partners during the then period in question, but this information was produced by Miss Endersby with the knowledge of the brother, Albert Forman, one of the other witnesses here today, and we believe with the knowledge of William Forman for the reason that Mr. George Mead, who represented William Forman before and as of this time, was present [1510] at that trial, and was, we believe, either advising Miss Endersby to so appear, or she did appear with full knowledge of Mr. Mead and his client, William Forman, and as such, anything so produced was in no way produced under force of subpoena.

The Court: Is there anything beyond what was then produced and called for in the present subpoena?

Mr. Obenour: Yes, sir.

The Court: What additional data is called for?

Mr. Obenour: I will have to look to make sure. Additional records that pertain to the transaction of William Forman and Albert Forman during the years '42 to 1949.

The Court: Are those records alleged to relate to the records that were produced on the previous trial or be concerned with the same transaction?

Mr. Obenour: I assume in some particulars the

information she produced at the last trial must be contained in this. However, the government does not propose to make a demand upon this witness to actually produce those records. She would be——

The Court: Beyond the ones that were called [1511] for in the first trial?

Mr. Obenour: Beyond the one in the first trial. She would be asked if she did comply and if those records are existent. Then, we would propose to——

The Court: They relate solely to the Albert Forman-William Forman partnership?

Mr. Obenour: Yes, sir, and the partnerships in which Mr. Seijas was, incidentally. In other words, there were more than one. There is one known as the Forman Brothers. There are others which I do not have full knowledge of, and the subpoena was all inclusive to that extent. However, we would propose to inquire of Miss Endersby not for the production of those records at this time, but rather to identify her signature upon Forman's 1945 tax return which is introduced in evidence, and which is signed by her. We would interrogate her concerning her preparation of that tax return which is in evidence. We would also interrogate her as to any other tax returns which she prepared, if she did so, and where are they now, and which we believe are in the possession of Mr. Mead.

If she has prepared any others, she would be interrogated as to the manner in which they were [1512] prepared. She would be interrogated as to any knowledge she had of any monies received by William Forman from businesses other than the

ones of which she was a bookkeeper. She would be interrogated if she had any knowledge of any funds received from the pinball business operated by Forman and Seijas and subject to this matter, whether it was in any way incorporated the tax returns prepared by her. The similar matter would be undertaken with Albert Forman, although it would appear to my limited knowledge, and, again, he refused to speak, I don't think he had anything to do with the preparation of the returns, and he indicated on the last occasion that he had no knowledge of the books themselves. They would probably be, then, limited to any knowledge of any additional income of William Forman which was in any way incorporated in their income reported under Forman Brothers, or any of the other associations, and, lastly, of the accountant William Meyer who would be similar in nature, establishing the present whereabouts, if such exists, of copies of earlier tax returns, if they are in fact existent, where are they, what his knowledge is in their preparation, what he has done [1513] in the nature of preparing such return, and if in fact he included any returns or any work he did, income received from the pinball business and incorporated by William Forman through any manner, in other records reported in their books. In other words, if it is not reported as a partnership income of the amusement company, it is not incorporated in the return of William Forman in any other way.

The Court: As far as Albert Forman, there is

nothing new to be added with respect to what was covered on the motion to quash?

Mr. Obenour: No, your Honor.

The Court: Very well.

Mr. Obenour: Similarly, we wouldn't make any demand upon him to produce the documents if they are in existence and if he had them, and for his then knowledge of the information which we just suggested.

The Court: Would you like to make your point?

Mr. Mead: Yes, sir. If I may make the observation, we know of no proeedure whereby these witnesses who are to be called are adverse witnesses. It is up to your Honor to determine that from the testimony adduced. [1514]

The Court: I think that point is well taken.

Mr. Mead: They are not adverse witnesses.

The Court: Not on the mere statement, but they may turn out to be so.

Mr. Mead: That will be for your Honor to determine. I might state to your Honor that each of these three witnesses are here and each of them have complied with the Court's direction and have the records that they have in their possession. It is true that certain of these records are in my possession. Many were turned over to me in 1953, those records being the income tax returns of William Forman.

The Court: It might be of some importance to know whether they were turned over to you.

Mr. Mead: They were turned over to me, I believe the record will show in July of 1953, your

Honor, and these returns are all in my possession and are here in this courtroom if your Honor should direct they be produced.

The Court: Well, you are not subpoenaed.

Mr. Mead: I understand that, your Honor.

The Court: There is no direction to you.

Mr. Mead: There is no concealment, and I wish the record to show, your Honor, that all of these [1515] records that are being referred to, none of them have been lost, none have been mislaid, and none have been concealed, and they are all here in this courtroom.

The Court: I didn't mean to suggest that at all. I merely thought it might be of some importance to know that date, because the year '53 was an important year in many respects with regard to this litigation, and I thought that the time of your receipt of the records — I presume you did procure them from your client?

Mr. Mead: No—well, I procured them from my client's employees. That would be the same thing, and they were directed by him to turn them over to me.

Mr. Obenour: In that regard, the nature of the time, we would show here, again, I don't know what statement that Mr. Meyer will give, but we would show a prior statement he made in 1953 concerning the records to the agents when they attempted to inquire of them.

Mr. Bischoff: I wish to enter a formal objection to the offer of proof.

The Court: Do that.

Mr. Bischoff: At this time the defendant [1516] Forman objects to the offer of proof on the grounds that it constitutes an unlawful search and seizure and a violation of the constitutional guarantee against self incrimination of the defendant Forman. With respect to the portion of the offer which relates to what transpired in the prior trial of Mr. Seijas, this defendant objects to any evidence in relation thereto on the grounds that he was not a party to the trial or to the charges upon which the defendant Seijas was tried, and he cannot be deprived of his constitutional guarantees by anything that was done by anybody at that trial.

The Court: Since the matter was raised yesterday, I have had occasion to examine very carefully the opinion of Judge Murphy in the Winter's case, for the lack of a name, it has a long title, and also have conducted some independent research on my own concerning the matter, and I think that it might be desirable to avoid any possible mischance about this, considering that we have spent two weeks in the trial of the case and I don't want to have a problem of mistrial, that I should at least briefly interrogate each of these witnesses on my [1517] own behalf solely with respect to the matters in question, and then I will rule.

Call the witness Meyer.

WILLIAM F. MEYER

called by the Court, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

(Testimony of William F. Meyer.)

The Witness: My name is William F. Meyer, M-e-y-e-r.

Examination by the Court

Q. Mr. Meyer, we are concerned at this time with a subpoena which I understand was served upon you? A. Yes.

Q. In this proceedings? A. Yes.

Q. Requiring you to produce or demanding that you produce certain documents and records. The Court now at the moment is considering the questions that were raised by certain objections that have been made. I am making this explanation to you in order that you may understand the character of this interrogation. Is it clear to you?

A. Yes.

Q. I believe you are an accountant, are you, Mr. Meyer? [1518]

Q. And you are practicing in Portland?

A. Yes, sir.

Q. And were you served with a subpoena duces tecum in this proceedings? A. Yes, sir.

Q. When were you served with it?

A. Well, it was sometime late in July. I don't remember.

Q. Of this present year?

A. Yes, sir. I have it here.

Q. If you have it, would you please get it out?

A. Well, there is evidently no date of service issued—it is issued June 25, 1956.

Q. Do you recall the time it was served on you?

A. I don't recall exactly. I would say it must have been, probably, about the middle of July.

(Testimony of William F. Meyer.)

Q. The middle of July of this present year?

A. Yes.

Q. Now, do you have in mind the papers and documents that the subpoena calls for you to produce? A. Yes, sir.

Q. If not, look at the subpoena now to satisfy yourself about it.

A. Yes, sir, I have them in mind.

Q. You have them in mind?

A. Yes, sir. [1519]

Q. Now, do you now have the documents?

A. They are in the court here.

Q. Were they in your possession at the time this subpoena was served on you? A. No, sir.

Q. Have they been in your possession at any time since the subpoena was served upon you?

A. No, sir.

Q. Have you to this time revealed anything about these documents to any representative of the government?

A. I have discussed them several times with Mr. Obenour and Mr. O'Leary and Mr. Oftedal.

Q. Since the service of the subpoena?

A. Yes, sir.

Q. Have you related the contents of these documents or anything of that kind?

A. In a general way, yes, as near as I could.

Q. From your memory of them?

A. Yes. We have had quite extensive discussions about them.

Q. Both before and after the service of the

(Testimony of William F. Meyer.)

subpoena? A. Yes, sir.

Q. Was that with the knowledge of Mr. Forman or his counsel?

A. Well, I discussed it with them afterwards. At the time I don't think there was any particular discussion. [1520]

A. It is an important matter. I want you to give close attention to it. Do you mean to say that you discussed the matter with the government representatives without contacting Mr. Forman or his counsel to ascertain whether it met with their approval?

A. Well, the discussions occurred at several times. One in particular was the day that the subpoena was issued and we discussed it right at that time.

Q. At the time?

A. Yes. And then about, I think the second day of this trial on Monday or Tuesday, I had quite an extensive discussion with the United States Attorneys regarding them. Obviously I didn't discuss that matter at that time with Mr. Mead because there was no need to.

Q. Now, as I understand it, you did not then, nor have you made any claim of privilege of incrimination as far as you personally are concerned with respect to these documents?

A. No, sir.

Q. You don't claim any privilege on account of the possibility that you would be incriminated by producing these documents, do you?

(Testimony of William F. Meyer.)

A. No, sir.

Q. Did you at one time have possession of these documents? A. Yes, sir. [1521]

Q. When?

A. I had them at all times after their preparation until about July of 1953.

Q. And what did you do with them then?

A. They were delivered to Mrs. Endersby who is Mr. Forman's office manager in Portland.

Q. How did that come about?

A. I wasn't in the office at the time. We had quite a large office and Mrs. Endersby came to the office and requested the documents, and since she was known in our office and had been employed by us at one time, she was given them.

Q. Well, do you mean to say you don't know who it was, then, that requested these documents?

A. Well, it would have been Mr. Forman through Mrs. Endersby.

Q. Through his employee, Mrs. Endersby, who requested the return of all these documents?

A. Yes.

Q. Every and all documents referred to in the subpoena? A. Yes, sir.

Q. In substance, what did the documents consist of?

A. They would have been our working papers.

Q. Working papers of your accounting firm?

A. Yes, sir.

Q. About what? [1522]

A. About the income relative to the theatres

(Testimony of William F. Meyer.)

in Portland, Oregon. There would be the copies of Mr. Forman's tax returns.

Q. For what years?

A. From 1942 to 1952 inclusive.

Q. '42 to '52 inclusive? A. Yes, sir.

Q. Now, these copies of Mr. Forman's returns, were they in your possession, then, up until July of 1953? A. Yes, sir.

Q. How did it come about that you had possession of them during that long period up until that time?

A. Well, normally we would have in our files our work copies of the returns. However——

Q. Now, let me stop there a moment. As I understand it, when you prepared the returns from —did you prepare these returns for Mr. Forman during these years? A. Yes, sir.

Q. When you prepared the return you submitted the original that is to be signed and filed, a copy to the client—— A. Yes, sir.

Q. And then you retain a third copy which you call your working copy?

A. Yes, sir. Normally we would do that. In this case we didn't. [1523]

Q. What did you do in this case?

A. Well, Mr. Forman had always had the custom of sending back to us, or sometimes not even taking a typed copy that he would normally retain. We do that occasionally with other clients.

Q. But in this case did you not make the working paper that you keep in your own files as well

(Testimony of William F. Meyer.)

as the copy that you give to the client for his files?

A. There was a working copy I made, of course, to begin with, but in the cases where we retained the client's copy in our files, we stripped the files down and do not retain our working copies.

Q. What did you do in this instance?

A. Well, that was what we did in this instance.

Q. Do you mean to say that the only copy of these returns that you had up until the time you relinquished them were the copies that normally would be delivered to the customer?

A. That is correct. They were the typed carbons.

Q. And what happened to your work copies?

A. The work copies, the returns themselves, were destroyed.

Q. When?

A. As we went along. When the typed copies came back to us we destroyed the others.

Q. Was that done in this instance currently [1524] from year to year, or did you do it all at one time?

A. It was done currently because that is our custom.

Q. So the only copy that you had up until July of 1953 was the copy that you would normally give to the customer? A. That is right.

Q. What else did you have with respect to these returns?

A. We had the information—the partner information returns that had been sent to us from Seattle.

(Testimony of William F. Meyer.)

Q. What partnership, Seijas' partnerships in the amusement company, and so forth?

A. Yes, sir.

Q. And you are familiar with the companies involved in this trial, aren't you, the United Amusement Company, United of Bremerton, American, and Bremerton? A. Yes, sir.

Q. Did you have copies of those returns?

A. Yes, sir.

Q. For what years?

A. Well, I can't recall. We didn't have a complete file of th. n. Sometimes the information from those returns was sent to us in letter form or memoranda form, and other times we did have the returns, but they are the ones we had.

Q. So that at the present time you do not have [1525] the documents called for by the subpoena?

A. No, sir.

Q. But you say that you previous to this time have discussed with the government representatives, at least to some extent, the information called for by the subpoena? A. Yes, sir.

Q. I think you said that on the date the subpoena was served you had some discussion and then you had later discussions as well?

A. Yes, sir.

Q. And on the date the subpoena was served, you advised Mr. Forman and his counsel of the fact that you had been subpoenaed?

A. Well, either that day or soon after.

Q. And thereafter you had further discussions

(Testimony of William F. Meyer.)

with the Government representatives concerning the contents of these records? A. Yes, sir.

Q. Was that with the approval of Mr. Forman and his counsel?

A. I don't know that I even asked him about it.

Q. Were you instructed by them one way or another about it? A. No, sir.

Q. You were not instructed to make any claim of privilege with respect to them?

A. No, sir. [1526]

Q. And never have been? A. No, sir.

Q. So that whatever you did was without any instruction to you from Mr. Forman or his counsel concerning any claim of privilege to be asserted?

A. That's correct. I had the impression that I wouldn't be permitted to make such a claim.

Q. I am not concerned with your impression. I am concerned whether you had any instructions.

A. No, sir.

Q. From either Forman or Mr. Mead after they knew that you had been subpoenaed?

A. No, sir.

Q. Did you tell them of your discussion with the government representatives? A. Yes, sir.

Q. I beg your pardon? A. Yes, sir.

Q. You received no instructions to claim any privilege concerning it? A. No, sir.

The Court: Do either of you wish to make any further inquiry?

Mr. Obenour: Yes, sir.

The Court: Go ahead. [1527]

(Testimony of William F. Meyer.)

Examination

Q. (By Mr. Obenour): When you say—first of all, you recall June 28th, Thursday, in your office, that the first interview occurred?

A. No. I said that I don't recall the date, but you were there.

A. It was an occasion when three of us were present, as I recall, or four, Oftedal, O'Leary, Keeney, and myself were down there?

A. That's correct.

Q. And that was on Thursday, June 28?

A. I don't recall. That is the occasion when you all were there.

Q. And when you say you discussed the contents, did you—actually, first, we had about a 30 minute discussion or so, didn't we?

A. Yes, sir.

Q. And it was in your office and you had a member of your firm present? A. Yes.

Q. And actually, wasn't it more, Mr. Meyer, that you said we had witnesses there and you weren't going to make any statement in front of witnesses of anything definite where we would then impeach you as saying you had said something [1528] and said something else at the trial, and as a result you said you didn't know that we had asked what you knew, and you said, "Well, I can only talk generally," and, "You have witnesses here," and I was saying something then, and now, wasn't that about the gist of the conversation?

(Testimony of William F. Meyer.)

A. That is correct. We had a general discussion and I answered the questions that I could from definite memory. I told you I would write down and I would give you as near as I could, the dates. You asked me other questions besides those.

The Court: We are presently concerned, as I understand it, you did give some information, you say?

The Witness: Yes, sir.

The Court: But others you declined to do for the reason indicated in this questioning and answers that you have given?

The Witness: Yes, sir.

The Court: That is all that is necessary.

Mr. Obenour: I was trying to establish that the nature of the information he gave was background concerning himself, concerning the nature of his engagement by the Formans, the type of businesses whose work he did, the type of papers [1529] you had distinguished from the content, that you would receive information from Mr. Forman, or either of them, in the nature of slips of paper, first, and you simply prepared the returns in the beginning, and as they progressed you did more work but that the only information you got for the preparation of the returns were the partnership returns of the other businesses, some of which you still had and some of which you did not, I don't know which?

The Court: It is too difficult for the witness to

(Testimony of William F. Meyer.)

cover all that. In general, is that a correct statement, or not?

The Witness: Your Honor, I didn't mean to infer that we discussed every paper because I couldn't. This was extended over a ten year period, but I did generally tell you that I had partnership returns and I didn't know if I had them all or anything like that. I told you that I had the information that they had sent us and copies of the returns.

Q. (By Mr. Obenour): But the point is that it was the existence of the documents by name rather than content of the document?

A. I didn't, as I say, mean to infer I was [1530] telling you about every document in there.

The Court: I personally don't regard this as material to the inquiry that I have at the moment.

Mr. Obenour: One other question, your Honor.

Q. (By Mr. Obenour): Were you not advised as to the purpose of the inquiry and also as to the nature of the subpoena by me and you advised me that as I knew, you weren't going to act on the advice of the United States Attorney but would rather act on the advice of the defense counsel?

A. That is correct. You very carefully advised me that I must bring these documents. I told you I understood the nature of the documents and that I didn't have the documents, that I would rather, kiddingly said, that customarily I wouldn't be expected to take the advice of the opposing counsel, that I would talk to my client.

(Testimony of William F. Meyer.)

The Court: You don't have to kid about a thing like that. That is good advice.

The Witness: That is what I did.

Q. (By Mr. Obenour): And that was the entire substance of the interview on that occasion and that was about it, was it not?

A. Roughly speaking, you were there about a half hour.

The Court: I think I have the general [1531] character of the conversation, as far as I am concerned with it, anyway.

Q. (By Mr. Obenour): That was in our office on the first day of the trial which you stated you did not have the documents, that you were acting in the middle, as you put it? A. Yes.

Q. Mr. Mead had them and you had to come up—you had seen them the preceding Thursday in Mr. Mead's office? A. Yes.

Q. You named the documents you say, and to your knowledge they appeared to be in the same condition as when you turned them over?

A. That is correct.

Q. And that again you named the documents distinguishing from the contents?

A. I didn't name all the documents any more that time than I did the time before. We discussed generally the files over the ten years.

Q. I am distinguishing—you did not say there was so much of anything in it—you said you would have a document rather than what it contained?

A. Yes, sir.

(Testimony of William F. Meyer.)

The Court: That is all that is required for now, Mr. Obenour. Do you want to interrogate the witness? [1532]

Mr. Mead: Just one question.

Examination

Q. (By Mr. Mead): Mr. Meyer, I think you stated that on these two occasions that were described where you had discussions with Mr. Obenour and the other representatives of the Treasury Department, that you described the documents as well as you could that you had. Did you discuss with them any of the contents of the documents?

A. I don't believe we did.

Mr. Mead: Thank you, sir. That is all.

The Court: That is all, Mr. Meyer. Please step down.

(Witness excused.)

The Court: Call Mrs. Endersby.

THELMA ENDERSBY

called by the Court, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Thelma Endersby. E-n-d-e-r-s-b-y.

Examination by the Court

Q. Miss Endersby—— A. Mrs. [1533]

Q. Mrs. Endersby, the purpose of the present inquiry, in order that you may understand what is going on, is that I am concerned with a certain

(Testimony of Thelma Endersby.)

subpoena which I believe was served upon you to produce certain documents here. Do you have that in mind?

A. I wasn't asked to produce any documents.

Q. You weren't? A. No, sir.

Q. You were merely subpoenaed?

A. To appear.

Q. I misunderstood that. You are the same Mrs. Endersby, I believe, that testified at a previous trial in this same general proceedings, are you not?

A. Yes, that's right.

Q. Namely, in the trial of certain counts relating to Mr. Seijas? A. Yes.

Q. That was about a year ago. A. Yes.

Q. And at that time you appeared and testified with respect to certain transactions, records, data, concerning your employer, Mr. Forman, do you recall that, and his connection with certain ventures in which Mr. Seijas and others were interested?

A. I testified as to the Green Parrot operation, theatre operation. [1534]

Q. The operation of the Green Parrot Theatre?

A. Yes, sir.

Q. And when you testified on that occasion, did you bring with you at that time certain documents and reports?

A. I brought a copy of the books which showed the Green Parrot-First Avenue operation, yes.

Q. And your testimony did not relate to anything other than the Green Parrot operation?

(Testimony of Thelma Endersby.)

A. No, that is right.

Q. Now, when you appeared here at that time, did you do so with the knowledge and approval of your employer, Mr. Forman? A. Yes, sir.

Q. And he did not instruct you not to testify or to make any claim of privilege with respect to the information you then gave, is that right?

A. No, sir. That is right.

Q. You yourself do not claim any privilege against self incrimination by virtue of anything, as far as you know? A. No. That is right.

The Court: I think that is all I am interested in.

Mr. Mead: She is the one who has the knowledge with respect to the records that Mr. Meyer had, and I would like to inquire about that.

The Court: You may do that. I should have [1535] done that myself. I overlooked it.

Examination

Q. (By Mr. Mead): Mrs. Endersby, in July of 1953 did you receive any instructions from Mr. Forman with respect to obtaining the retained copies of his income tax returns?

A. Yes, sir, I did.

Q. What did he instruct you to do?

A. He asked me to deliver them to your office for you wanted to look them over.

Q. Did he state the reason that I wanted to see them?

A. Well, he said that you weren't familiar with his—that you wanted to look them over in relation

(Testimony of Thelma Endersby.)

to his tax matters, and so I delivered them to you.

Q. Did this include the available files that Mr. Meyer had on the subject of the income tax returns?

A. I went over and got the tax files and delivered them to you for Mr. Forman's instructions.

Q. And have they been in my office, to your knowledge, since that time? A. That's correct.

Q. In addition to having the income tax returns of Mr. Forman during that period of time, what is the situation with respect to all legal contracts involving the Forman theatres during the period [1536] 1941, or '40, up to the present time? Where are those contracts and things?

A. Those records are all in your office.

Q. And have they been continually in my office for ten or fifteen years?

A. That is correct, all leases and all that type of material is in your office.

Q. In other words, have I represented the Forman Brothers in their activities in the theatre business, to your knowledge, since 1940 up to the present time? A. That is correct.

Q. And the general papers and records of the organization have always been in my office, is that right? A. That is correct.

Q. Now, to your knowledge, had I ever had an opportunity to examine or see these income tax returns, the copies of them, or have been consulted with respect to that prior to this date in 1973?

(Testimony of Thelma Endersby.)

A. No. I am sure they were always in Mr. Meyer's office.

Mr. Mead: Thank you, your Honor. That is all.

Examination by the Court

Q. Mrs. Endersby, as I understand it, Mr. Forman instructed you to go to Mr. Meyer's office and get this material that we have been referring to?

A. That's right. [1537]

Q. When did that occur?

A. Oh, it was about, I would say, June or July of 1953, somewhere in there.

Q. And when you went to Mr. Meyer's office, what did you procure?

A. Well, I obtained the copies of Mr. Forman's tax returns.

Q. For what years? A. Well, all of them.

Q. Well, how far back?

A. Well, I think they ran back to '41, '42—'42 I believe.

Q. 1941 or '42 and down through the years up until that time? A. Yes.

Q. In other words, about eleven or twelve years of returns? A. Yes.

Q. And what were they, the retained copies of the returns?

A. The taxpayer's copies as well as Mr. Meyer's copies.

Q. And what else did you get?

A. Well, they were the work papers.

Q. The work papers of the Meyer's firm?

(Testimony of Thelma Endersby.)

A. That's right.

Q. With respect to it? A. Yes.

Q. Now, what, if any, part did you have in the preparation of these returns? [1538]

A. Well, I obtained the material.

Q. Supplied the information that went into the returns? A. Yes.

Q. In other words, it was your job to procure the information from various sources, either Mr. Forman personally or from records and what not, and transmit it to Meyer? A. That's correct.

Q. And did you have some part in checking back against the information when the returns were submitted for signature by Mr. Forman?

A. Yes. If there was any question or any—why, I always acted as——

The Court: Is there anything further you wish to bring out, either of you?

Examination

Q. (By Mr. Obenour): When do you recall giving the papers to Mr. Mead, Mrs. Endersby, in regard to the proceedings in the case?

A. Pardon?

Q. You have in some way to some extent been advised of the progress of the proceedings involving Mr. Forman?

A. Not at the time I delivered the papers. I knew nothing about why they wanted them, or anything.

Q. Pardon? [1539]

(Testimony of Thelma Endersby.)

A. Mr. Forman called me and asked me to deliver them to Mr. Mead, and I just went over to the accounting firm and got them.

Q. You were advised of the progress of the proceedings and investigation against Mr. Forman, were you not?

A. No I didn't know there was anything against Mr. Forman at the time. I knew Mr. Seijas was.

The Court: That doesn't bear on the matter as far as I am concerned at this time. It might have something to do later, but it doesn't seem to be material now.

Mr. Obenour: I was attempting to determine how she established the date.

The Court: I see. How do you establish that date?

The Witness: Well, the file is divided in — I always added material to it because Mr. Forman never kept his own tax returns, and I took them up and put them in Mr. Mead's office after they had been turned over to Mr. Mead, and kept the file up after they had been turned over to Mr. Mead. I always delivered the taxpayer's copy up there and kept the file up.

The Court: All right.

Q. (By Mr. Obenour): How do you establish [1540] that as being June or July of 1953?

A. Well, I know it was about the middle of the year, to the best of my knowledge.

The Court: It is just a general recollection, in other words, and not related to any files or records?

(Testimony of Thelma Endersby.)

The Witness: It would be about the time after he had filed the return that I took the material up there to keep the file up.

The Court: Anything further?

Mr. Obenour: No, sir.

The Court: All right, Mrs. Endersby. Will you remain in attendance, please.

(Witness excused.)

The Court: The only decision cited to me supporting the position of the defendant, namely——

Mr. Obenour: Excuse me, your Honor, I didn't know we were getting into that. I would like to ask Mr. Meyer to return for one other question that we didn't cover in light of the establishing of this time.

The Court: Well, all right.

Mr. Obenour: A statement made on the Meyer interview.

The Court: Call him back. [1541]

WILLIAM F. MEYER

resumed the stand and testified further as follows:

Examination

Q. (By Mr. Obenour): Mr. Meyer, do you recall on November 3 of 1953, you were contacted, I believe, the first time by agents O'Leary and Oftedal?

A. It was in November. I presume that is the date.

Q. And on that occasion you were asked for these same papers, were you not?

(Testimony of William F. Meyer.)

A. Yes, sir.

Q. And on that occasion do you recall what you told the agents?

A. I don't recall. As I told you, we have gone into that with you extensively.

The Court: The sole question now is what did you tell them on that day?

The Witness: I am trying to remember, sir. I told them, I believe, that I didn't have those records.

Q. (By Mr. Obenour): Did you not tell them that you had them stored and that while you couldn't get them right then, you had them stored and would get them, and when they returned to get them you said Mr. Mead had them?

A. I don't recall that conversation. [1542]

The Court: By that you mean it may have occurred?

The Witness: I don't recall it. At that time we had no storage space, and that is why I can't recall making such a remark.

Q. (By Mr. Obenour): Would there have been any reason why you would not have been able to give them to us at that time? A. What?

Q. Why wouldn't you have been able to give them to them at that time when they asked for them? A. I didn't have them.

Q. But you didn't tell them then that Mr. Mead had them, did you? A. I don't recall.

Q. Do you recall being asked on both occasions, that is both occasions in which I have talked to

(Testimony of William F. Meyer.)

you on the occasions in your office in Portland and the first day of this trial, you were asked when did you give them, the papers, to Mr. Mead? Do you recall that? A. Yes, sir.

Q. And do you recall your answer at that time?

A. I don't recall. I referred to the affidavit which I furnished Mr. Oftedal's office that stated in July and that affidavit was made in January of [1543] 1954 which was a closer date to the date we are talking about.

Q. You said you didn't remember and then referred to your affidavit as to when it was?

A. Do you mean at that last meeting with us?

Q. On both occasions when we met with you I asked you as to when you furnished it and you stated you didn't remember, and then you say you made the affidavit and you referred to that as establishing when it was.

A. That is correct. When you were in the office in July I didn't have any recollection as to the exact date, and then I had the affidavit. I referred to that later. I don't believe I referred to the affidavit the day you were there.

The Court: I think that is sufficient on that. I don't think that is controlling now. That is a subject you might inquire into later. That is all, Mr. Meyer. Remain in attendance.

(Witness excused.)

The Court: Well, gentlemen, the only authorities submitted to me as supporting the position of the defendants in this connection is Judge Mur-

phy's opinion, recent opinion, in this Winter's matter which I have examined carefully as well as general text authorities, Wigmore and McCormack, and some cases that we have been able to dig up [1544] in the short interval between the time this matter was raised.

My view is this, that as far as the matter of Albert Forman is concerned, I am not going to add anything about that. I fully considered the matter on the motion to quash and I stand now on the ruling then made; namely, denying the motion to quash and requiring the production of the witness, and I will be controlled by what occurs further in that connection by the examination, and any objections that may be made then. However, the general objection as stated in your motion to quash, of course, is preserved and will not need to be restated, as far as the court is concerned, any further. I think you made a full record on the motion to quash.

Now, with respect to the other two witnesses, it is my opinion that the situation confronting Judge Murphy was very different than the situation confronting me. In Judge Murphy's case, the attorney for the defendant was subpoenaed to produce private records which were held and found to be the private property of the client, the defendant client, and that was the sole question presented in that case. [1545]

Incidentally, the question of the necessity of an accountant producing records was not specifically involved in that case, and Judge Murphy mentions

that. Apparently there was a subpoena to the accountant Woods in that case that was not challenged, at least as far as this opinion reveals.

Now, we are not confronted here with a subpoena issued to the defendant or to his counsel to produce private records of the defendant. If that were the question involved, there wouldn't be anything to it. It is obvious the privilege of self incrimination would be applicable, although, there is some authority to the contrary in that situation. I wouldn't hesitate to sustain an objection to the issuance of a subpoena under those circumstances.

However, here we have a situation where an accountant, and it is well settled, in fact, Judge Murphy himself makes reference to it, to the fact that it is well settled that there is no privileged relationship between an accountant and a customer, and it seems to me that there is really no problem involved here at all. I think that it is competent and relevant and material, and I believe [1546] competent by this means of showing that these particular records were in existence, that the witness prepared them, that he had knowledge of their contents, and that he had control of them up to the time that he relinquished the control of them.

It seems to me that there is no real problem of privilege involved in that kind of a situation. Repeatedly the courts and Supreme Court has held that there is no question of privilege under those circumstances. Moreover, even if it might have been assumed that somehow or other there was

a privilege involved in the situation, when the defendant Forman revealed the information contained in the tax returns to Wood, immediately, even according to Judge Murphy's decision, the privilege as far as the witness is concerned, would terminate.

Accordingly, it is the judgment of the Court that each of these witnesses, Meyer and Endersby, may be called, that it may be shown that they were subpoenaed to produce these documents, and they may be interrogated concerning the existence of the documents and their one-time possession of them. They may be interrogated as to the [1547] disposition made of them and the fact that they have no present possession of them, and I believe they may be interrogated as to the content of the documents insofar as they have any memory of what the content is.

Accordingly, that is the ruling of the Court and the objections made are overruled and denied. Of course, it goes without saying that this ruling only covers the matters that have been called to my attention and does not include anything beyond the offer of proof made. I will expect counsel to strictly observe that admonition.

Call the Jury in, please.

Mr. Bischoff: May an exception be noted, and may it appear that we need not repeat the objection when the witnesses are called and that the objection will be deemed to have been taken at that time?

The Court: That is entirely agreeable to me that that be understood.

(Thereupon, the Jury resumed the box.)

The Court: Good morning, Ladies and Gentlemen. Won't you be seated, please. I am sorry, but we were just a bit more delayed than expected, but not by a very wide margin, so you haven't been unduly inconvenienced, I hope. The Jury are all present. Proceed. [1548]

ALBERT FORMAN

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Albert Forman, F-o-r-m-a-n.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. Forman? A. Portland, Oregon.

Q. And your address?

A. 904 Public Service Building, office address.

Q. And are you related to the defendant William R. Forman? A. He is my brother.

Q. And are you older or younger than he?

A. I am older.

Q. What business are you in?

A. In the motion picture theatre business.

Q. And what is the nature of your motion picture theatre business?

A. Well, we are in what is called the exhibition

(Testimony of Albert Forman.)

end of the theatre business where we show pictures in theatres.

Q. And as such, do you own or lease or operate any theatres? A. Yes, sir.

Q. And which is it? Do you operate them or [1549] own an interest or lease them, or what?

A. Well, we operate most of the theatres, and we own them, and we also lease.

Q. You own and operate them?

A. Yes, right.

Q. And where is your business located?

A. In various communities of Oregon, also Washington.

Q. Your offices are where?

A. Portland, Oregon.

Q. And your offices in Portland — how many theatres do you have?

A. My brother and I have about twelve theatres.

Q. Your brother and you have twelve theatres?

A. Yes.

Q. How are they owned?

A. Well, most of them are in corporate form.

Q. Pardon? A. Corporate form.

Q. Corporate form? A. Yes.

Q. Is there a partnership of Forman Brothers?

A. Yes.

Q. What is that?

A. Well, that was a partnership that we had when we first went into the business together.

Q. And who constituted the partnership?

A. My brother and myself.

Q. Pardon? A. My brother and myself.

Q. Where was this business operated, that office? A. In Portland, Oregon.

Q. When did you and your brother go into business? A. The early part of 1940.

Q. The early part of 1940? A. Yes.

Q. Prior to that time what was your business?

A. I was in the theatre business as an employee.

Q. Of whom were you an employee?

A. Of Sterling Theatres in Seattle.

Q. Who owned the Sterling Theatres?

A. Well, the president of the company was Mr. John Danz.

Q. And how long did you work for Sterling Theatres? A. Three years.

Q. And those years were what?

A. From '36 through '39.

Q. Where were you employed for Sterling Theatres?

A. In a town called The Dalles, Oregon, in eastern Oregon, and Portland.

Q. And then after you left Mr. Danz and the Sterling Theatres in 1939, what did you do then?

A. I went into the business in St. Helens, Oregon.

Q. In what business?

A. In the theatre business.

Q. And in what way did you go into business, with whom?

A. My brother and I bought the theatre in St. Helens, Oregon.

(Testimony of Albert Forman.)

Q. And St. Helens is located where?

A. About 30 miles out of Portland.

Q. Which way? A. Northwest.

Q. It would be along the river? A. Yes.

Q. Towards the ocean?

A. Yes, along the Columbia River.

Q. Did you operate that theatre yourself?

A. Yes.

Q. Personally? That is, did you take an active part in its management? A. Yes, I did.

Q. And at that time what was your brother doing?

A. Well, he was an employee of Sterling Theatres in Seattle, Washington.

Q. He was still an employee? A. Yes, sir.

Q. And how did you and your brother purchase [1552] that theatre? How were you financed?

A. Well, we financed it through money that——

Mr. Mead: We object to that, your Honor, as being immaterial to any issue involved in this case. This involves a period of 1942 to 1945, and the partnerships of William Forman and the defendant Arias in the pinball ventures.

The Court: It is not clear to me what the details of this matter are, how they are relevant.

Mr. Obenour: I believe the matter of financing at that time would have a direct bearing upon subsequent transactions of the '42 to '45 period, and also, the further subsequent activities of the defendant from '46 and later, his ability or nonability to enter into the acquisition of properties prior to the time

(Testimony of Albert Forman.)

he is alleged to have been in the partnership in the pinball activities. It would have a definite bearing, I would submit, if your Honor please.

The Court: Well, the point is we don't want to digress into the details of anything that is not rather closely relevant to the matter. You can in general terms inquire into it, but not in detail unless the defense desires it. Go ahead.

The Witness: Would you repeat the question?

The Court: How did you finance the purchase?

The Witness: By money that—some money my brother and I put up and also money that we borrowed.

Q. (By Mr. Obenour): How much did you and your brother put up?

Mr. Mead: I object to this as going into details of this. The only issue here is Mr. Seijas' income tax returns and whether or not——

The Court: Well, I hesitate, counsel, I don't want to debate the matter with you, but you frequently make that assertion and I am not satisfied that that is the case that is before us, so it obliges me occasionally to call your attention to the allegation of the indictment without debating them with you.

Mr. Mead: Yes, your Honor. We are objecting to this testimony on the grounds that it is immaterial and irrelevant to the issues involved.

The Court: I understand that. Go ahead.

Q. (By Mr. Obenour): How much did you and your brother put up?

(Testimony of Albert Forman.)

A. Well, that is a little bit difficult for me to remember right offhand. That has been quite a while ago. I know that we didn't have all of the money for the down payment [1554] and that we did borrow some of the money. I can't tell you offhand. Our records probably would show that.

Q. From whom did you borrow?

A. We borrowed from members of the family and also from the bank.

Q. Up until that time, I believe, how would you describe your own financial position from your activities during the Thirties?

Mr. Mead: That is objected to, your Honor, as being immaterial.

The Court: I think so. The defendant's position is something else.

Q. (By Mr. Obenour): What was the financial position of your brother at the same time, Mr. Forman?

A. Well, he was employed and had a good job. I didn't count his money. I don't know how much money he had.

Q. But it was necessary for you to borrow from members of your family?

A. Yes, we did have to borrow money when we went into business.

Q. You borrowed from, among others, Mr. Danz?

A. From who?

Q. Mr. Danz. A. Mr. Danz?

Q. Yes. [1555] A. No, sir.

Q. You did not? A. No.

(Testimony of Albert Forman.)

Q. Do you know where the money came from that you borrowed?

A. As I previously stated, it came some of it from the bank and some of it from relatives.

Q. Yes, sir. And who were the relatives?

Mr. Mead: We have a continuing objection, your Honor, to this.

The Court: Yes, you may. Go ahead.

The Witness: The question was, who were the relatives?

Q. (By Mr. Obenour): Yes, sir.

A. Two widow aunts of mine.

Q. Incidentally, did you and I ever discuss this matter before, Mr. Forman?

A. No. My only contact with you was in my office.

Q. And on that occasion did we discuss your testimony? A. What was that question?

Q. Did we discuss your testimony at that time?

A. Your present line of questioning do you have reference to?

Q. Yes. A. No, sir.

Q. In fact, did we discuss any of your testimony at that time? [1556] A. No.

Q. And on that occasion——

A. (Interrupting) With one exception, it comes to my mind, whether this is important or not, you did ask me what previous theatre experience I had the day in the office and I told you I had worked for Sterling Theatres in Seattle, as I remember it now.

(Testimony of Albert Forman.)

Q. After that time, how long did you continue to operate the theatre in St. Helens?

A. If my memory serves me correctly, I believe we operated for a period of some ten years.

Q. And what was the next theatre you acquired?

A. We acquired a theatre in Salem, Oregon.

Q. When was that?

A. That was in 19—somewhere in the summer of 1941.

Q. The summer of 1941? A. '41, yes, sir.

Q. And is it correct that all of these theatres were acquired by just you or your brother of the ten or twelve that you now have?

A. That's correct.

Q. So there were no other persons, then, other than yourselves interested in any of these theatres?

A. Well, with the exception of the ownership that Mr. Seijas had in the Green Parrot and First Avenue. [1557]

Q. How was the theatre in 1941 acquired? How was it financed? A. With our funds.

Q. Pardon? A. With our own funds.

Q. Did you borrow any money on that occasion?

Mr. Mead: Could we have a continuing objection to this line of inquiry, your Honor?

The Court: You do. Go ahead.

Q. (By Mr. Obenour): Did you also borrow money from anybody for the acquisition of the theatre in Salem, Oregon?

A. I don't recall right now whether we borrowed

(Testimony of Albert Forman.)

it or not or whether we used it out of funds that we had.

Q. Could you have borrowed a little on that occasion from banks or relatives? A. Yes.

Q. And what was the third theatre—how long did you operate that theatre?

A. We still have that theatre.

Q. You still have that theatre? A. Yes.

Q. What was the next theatre you acquired?

A. We went into business in Longview, Washington.

Q. And on that occasion was there anyone other than the two of you interested in that venture?

A. No.

Q. And what was the name of the corporation in Longview, or was this still the partnership?

A. I don't rightly remember now whether there was a corporate entity or not or whether that was a partnership. It is a long time ago. I can't recall.

Q. Have you ever heard of Vista Vision?

A. I beg your pardon?

Q. Vista Vision? A. Vista Vision?

Q. Is that a name with which you are familiar?

A. No. There was a Vision Corporation.

Q. Vision Corporation? A. Yes, sir.

Q. Was that involved at Longview?

A. Yes, sir.

Q. And was there any one else in that corporation other than you and your brother?

A. Yes, sir. Originally, Mr. Ripley belonged to it.

(Testimony of Albert Forman.)

Q. And did Mr. Seijas have any interest in it from his work of incorporation?

A. You say Mr. Seijas had what?

Q. Did he have any interest in it through his activities in incorporating the Vision Corporation?

A. I don't recall him handling the activity in that connection. [1559]

Q. And what theatres did you have in Longview?

A. The Longview Theatre.

Q. The Longview Theatre?

A. No, the Roxy Theatre was the original acquisition.

Q. The original theatre was the Roxy?

A. Yes.

Q. And what happened to the Roxy?

A. It is still there.

Q. Still there? A. Yes.

Q. Do you and your brother still own it?

A. No.

Q. Pardon? A. No.

Q. Who owns it? A. Mr. Barber.

Q. You and your brother sold the Roxy?

A. Yes.

Q. Do you have any other theatre interest in Longview, or after that did you have any other than the Roxy? A. No.

Q. The Roxy was the only interest?

A. Well, later on we went into a partnership arrangement in Longview.

Q. What was that? [1560]

A. Mr. Danz bought Mr. Ripley out. We formed

(Testimony of Albert Forman.)

what was known as a "pooling arrangement" or a partnership arrangement to operate the theatres there together.

Q. How many theatres were there there?

A. There were three involved.

Q. And what were they?

A. The Columbia, the Longview, and the Roxy.

Q. And who owned the three of them?

A. Oh, my brother and I owned the Roxy and Mr. Danz owned the other two.

Q. The Columbia and the Longview?

A. Yes.

Q. And you formed a pooling arrangement?

A. Yes.

Q. What is that?

A. Well, that is the same as a partnership arrangement.

Q. Did you then own the theatres together or did you simply buy film together?

A. No, we just operated the business together. We each owned our own business.

Q. The ownership continued in the respective theatres unchanged but you shared the profits and costs? A. That is correct.

The Court: When was this Roxy Theatre acquired, Mr. Forman? I think I overlooked that if it was brought out. [1561]

The Witness: I believe it was in 1942.

The Court: 1942?

The Witness: Yes, sir.

Q. (By Mr. Obenour): How long did you and

(Testimony of Albert Forman.)

your brother own and operate the Roxy Theatre?

A. I can't tell you the date.

Q. Did you and your brother continue to own and operate the Roxy Theatre after 1945?

A. I don't remember the dates.

Q. It was sold by you and your brother?

A. Yes, we sold it.

Q. All right. I am not sure I understand, Mr. Forman, you and your brother together bought the Roxy Theatre in Longview in 1942?

A. I believe that is right.

Q. Or whatever date was. You operated it together until the time you formed a pool with Mr. Danz who owned two other theatres? A. Yes.

Q. And thereafter you and your brother operated in this pool for how long? What would be your best recollection, would you say?

A. I don't recall when we sold the theatre to Mr. Barber. I don't recall. It was either '45 or '46.

Q. But after operating in this pool, you and your brother [1562] then still had your interest in the Roxy? A. That's right.

Q. And then you and your brother sold the Roxy apart from this pool to Mr. Barber?

A. That's right.

Q. And thereafter, did you or your brother or together have any interest in the theatres in Longview? A. No.

Q. Have you since that time? A. No.

Q. And after that time the Roxy was owned and

(Testimony of Albert Forman.)

operated by Mr. Barber without interest in you or your brother? A. That's right.

Q. And Mr. Danz continued to operate the other two theatres in Longview? A. That is correct.

Q. What were the other theatres you acquired between the period of 1942 to 1945?

A. Well, we acquired the State Theatre in Salem, Oregon.

Q. When was that, sir.

A. That was in '42.

Q. Was that a second theatre in Salem?

A. Right. The third theatre was in '43, the Liberty.

Q. This was also in Salem? A. That's right.

Q. So you now have three theatres in Salem, St. Helens, and Longview? A. That is correct.

The Court: Now, let's see, there is the State in '42, the Liberty in '43, is that right?

The Witness: Right.

Q. (By Mr. Obenour): What was the name of the first one you acquired in '41?

A. The Grand.

Q. The Grand? A. Yes.

Q. What was the next theatre, sir?

A. In 1946 we acquired the theatres in Bend, Oregon.

Q. How many were there? A. Two.

Q. And the next?

A. 1951, the theatre in Camas, Washington.

Q. The next?

(Testimony of Albert Forman.)

Mr. Mead: Could we have a continuing objection, your Honor?

The Court: Acquisitions beyond this time are not material.

Q. (By Mr. Obenour): You now own how many theatres, you and your brother?

A. I believe it is twelve or thirteen. I don't recall. [1564]

Q. Twelve or thirteen? A. Yes.

Q. All of the rest have been acquired subsequent to 1951? A. Yes.

Q. Are all of your theatres indoor theatres or are any of these outdoors?

A. Some are outdoor theatres.

Q. And would the ones acquired subsequently be the outdoor theatres or were any of these others you have named outdoor theatres?

A. No, the ones that were acquired subsequently were outdoor.

Q. The ones subsequent to the Camas operation are outdoor theatres? A. That is right.

Q. The theatres you purchased in Bend, do you recall how much they cost?

Mr. Mead: Objected to, your Honor, as being immaterial, has no bearing on the issue involved here. It is a later time.

The Court: It's close enough. Overruled.

The Witness: It was in the neighborhood of $200,000.

Q. (By Mr. Obenour): And how were they financed?

(Testimony of Albert Forman.)

A. Partially with our own funds and partially by virtue of [1565] a bank loan.

Q. And how much was your own funds?

A. Well, as I recall, roughly about $30,000, I believe the down payment—I am recalling this from memory, so it may not be exact, but I believe the down payment was $60,000 with $30,000 from the bank and $30,000 of our own funds.

Q. Thirty thousand of your own funds. Would that be something from your partnership bank account or contributions by each?

A. That is correct.

Q. Which?

A. I don't recall where the funds came from. We were operating a number of units. I don't recall exactly where they came from.

Q. During this entire period, Mr. Forman, your books and records were kept by whom?

A. Well, Mrs. Endersby has been our office manager, with the exception of about a year and a half since I have been in busines, she has been in charge of the office.

Q. And was this year or year and a half the earliest part?

A. That is right, at the beginning.

Q. Would it be——

A. (Interrupting) Originally, she came into the picture and she was working in Mr. Meyer's office, and she [1566] handled our account then, and later she came into my office.

(Testimony of Albert Forman.)

Q. Would that be about 1942, then, if it was a year and a half after you began?

A. '42 or '43, along in there. I don't recall the exact date.

Q. But at this time was she your employee or was she in the employee of Yergen and Meyer?

A. She came from Mr. Meyer's office to our office.

The Court: Meyer, the accountant?

The Witness: Yes, sir.

Q. (By Mr. Obenour): But during that entire time, she did keep the records or was in charge of the records maintained at your office in Portland?

A. That is correct.

Q. Apart from the theatres you and your brother had an interest, did you have any other interest, business interest, with your brother?

A. My brother and I had a partnership in a film company called "Film Classics."

Q. What was that, sir?

A. Well, that was a company that handled old pictures for distribution to the theatres.

Q. Where were those records kept?

A. Those were kept in Portland, Oregon. [1567]

Q. And by whom? A. By Mrs. Endersby.

Q. All right, sir. Apart from that, did you through the period of 1942 to 1945 operate these five theatres as a partnership or were any of them incorporated?

A. I believe during that period of time they were partnerships.

(Testimony of Albert Forman.)

Q. And was that operated under what you call Forman Brothers Partnership? A. Yes.

Q. Other than Film Classics and the operation of the five theatres you have named, did you have any other interests in the business venture with your brother? A. No, sir.

Q. I believe you also acquired at this time, had you not, the two theatres in Seattle, the Green Parrot and First Avenue?

A. Yes. I overlooked those. That was in '44, I believe, or '45. I don't recall the year.

Q. Those were the Green Parrot and First Avenue in Seattle? A. That is correct.

Q. And in that one I believe you previously mentioned Mr. Seijas? A. That is correct. [1568]

Q. Now, with the exception of these theatres, was there any other business interest that you had with Mr. Forman?

A. Nothing outside of the theatre business.

Q. And did you have any business interests with Mr. Seijas other than the Green Parrot and First Avenue? A. None.

Q. Did you have any knowledge of the partnership or of any partnership between Mr. Seijas and your brother William?

A. I knew nothing about their activities.

Q. Did you have any knowledge that your brother had any interest in pinball operations?

A. I knew that he had some kind of a deal with Seijas, but what it was I didn't know. He didn't discuss it with me.

(Testimony of Albert Forman.)

Q. He didn't discuss it with you? A. No.

Q. Did you know it was a pinball operation?

A. I had heard that it was.

Q. Did you know anything about their business at all?

A. No, except that it was in the Bremerton area.

Q. What part did your brother play in the theatre operations in the Portland office?

A. Well, we worked together on film deals and general operations.

Q. At this same time, Mr. William Forman had his own office up there with Seijas in Seattle, did he not? [1569]

A. Well, he didn't have an office with Seijas. He had his own office.

Q. Yes, sir. He had his own office in Seattle from '42 to '45?

A. I am trying to recall now when he left. He left Mr. Danz to go into business with me, I believe in '41 or '42. I guess that is where his office was, yes.

Q. That is where his office was? A. Yes.

Q. And he was primarily concerned with the operation in Seattle while you were primarily concerned with maintaining your operation in Portland, is that correct? A. That is correct.

Q. And you were supervising the activities of Miss Endersby? A. Yes.

Q. Did Mr. William Forman have anything to do with any of the records maintained by Miss Endersby?

(Testimony of Albert Forman.)

A. Did he have anything to do with them?

Q. Yes.

A. Nothing except the same as myself, I mean with regard to reports that came out of the office on our operating statements and things of that kind.

Q. He had received the same reports you had?

A. That's correct.

Q. And who did the banking for your partnership? A. Who did the banking? [1570]

Q. Yes, sir:

A. I don't know what you mean by that.

Q. Did you have a partnership bank account?

A. Yes, sir.

Q. And who made the deposits?

A. Well, Mrs. Endersby has handled our transactions at the bank. The funds were deposited in the various towns and the check was drawn down and she took care of that.

Q. Your partnership bank account would reflect the earnings of the Forman Brothers partnership combined theatre operations?

A. I would say so, yes.

Q. And then, nothing other than funds from theatre operations was put into the partnership bank account?

A. To the best of my knowledge that is correct.

Q. And nothing other than the theatre operation partnership receipts were reported on Forman Brothers or Film Classics partnership returns?

A. That is right.

Q. Any money that Mr. William Forman would

(Testimony of Albert Forman.)

have put into the records as partnership income of Forman Brothers which was not in fact theatre operation receipts would then cause you to pay the tax upon half of such monies, would it not?

The Court: If that occurred.

Q. (By Mr. Obenour): If that occurred, yes, sir. [1571]

Mr. Mead: That is calling for a conclusion of the witness, and it is improper.

The Court: That is something we can all draw our own inferences about.

Q. (By Mr. Obenour): To your knowledge, did you know of any monies other than theatre receipts that was ever reported during the years '42 to '45 in the Forman Brothers or Film Classics partnership returns? A. No.

Q. You and your brother both received financial statements, balance sheets, and partnership returns from Mrs. Endersby in the normal course of your business? A. That is correct.

Mr. Obenour: I believe that is all.

The Court: Cross-examination?

Cross Examination

Q. (By Mr. Mead): Mr. Forman, you stated that you are the older of the two, older than Bill. How old are you? A. I am 48, sir.

Q. And how old is Bill? A. 43.

Q. You have mentioned having acquired a theatre in 1940 in St. Helens. What do you mean by acquiring. Had you [1572] bought the building or did you lease the theatre?

(Testimony of Albert Forman.)

A. We leased. We acquired a leasehold in the theatres in St. Helens.

Q. Now, with regard to that particular theatre venture in St. Helens in the start of which, I think, you said was in 1940, you borrowed some money from two maiden aunts and from the bank and your brother and yourself put in some funds, is that correct? A. That is correct.

Q. At the start of that venture did you have an additional partner too? A. Yes, we did.

Q. What was his name? A. Ralph Cohen.

Q. And did you buy him out at a later time?

A. Yes.

Q. And, then, when you say that you acquired the theatres in Salem, the Grand, Liberty, and State theatres in Salem, what do you mean by that? Do you mean that you bought the buildings or that you leased the property? Which was it?

A. No, sir. Those theatres you mentioned were leaseholds.

Q. They were leaseholds?

A. That's right.

Q. So when you say you acquired them you mean that you leased [1573] those three theatres and at various times, is that correct?

A. That is right.

Q. Now, was Mr. Seijas interested in any way in any of the theatre operations, to your knowledge, that you have described, during the entire period of time in Oregon? A. No.

Q. Was the only connection that he had with the

(Testimony of Albert Forman.)

theatre business the one that you have mentioned in Seattle, the Green Parrot and the First Avenue Theatres?

A. That I had nothing to do with.

Q. That you had nothing to do with?

A. Right.

Q. Now, was your father ever interested in that business in Seattle, the Green Parrot and the First Avenue Theatres? A. He was not.

Q. Has your father passed away, Mr. Forman?

A. Yes.

Q. When did he pass away?

A. April of this year.

Q. I think you stated that Mrs. Endersby, Thelma Endersby, kept all the books and records during most of the period of 1942 or '43 right up to the present time? A. That is correct.

Q. And these are the records that have to do with your [1574] theatre business and Mr. William Forman's theatre business in Oregon, is that correct, sir? A. That is correct.

Mr. Mead: That is all.

The Court: That is all.

Mr. Mead: Just a moment, just one more question, if I may?

The Court: Certainly.

Q. (By Mr. Mead): In connection with the theatre business that you have described, during the period of 1942 to 1945, didn't Bill Forman come down occasionally to assist you with the buying and management of these theatres?

(Testimony of Albert Forman.)

A. Very definitely. I said that.

Q. How frequently would he come down?

A. Well, as often as once a month and sometimes oftener, depending on whether I needed him or not.

Mr. Mead: That is all. Thank you.

Redirect Examination

Q. (By Mr. Obenour): You appeared under what is called a subpoena duces tecum, did you not?

The Court: Is this something you overlooked on your direct examination? [1575]

Mr. Obenour: Yes, sir.

The Witness: Yes.

Q. (By Mr. Obenour): In which you were requested to bring certain records with you?

A. Yes, sir.

Q. And did you do that?

A. Yes. That is, I think I have the records.

Q. However, since your appearance under that subpoena, have you shown those records and the contents to any government agent or representative? A. No, sir.

Q. No one has seen the contents, representing the government, of any of the things you have produced subject to that subpoena, is that correct?

A. That is correct.

Q. On a prior instance, the trial of Mr. Seijas, you were subpoenaed to produce certain records pertaining to the Green Parrot and First Avenue Theatres, were you not?

(Testimony of Albert Forman.)

A. That is correct.

Q. And on that occasion, I believe you stated you were unable to explain the records and so you requested Mrs. Endersby to appear for you?

A. That is correct. I did not appear.

Q. And she did appear in your stead subject to that first subpoena? [1576]

A. That is correct.

Q. And you had full knowledge of her appearance at that time? A. Yes.

Q. And had you discussed this fact of her appearance and what she was to produce with your brother Bill? A. Had I what?

Q. Had you discussed the fact of her appearance and what she was to produce with your brother Bill?

A. I don't remember. I think I did.

Q. You think you did? A. Yes.

Q. Did you discuss it with his attorney, Mr. Mead? A. Yes.

Q. And, in fact, Mr. Mead accompanied Mrs. Endersby up here at that time, did he not?

A. Well, I was told that he did. I guess he did.

Q. And both Mr. Mead and Mr. Forman, William Forman, were fully apprised of what she was —of her appearance and her activities?

A. That's correct.

Q. And at that time did you in any way object to her appearance and supplying the information then requested?

(Testimony of Albert Forman.)

Mr. Mead: That is objected to as immaterial, your Honor, whether he objected or not. [1577]

Mr. Obenour: The subpoena was directed——

The Court: He may answer.

The Witness: What was the question again?

The Court: The question is, did you in any way object to her appearance at that time?

The Witness: No, I did not.

Mr. Obenour: I believe that is all.

Recross Examination

Q. (By Mr. Mead): Mr. Forman, I have been mentioned in the last few questions. What is my connection, or what has my connection been with your theatre enterprise and Mr. Forman's, Mr. William Forman's theatre enterprise over the period since 1940 up to the present time?

A. Well, you have been our attorney since we first went into the business, and you have taken care of all of our legal business with the exception of the period of time when you were in the service.

Q. And that has had to do with your theatre operations and Mr. William Forman's theatre operations in Oregon? A. That is correct.

Q. And these other theatres that you have described? A. That's right.

Q. Have I always been your family attorney?

A. Right.

Mr. Mead: That is all.

The Court: That is all.

(Testimony of Albert Forman.)

Redirect Examination

Q. (By Mr. Obenour): In fact, that was your explanation, was it not, the only other time I have seen you or talked to you was in your office in Portland, you mentioned that you wanted to talk to Mr. Mead before you discussed the matter any further with us? A. That is correct.

Q. And that was all you had ever—the entire matter of any discussion between us concerning this trial has been just the fact that you were at The Dalles? A. That is right.

Mr. Obenour: That is all.

The Court: You may be excused and you may leave whenever you wish.

(Witness excused.)

The Court: We will take a short recess at this time.

(Thereupon a short recess was taken. [1579]

THELMA ENDERSBY

called as a witness on behalf of the Plaintiff, having been previously sworn, was examined, and testified further:

The Clerk: You have been previously sworn, Mrs. Endersby. Just resume the stand.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mrs. Endersby?

The Court: I don't believe the Jury are aware of this lady's name and so forth. You had better bring it out.

(Testimony of Thelma Endersby.)

Q. (By Mr. Obenour): Your name is what?

A. Thelma Endersby.

Q. Where do you live, Mrs. Endersby?

A. In Portland, Oregon.

Q. And where are you employed?

A. For the Forman Brothers.

Q. Forman Brothers? A. Yes.

Q. And is that a partnership?

A. Well, it consists of a partnership and a corporation.

Q. And where is your office located?

A. 904 Public Service Building.

Q. In Portland? A. Portland, Oregon.

Q. What is your position?

A. Office Manager.

Q. How long have you been employed by Forman Brothers? A. Oh, about fifteen years.

Q. And incidentally, when you speak of Forman Brothers, to whom are you referring?

A. Albert and William Forman.

Q. And you say about fifteen years has been your employment? A. Yes.

Q. Has it always been in Portland?

A. That's correct.

Q. And what is the nature of the business of Forman Brothers in Portland?

A. Theatres.

Q. And prior to your employment by the Forman Brothers, where were you employed?

A. I was employed by the accounting firm of Yergen and Meyer.

(Testimony of Thelma Endersby.)

Q. And where is that located?

A. Well, it is now on Southeast Ash. It was in the Meade Building at the time I worked for them.

Q. During what period did you work for them?

A. I believe it was September of '42 to September of '43.

Q. September of 1942 to '43? A. Yes.

Q. And during the period of your employment for Yergen and Meyer, did you in the course of employment employ them to work for Forman Brothers? A. Yes.

Q. What work did you do for them?

A. Well, I made weekly profit and loss statements and started setting up their set of books and permanent set of books.

Q. You set up the physical set of books for them while you were employed for Yergen and Meyer? A. I started them.

Q. Was anyone other than you keeping the books before you were actually employed by them?

A. Do you mean by the Formans?

Q. Yes.

A. Well, Mr. Forman kept his day ledger and Mr. Meyer had an accountant that kept the work sheets all the time, profit and loss statements.

Q. And so actually all their bookkeeping work has either been done by you as an employee of Yergen and Meyer or as an employee of Forman Brothers? A. That is right.

Q. During your employment have you ever worked on the partnership returns, information re-

(Testimony of Thelma Endersby.)

turns of the Forman Brothers? A. Yes, sir.

Q. And what was the first year that you recall working on [1582] the partnership returns of Forman Brothers? A. Well, it would be '43.

Q. That would be for the year '43 or for the '42 return filed in '43?

A. Well, if I worked for them in September of '42 it would be the '42 returns. I probably had something to do with those returns. It has been a long time ago. It is hard to remember.

Q. And that first year, did you actually prepare the returns or did you do work which you gave to someone else to prepare the actual return itself?

A. Well, I couldn't tell you exactly. I am sure I had aid in working on them through the firm.

Q. If in fact you did not prepare the partnership return, then you did preparatory work which was used in the preparation of the return itself?

A. Yes.

Q. To your knowledge, was Mr. Al Forman subpoenaed in the Seijas trial?

A. I don't believe he was.

Q. Did you appear subject to a subpoena in the Seijas' trial? A. Yes, sir.

Q. And do you recall whether or not Mr. Al Forman had been subpoenaed and because you were the one with the actual knowledge of the information, you appeared in his stead? [1583]

A. No, I don't recall that, Mr. Obenour.

Q. But you did, in any event, appear?

A. That is correct.

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VOLUME IV

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 43

WILLIAM R. FORMAN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1959
CERTIORARI GRANTED MAY 4, 1959

No. 15324

United States Court of Appeals

for the Ninth Circuit

WILLIAM R. FORMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

(In Four Volumes)

VOLUME IV.

(Pages 1425 to 1882, inclusive)

Appeal from the United States District Court for the Western District of Washington, Southern Division

(Testimony of Thelma Endersby.)

Q. And you brought certain records with you pertaining to the Green Parrot and First Avenue Theatres? A. That is correct.

Mr. Obenour: I will ask this be marked.

The Clerk: Plaintiff's Exhibit No. 138 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 138, Mrs. Endersby, on that occasion I will ask you if you did not introduce that document as a transcript of your entries from the original books?

A. That is right.

Q. And that was the only thing which you furnished under that subpoena in the Seijas trial is the document you have before you?

A. No. I furnished a photostatic copy of a 1948 income tax return and also a photostatic copy of the United Theatre books.

Q. Photostatic copy of the United Theater books for what year?

A. Covering the Green Parrot operation, I remember that.

Q. It pertained strictly to the Green Parrot operation? A. Yes.

Mr. Obenour: I had forgotten those were [1584] included, and I will attempt to find them subsequently, your Honor.

The Court: You may do so.

Mr. Mead: I couldn't hear you.

Mr. Obenour: I will attempt to find those documents and have them marked for identification.

Q. (By Mr. Obenour): Did you discuss your

(Testimony of Thelma Endersby.)

appearance with Mr. William Forman prior to your appearance in the Seijas trial?

A. No, I don't think so.

Q. You don't think so? A. No.

Q. Did you discuss it with Mr. Mead?

A. Well, I might have mentioned it. I don't recall any special discussion.

Q. Did Mr. Mead accompany you at the time of your appearance? A. Yes, I believe so.

Q. What records, if any, have you kept of any business enterprises in which Mr. Army Seijas had an interest?

A. Green Parrot and First Avenue operation was the only one.

Q. That is the only one? A. Yes, sir.

Q. And all other books and records you kept, were they joint or partnership of Forman Brothers alone? [1585] A. Through '50?

Q. Yes.

A. No. They had the drive-in theatres.

Q. Pardon.

A. They had some drive-in theatres.

Q. And how do those differ from the partnership? A. Those are corporate.

Q. Those are corporate? A. Yes.

Q. Does Mr. Seijas have any interest in that?

A. No.

Q. And the only interest, to your knowledge, of any records you kept where Mr. Seijas had an interest was the First Avenue and Green Parrot theatres in Seattle? A. That's right.

(Testimony of Thelma Endersby.)

Q. Who did the banking for the Forman Brothers partnership, Mrs. Endersby?

A. Well, most of our banking is done locally and in the town in which the theatre is located.

Q. And what is deposited to those accounts?

A. The receipts from the theatres.

Q. The receipts from the theatres?

A. Yes, sir.

Q. How do you use the information that you get from your local theatre operations in reporting the receipts from [1586] these theatres on a partnership book?

A. Well, there is a box office report that comes in each day from each theatre with a deposit slip attached, and those are what we use to make the entries.

Q. And the receipts shown on the partnership books, then, are entries made by whom?

A. Well, they are either made by myself or some girl in my office under my supervision.

Q. And is anything entered on your books as receipts of Forman Brothers other than the receipts of the various theatres either owned or operated by the Forman Brothers?

A. No, other than capital investments or something like that.

Q. Other than capital investments?

A. Yes.

Q. But they would not constitute receipts of income, would they? A. No.

Q. And the only income reported on Forman

(Testimony of Thelma Endersby.)

Brothers would be the receipts which you show from the various theatre operations?

A. That is correct.

Q. And handing you Exhibits 30 and 31, Mrs. Endersby, do you recognize those documents?

A. Yes, sir.

Q. And those are what? [1587]

A. William Forman and Dorothy Forman's income tax return for 1945.

Q. And who prepared that? A. I did.

Q. And what was the information you used in the preparation of the tax returns for William and Dorothy Forman?

A. Well, it is material taken from the various books in my office plus the material furnished to me by William Forman.

Q. And the information would have come from William Forman for both returns?

A. Yes, because Mr. Forman—the division of the returns are arbitrary. You compile the material and then half of the revenue goes over on Mrs. Forman's return.

Q. They were filed in Tacoma, is that not correct? A. Yes.

Q. And as such they were filed as community property? A. Yes, that's right.

Q. And then the information for both returns came either from your records which you maintained or from information from William Forman?

A. That's right.

Q. And would you please refer to either Exhibit

(Testimony of Thelma Endersby.)

30 or 31, whichever one is Mr. Forman's, and incidentally, Mrs. Forman's return simply refers to Mr. Forman's for [1588] informational details, does it? A. Yes.

Q. Would you please refer to Mr. Forman's return? That is what exhibit? A. 31.

Q. Would you please show or tell the Jury what was the information you included on that return from records kept by you, and, then, secondly, I will ask you to refer to that information you included which came directly from William Forman.

A. Well, there is the Forman Brothers revenue, Film Classics of the Northwest, and the Green Parrot Theatre records kept in my office.

Q. And on that information would be from information of partnership returns which we have just been discussing which you would have prepared?

A. From the records which are kept in my office.

Q. You kept the records and prepared partnership returns as well?

A. Yes. I don't know whether I prepared the partnership returns. Of course, all partnerships with income tax returns that I worked on, Mr. Meyer always checked them.

Q. But the information contained in those three items, Forman Brothers, Film Classics, and Green Parrot, had been information from your records and from the partnership [1589] returns prepared from your entries? A. That is correct.

(Testimony of Thelma Endersby.)

Q. And what would have come from Mr. Forman personally?

A. United Amusement Company of Bremerton, United Amusement Company, both of Seattle addresses, A. A. Seijas and William R. Forman, and Dock Concessions, again on the sale of the United Amusement Company.

Q. And how would you have obtained the information which you have included there as from Mr. Forman? What would be the form of the information you would get from Mr. Forman?

A. He generally wrote me a letter and outlined the material. Occasionally I got a partnership return, but not all of them. Mainly it was through Forman's letter.

Q. Handing you Exhibits 11, 16, and 22, do you recall whether you actually got those partnership returns or if you simply received the information?

A. No, I couldn't tell you whether I received these copies of these partnership returns, Mr. Obenour.

The Court: Those being returns from the Dock Concessions, United Amusement, and——

The Witness: A. A. Seijas and William R. Forman.

The Court: You don't recall whether you saw the returns themselves or whether information [1590] came directly from Mr. Forman?

The Witness: That's correct.

Q. (By Mr. Obenour): I will ask you to check, if you do not recall, to determine whether or not

(Testimony of Thelma Endersby.)

the amounts you included on Mr. Forman's 1945 tax returns for each of those partnerships corresponds to the amount reported on the information returns?

A. United Amusement Company checks. The A. A. Seijas and William R. Forman checks, and the Dock Concessions, that checks.

Q. And the only one, then, remaining is United Amusement Company of Bremerton, is that right?

A. That is right.

Q. And I will hand you Exhibit 2 and Exhibit 89, and particularly the last partnership return on Exhibit 2 being Army Seijas' '45 tax return, and Exhibit 89 being a group of United Amusement Company, a group of partnership returns, copies of them, and ask you to check for—may I approach the witness?

The Court: Yes.

Q. (By Mr. Obenour): —to check for the amount shown for Mr. Forman's share on the Exhibit 89 and this was the period of January 1 to March 31, '45, with the amount shown on Mr. Seijas' return for the same period, and ask you if they do not agree? [1591]

A. This is a partnership, United Amusement Company, for '45, Mr. Seijas' portion was $658.78—I beg your pardon, that is the amount of Mr. Seijas' return.

Q. And if you notice also, that there were two partnership returns filed for 1945, one for January 1, '45 to March 31, and the second for April 1 to December 31. I will ask you if the total amount re-

(Testimony of Thelma Endersby.)

ported by Mr. Seijas for United Amusement Company of Bremerton does not agree to the amount you have included as Mr. Forman's share for United Amusement Company of Bremerton for the same period?

A. It does. The figure is the figure that Mr. Forman has on his return.

Q. Then, all the—what was the amount of income shown by Mr. Forman in that year, Mrs. Endersby?

A. United Company of Bremerton?

Q. His total amount of income reported.

A. Well, it was $74,136.14 before capital gain.

Q. Yes.

A. Capital gain of $22, total of $96,136.14.

Q. And the $74,000, that was made up of all of the partnership returns we have just discussed?

A. That is right, with the exception of the Forman Brothers Film Classics.

Q. Which you kept yourself? [1592]

A. Yes.

Q. And was that the same practice, Mrs. Endersby, of all of the preceding tax returns which you prepared for Mr. Forman, his personal tax returns?

A. Yes. We followed the same routine. He always submitted the material to me from the outside sources of his income other than my office.

Q. And to your recollection, Mrs. Endersby, during the period of 1942 to 1945 was not Mr. William Forman's source of income the same as you

(Testimony of Thelma Endersby.)

have shown on the return for 1945, being those same particular partnerships?

A. Well, I couldn't tell you. I couldn't state one hundred percent that is right because I don't know anything about—I don't quite remember when these started appearing.

Q. You don't know when they started appearing?

A. No, I don't, without checking these returns.

Q. Do you know of any other source of income Mr. William Forman had other than the Forman Brothers and the companies which you personally were acquainted with and these amusement companies which you showed, in '45?

A. Well, none other than that appear on these returns.

The Court: Do you know of any others than are reflected on the return?

The Witness: No. [1593]

Q. (By Mr. Obenour): Then, all of the income which you would have shown on Mr. William Forman's tax returns for the years '42 to '45 would have come from these same sources, assuming, if I understand you, that you are not sure of exactly when they might have first appeared?

A. That is right.

Q. So there was no other income reported by Mr. Forman except the amusement company and theatres and the ones you prepared? A. Yes.

Q. And all the information in each of the pre-

(Testimony of Thelma Endersby.)

ceding years, '42 to '45, did you similarly get that from Mr. Forman or from your records?

A. That's right.

Q. And was the same practice followed that you may have gotten in letter form from Mr. Forman or may have received copies of the various partnership returns? A. That's right.

Q. What was this capital gains, was that also from Mr. Forman?

A. Yes, that is right. It is all United Amusement Company, so I——

Q. Do you know what that was?

A. It appears on his return as $22,000. [1594]

Q. $22,000? A. Yes.

Q. And did you get any information as to what that capital gains was?

A. I don't recall. I mean, I don't have enough to make the return from. The capital gains schedule is in his return and shows a half interest of United Amusement Company.

Q. Now, you are referring to a schedule. What is that schedule?

A. It is the schedule gains and losses in his 1945 return.

Q. And what does it show as what constituted that capital gains?

A. Half interest in United Amusement Company purchased in June of '41.

Q. And do you recall receiving any additional information as to what that company was?

A. No.

(Testimony of Thelma Endersby.)

Q. But it was a sale other than what you have shown there of a half interest in the United Amusement? A. That is correct.

Q. And his share was $22,000?

A. $22,000, that is right.

Q. And it was acquired when?

A. In June, June 4, 1941. [1595]

Q. I see. And sold when?

A. In '45 sometime. I don't have the exact date.

Q. Did you have any knowledge of any other income Mr. Forman might have received during this period other than the information you just described? A. No, sir.

Q. Did you have any——

The Court: What period are you speaking of?

Mr. Obenour: 1942 to '45.

Q. (By Mr. Obenour): Did you have any knowledge of any income Mr. Forman might have received during the period of 1942 to 1945 from United Amusement Company or the other amusement companies other than was shown on the partnership returns?

A. I knew nothing about his Seattle operations.

Q. Did you in any years of 1942 to 1945 include any additional income received by Mr. Forman other than the theatre interests income you have described and the partnership returns which you have described?

A. None other than it was submitted to me and what was taken from my records. That is all that I reported.

(Testimony of Thelma Endersby.)

Q. And those would be simply the partnership returns or the contents from Mr. Forman's letter?

A. That's right.

Q. Did you ever report any additional income in any years [1596] from any source other than that?

A. Well, I don't recall.

Mr. Mead: That is objected to as repetition. It has been answered previously.

The Court: I think it has, although there was sort of a qualification to the answer that might have confused the answer the first time. I think it is cleared now.

Q. (By Mr. Obenour): And this information, the returns that you prepared were reviewed by Mr. Meyer? A. Oh, yes.

Q. And in each instance? A. Certainly.

Q. Did you ever see these returns you prepared or copies of them after you had prepared them?

A. Oh, yes, sure.

Q. What would you do with them?

A. They remained in Mr. Forman's tax file.

Q. And where was that?

A. They were kept in Mr. Meyer's office. The taxpayer's copies were kept in Mr. Meyer's office.

Q. How many copies would you make, Mrs. Endersby?

A. Mr. Meyer generally made the returns up.

Q. You would make out a rough copy, or some such? A. That is right. [1597]

Q. And you would do what with it?

A. Take it over to Mr. Meyer and he would

(Testimony of Thelma Endersby.)

check it and finish the return up and then he would deliver me a copy and submit the original to send to Mr. Forman to sign and to mail his check to the Revenue Department.

Q. And would you get any copy other than the original? A. No.

Q. You would get just the original?

A. Just the taxpayer's copy was kept in Mr. Meyer's file for the taxpayer and merely delivered the original to Mr. Forman.

Q. I see. And what happened to your rough draft or your work sheet?

A. It was always turned over to Mr. Meyer.

Q. Did you keep any file in your office to which you would refer in succeeding years for such things as depreciation or anything like that?

A. Not on Mr. Forman's return, no.

Q. And where would you get that information when you would want it?

A. For depreciation I didn't particularly need it. All I needed was—for my partnership figures to prepare what his share of the income was.

Q. Well, then, after submitting the taxpayer's—rather, the original for Mr. Forman to sign, would you ever see [1598] any of the returns you previously prepared?

A. Well, I would refer to them occasionally.

Q. And did you have occasion to see them in 1953? A. Oh, yes.

Q. What was the occasion that you had in 1953?

A. Well, I had access to Mr. Forman's tax file.

(Testimony of Thelma Endersby.)

Q. Was the file ever kept anywheres other than Mr. Meyer's office after 1953?

A. Yes. It was taken up to Mr. Mead's office in 1953 and I referred to it up there many times.

Q. By whom?

The Court: Who took it to Mr. Mead's office?

The Witness: I did.

Q. (By Mr. Obenour): And did you receive instructions to take it to Mr. Mead's office?

A. I sure did.

Q. From whom?

A. From Mr. Forman who called me and asked me to deliver it, and also Mr. Mead asked me if I had a call from Mr. Forman to deliver the file to him, and I did.

Q. And this Mr. Forman was Mr. William Forman? A. Yes.

Q. And he called you from where?

A. I don't remember whether he called from Seattle or Los Angeles, or wherever he happened to be at the time. [1599]

Q. Do you recall when it was?

A. Well, it was in the middle of '53 sometime, June or July, thereabouts.

Q. And you received a call from Mr. Mead inquiring about the matter?

A. Mr. Mead is in our building, and I don't remember whether he called me or whether he came down, or what, but he asked me if I had instruc-

(Testimony of Thelma Endersby.)

tions to deliver the returns to his office, and I told him yes, that I had them for him.

Q. And did you do so? A. Yes.

Q. And since that time, do you know, have you seen them?

A. Oh, yes, I have seen them. I have referred to them several times up in Mr. Mead's office.

Q. I see. A. I have access to the files.

Mr. Obenour: I believe that is all.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Mead): Mrs. Endersby, I think you said you went to work for Forman Brothers when, please?

A. It was in September of '43, I think. [1600]

Q. And prior to that time had you had occasion to take care of books and records while you were employed by Yergen and Meyer?

A. Yes, sir.

Q. And I think you stated that you prepared the income tax returns, the personal returns of William Forman from information which he submitted to you by letter as well as partnership information returns in some cases, is that right?

A. That is correct.

Q. And the information which you used in preparation of the returns for the theatre interests which were included there were all from your records during this period of time?

A. That's right.

(Testimony of Thelma Endersby.)

Q. And by "this period" I mean from 1942 to '45, is that right? A. That is correct.

Q. Did you have any connection with or access to any of the so-called pinball enterprises that have been referred to as the United Amusement Company and United Amusement Company of Bremerton and the other amusement companies that he was interested in with Mr. Seijas? A. No.

Q. Were the records of those activities, those partnerships, [1601] ever in the Portland office of Forman Brothers at any time, to your knowledge?

A. No.

Q. Now, Mrs. Endersby, you have stated that you prepared these returns and delivered them to Mr. Meyer of Yergen and Meyer and he prepared the final return, did he? A. That is right.

Q. Was there any occasion for any consultation during that period with me or any other lawyer about Mr. Forman's returns?

A. No, I never ever had anything to do with the tax returns that I have ever recalled of. It was always between Mr. Meyer and myself or Mr. Forman.

Q. Was Mr. Forman's request that I have a chance to examine these returns and familiarize myself with them, made to you sometime in July or August?

A. It was in the middle of '53 sometime when I was asked to deliver them to you.

Q. Those returns? A. Yes.

Q. And all those returns are still in existence?

(Testimony of Thelma Endersby.)

They have not been lost or destroyed, have they?

A. That is right.

Q. Now, did Mr. Forman have occasion to come to Portland during this period of 1942 to 1945 for the theatre [1602] activities or to participate in the running of those activities down there, that have been described?

A. Oh, yes. He did almost all of the buying for our theatre interests, and he was in very frequently.

Q. When you refer to buying, what do you mean by that?

A. Well, you purchase film by the picture or by a block of film, that means ten or twelve pictures at a time, so that it is available for booking in the various theatres.

Q. I think, Mrs. Endersby, you have referred to having seen records or referred to records in my office. Where are all the legal contracts of the Forman Brothers' theatres kept?

A. In your office. You handle leases and all of that.

Q. How long has that been so?

A. Well, ever since I have been working for them.

Q. Which is from 1942 or '3? A. Yes.

Q. Was there any exceptions during that period, during the time when I was in the Army from '42 to '45, or were the records still in my office?

A. They were all in your office.

Mr. Mead: That is all. Thank you. [1603]

(Testimony of Thelma Endersby.)

Redirect Examination

Q. (By Mr. Obenour): These records, the contracts, you say, they were in Mr. Mead's office from 19—as far as you knew, from '42 to the present and still are? A. Yes.

Q. Up until the mid-summer of '53 all the tax records were in Mr. Meyer's office?

A. That's right.

Q. Mr. Mead was the attorney for the partnership in 1942 through to date? A. Yes.

Q. And Yergen and Meyer was the firm, was the accountant through the entire period?

A. That's right.

Q. Has there been any change in the work performed by the attorneys or by the accountant which would necessitate a change in the records being retained in Mr. Mead's office instead of Mr. Meyer's office?

Mr. Mead: That calls for a conclusion of the witness, and it is objected to on that ground.

The Court: Well, if she knows or has any instructions concerning it, then she may answer.

The Witness: Mr. Forman told me to take them up there and I had no reason to question it. [1604]

Q. (By Mr. Obenour): Has there been any reason, anything you have told, or any change in your operations, in any manner, in which you performed your work that would necessitate a change of the tax records from Mr. Meyer's office to Mr. Mead's office?

Mr. Mead: Same objection, your Honor.

(Testimony of Thelma Endersby.)

The Court: This relates to anything you know of that would require that change.

The Witness: Mr. Mead was Mr. Forman's attorney—well, Mr. William Forman's as well as Mr. Albert Forman's attorney, and so if he wanted to see the records and Mr. Forman told me to take them up there, I followed his instructions.

The Court: The question was, was there any change in the work, as far as you know?

The Witness: Oh, no.

The Court: That called for a change in the location of the records?

The Witness: No.

Q. (By Mr. Obenour): And since that time you have to go to Mr. Mead's office for any of the tax records? A. Yes, sir, that's right.

Q. And Mr. Meyer has to go to Mr. Mead's office for any of the tax records for the work he wants to do? A. Yes, sir, that is right. [1605]

Q. And that has been since mid-summer of 1953? A. Yes.

Q. And, to your knowledge, do those copies of returns for '42, '43, and '44 still exist in Mr. Mead's office? A. Yes.

Q. And do any of your tax returns for the period of '42 to '45 for Mr. William Forman include any part of any $86,000 income not reported on the books and records of the amusement company or any of the four amusement companies?

Mr. Mead: That calls for a conclusion of the witness.

(Testimony of Thelma Endersby.)

The Court: It has been covered on direct, in any event.

Mr. Obenour: That is all.

The Court: That is all, Mrs. Endersby, and you may leave whenever you wish.

Mr. Mead: May I ask another question, your Honor?

The Court: Certainly.

Recross Examination

Q. (By Mr. Mead): Mrs. Endersby, you stated that these records were in my office. Those records are all here in Tacoma, are they not? [1606]

A. Yes, they are.

Mr. Mead: That is all.

Mr. Obenour: One thing, your Honor, I would attempt to find these other documents.

The Court: Do you want Mrs. Endersby to remain in attendance?

Mr. Obenour: Yes, sir.

The Court: Until we excuse you, Mrs. Endersby, you will remain in attendance. You will leave the stand now, please.

(Witness excused.)

The Court: Call another witness, please.

WILLIAM F. MEYER

called as a witness on behalf of the Plaintiff, being previously duly sworn, was examined, and testified as follows:

The Clerk: You have been sworn, Mr. Meyer. Just resume the stand.

(Testimony of William F. Meyer.)

The Court: Your name is spelled M-e-y-e-r, and your first name is William F.?

The Witness: Yes, sir.

The Court: Go ahead. [1607]

Direct Examination

Q. (By Mr. Obenour): Your name is William F. Meyers?

A. William F. Meyer, M-e-y-e-r.

Q. Where do you live, Mr. Meyer?

A. Portland, Oregon.

Q. And your occupation is what?

A. Certified Public Accountant.

Q. How long have you been so engaged?

A. More than thirty years.

Q. And during that time have you practiced in Portland, Oregon? A. Yes.

Q. Are you associated with anyone?

A. I am a partner in Yergen and Meyer.

Q. And you have offices, I believe, apart from Portland, do you not?

A. Yes. We have seven offices in Oregon and northern California.

Q. And do you know William Forman?

A. Yes, sir.

Q. And Albert Forman? A. Yes, sir.

Q. And how long have you been acquainted with them? A. Since about April of 1940. [1608]

Q. How did you become acquainted with them?

A. They came to the office and wanted some accounting work done in connection with a couple

(Testimony of William F. Meyer.)

theatres they owned at that time in St. Helens, Oregon.

Q. And your association with them has been professional on your part? A. Yes, sir.

Q. Did you continue to do that accounting work for them since, you say, 1940 or '41?

A. Since 1940 to the present time.

Q. '42? A. 1940.

Q. 1940 until the present time?

A. Yes, sir.

Q. What was the engagement that you had at the outset?

A. In the beginning we kept such books as they had concerning the two theatres, the income and expenses, and that would have been in 1940, as I recall, and '41 and '42, and then——

Q. In keeping these books, did you simply, or someone employed by you, simply make a call there, or were there—how was it done?

A. As I best recall, the books were very simple. The theatre was very simple, and I believe that they were written up along towards the end of the year, about tax [1609] time, and from the cancelled checks they had in their record of receipts and disbursements. They were not a formal set of books at that time. They were what we called "work sheets."

Q. Was your contact at that time with Al Forman or Bill Forman?

A. I believe, as near as I can recall, it was with both of them.

Q. Did you prepare the individual returns for

(Testimony of William F. Meyer.)

Forman Brothers as well as their offices as well as keep their office records?

A. Yes. I prepared—the first return I prepared, that our office prepared for William Forman, was in 1942.

Q. 1942? A. Yes, sir.

Q. After that time did you continue to prepare the tax returns for William Forman?

A. Yes, sir.

Q. And for his wife Dorothy? A. Yes, sir.

Q. And did you file in each instance under the community property law of separate returns?

A. Yes, sir—well, it is immaterial, I presume, but——

Q. Well, I will break it down. Did they always file it in Tacoma? [1610]

A. Yes, sir.

Q. In each instance they filed in Tacoma?

A. As far as I know. Of course, you understand he probably would have mailed the return in in most instances, I presume they were filed in Tacoma.

Q. However, at that time did you or could you file separate returns in Oregon?

A. Do you mean Oregon State returns?

Q. No, sir. I mean, wasn't at that time the Federal law controlled by the location of the residents as to whether they filed separately or jointly?

A. Yes, there was a time when you could file under community property law, and those returns, as I recall, were filed on a theory they were Wash-

(Testimony of William F. Meyer.)

ington residents, so that there were two returns filed when it was advantageous to file two returns. Now, of course, there is one return filed.

Q. However, in order to file at that period when it was controlled by the residence, you would have to have been filed in Washington where the residence would apply, would it not? A. Yes, sir.

Q. And at that time who was doing the actual work for the Formans when you first began?

A. That would be hard to say. I might explain. As you [1611] know, we have quite a large organization and various people did it, but generally speaking, it would have been someone on the staff under my supervision until Mrs. Endersby came with us and she more or less took over the account while she was there with us.

Q. And thereafter she went to work directly for the Formans? A. Yes, sir.

Q. And after she went to work, what was the position of Yergen and Meyer with this account?

A. Well, we then more or less filed the tax returns. As a matter of fact, I believe there were one or two years when we more or less examined the returns that she had made up, but generally we had the responsibility for filing the tax returns for the individuals and for the partnership covering the Oregon operations.

Q. Handing you Exhibits 30 and 31, can you identify those documents as tax returns of William and Dorothy Forman prepared under your supervision? A. Yes, sir.

(Testimony of William F. Meyer.)

Q. As a matter of your engagement, what would be your participation in these tax returns, the preparation or their review, or just what did you do in that regard?

A. Well, they would be prepared by our staff from information submitted by Mr. Forman, by a member, or letter from his office covering certain of his income. The income that was derived from the Oregon enterprises, I believe, we prepared that generally from the books. The other information, as I say, came to us in the form of information partnership returns, and additional information on inter-office memos as we call it.

Q. Would you please refer to Exhibit 31. I believe there are six partnerships referred to there.

The Court: 31 is the return for William Forman for 1945, is it?

The Witness: Yes, sir.

The Court: All right.

The Witness: There are seven items of income. I don't know if they are partnerships.

Q. (By Mr. Obenour): They are in a schedule and there are seven items?

A. Yes. Pardon me. It does say partnership income.

Q. And how many of those would you have prepared from the books and records of the Oregon business, and how much from partnership returns?

A. Forman Brothers, Portland, Oregon, we prepared that. That would be theatre businesses in Oregon. Film Classics of the Northwest was a

(Testimony of William F. Meyer.)

small operation, and I believe we probably prepared that. The Green Parrot Theatre in Seattle, I don't remember. We did prepare some returns for the Green Parrot Theatre. The other [1613] items on there we did not.

Q. And, the other items are what, sir?

A. The United Amusement Company of Bremerton, United Amusement Company, the Smith Tower Building in Seattle, A. A. Seijas and W. R. Forman, Seattle, Dock Concessions, Ferry Terminal Building, Seattle.

Q. And those items would be included through what information, sir?

A. They would be either copies of partnership returns for those partnerships or simply an inter-office memo stating that was the income from these partnerships.

Q. When you say "inter-office memo," would that be information furnished to someone in your office?

A. I believe the information first came from Seattle, or whether it came to the Portland office of Forman Brothers and then was given to us——

The Court: You got it from Forman?

The Witness: Yes, sir, or his representative.

Q. (By Mr. Obenour): And in each instance—at any time did you ever show any income for the partnerships which you did not yourself report or control, did you ever report any items for those companies other than what was shown on the partnership return?

(Testimony of William F. Meyer.)

A. Let me understand your question. You are referring to those that we did work for? [1614]

Q. Exclusive of those to which you did work, now referring to the ones you received from Mr. Forman or his representatives, did you ever put any figure down as income for those partnerships other than the amount shown on the partnership returns or in the—shown to be the income from whatever your source of information was? A. No, sir.

Q. And is that true in each of the years '42 to '45? A. Yes, sir.

Q. And, sir, you were subpoenaed to produce certain records here today, is that correct?

A. Yes, sir.

Q. And do you have those records with you?

A. They are in the courtroom.

Q. But are they in your possession?

A. No, sir.

Q. And you did not produce them, then, under the subpoena yourself? A. No.

Q. And are there duplicates or copies of the original returns for William and Dorothy Forman for the years '42 through '44 in existence?

A. None that I know of other than those that are in this file that I have just mentioned.

Q. And in whose possession were they last, to your knowledge? [1615] A. Mr. Mead's.

Q. Pardon? A. Mr. Mead's.

Q. And had you had those in your possession, Mr. Meyer? A. Sir?

Q. Had you had those in your possession?

(Testimony of William F. Meyer.)

A. I had them originally when we prepared them, yes.

Q. You had them originally? A. Yes.

Q. And how long did you retain them in your possession? A. Until about July of 1953.

Q. July of 1953? A. Yes.

Q. And what was the occasion then?

A. The occasion was that Mr. Mead and Mr. Forman wanted them for study, and inasmuch as these were the only copies in existence, they requested them from our office.

Q. And since 1953, have they retained them for study? A. Yes, sir.

Q. And since that time, '42 through the present date, has your practice of operation continued to be the same in the same nature of work you have done for them? A. Yes, sir.

Q. The nature of your engagement continued to be the same from 1942 through 1956? [1616]

A. Yes, sir. There has been no change.

Q. And since 1953, have you had reason to require information contained on the work that you have done previously?

A. I have seen those files since.

Q. In your work have you had occasion to refer to your work papers, copies of tax returns, other records, and information furnished you which you had previously in your possession but which was given to Mr. Mead? A. No.

Q. You have referred to them?

A. I have referred to them.

(Testimony of William F. Meyer.)

Q. And how do you have access to them when you require their need?

A. Well, I haven't needed them except that I did look at them about two or three weeks ago. I haven't needed them in preparing the returns.

The Court: They haven't been in your possession since July of 1953, is that right?

The Witness: Yes.

The Court: When you have seen them, you have seen them at Mr. Mead's office, is that it?

The Witness: Yes, sir.

The Court: We are at the noon hour now. We will recess until 1:30 this afternoon. Keep in mind my admonition.

(Thereupon, a noon recess was taken until 1:30 p.m. of the same day.) [1617]

After Recess

The Court: Proceed.

Q. (By Mr. Obenour): Mr. Meyer, handing you Exhibit 31 and Exhibits 11, 22, and 16, being the returns for Mr. Forman for the years 1945, and also the partnership returns for 1945 for Dock Concessions, Forman and Seijas partnership, and the third—I have forgotten——

A. United Amusement Company.

Q. Will you compare the distributive share for Mr. Forman with the amount included on the tax return for Mr. Forman for the respective partnership for the year 1945? A. Yes, sir.

(Testimony of William F. Meyer.)

Mr. Mead: I object to the question, your Honor, as the records are the best evidence.

The Court: This is the same thing Mrs. Endersby did this morning?

Mr. Obenour: Yes, sir.

The Court: Did you have something further to inquire into?

Mr. Obenour: She prepared the rough draft and submitted it to him.

The Court: That is right. Go ahead.

The Witness: Yes, these seem to agree.

Q. (By Mr. Obenour): And the other partnerships, the three other partnerships were the ones you supervised and [1618] took from the books themselves? A. Yes, sir.

Q. And the one remaining is United Amusement Company of Bremerton, is it not? A. Yes, sir.

Q. Handing you Exhibit 2, I will ask you if you will notice on the return for Mr. Seijas for the year 1945 there were two Bremerton United Amusement—United Amusement Company of Bremerton partnership returns indicated, the one from January 1 to March 31 and the second from April 1 to December 31 for that year, and if you would total both entries for the United Amusement Company of Bremerton and compare your total with the amount shown on the tax return prepared by you for the same partnership?

A. United Amusement Company of Bremerton, the two items together total the item that is on the

(Testimony of William F. Meyer.)

Forman return, and United Amusement Company, is the same in Seattle.

Q. And then, all of the income shown for the respective partnerships, then, to your knowledge, correspond to the amounts indicated on the respective partnership returns, is that correct?

A. Yes.

Q. And is there any other item of income reported? A. On the Forman return? [1619]

Q. On the '45 return for Mr. Forman, Exhibit 31.

The Court: Other than what you have covered.

The Witness: Well, I don't understand your question, Mr. Obenour.

Q. (By Mr. Obenour): What other income was reported by you for Mr. Forman in his 1945 tax returns, Exhibit 31, other than the partnership income you have already indicated?

A. There was the income of Forman Brothers of Portland, Oregon, Film Classics of the Northwest at Portland, Oregon, that was a small loss, Green Parrot Theatre in Seattle, and that is it.

Q. And those three are the ones whose records you kept yourself?

A. They are the ones that we had in Portland when he kept them there.

Q. But you prepared the information directly from the records? A. Yes, sir.

Q. And is there any other income reported in there?

(Testimony of William F. Meyer.)

A. There is a gain on the sale of the United Amusement Company.

Q. Yes, sir. And that is shown on the accompanying schedule as long term capital gains, is it not? A. Yes, sir.

Q. And that purports to show a sale of a half interest of [1620] the United Amusement Company by Mr. Forman? A. Yes, sir.

Q. During that period? A. Yes, sir.

Q. And is that the entire amount of income included, then, by you on the return prepared and filed by Mr. Forman? A. Yes, sir.

Q. Did you in any way, then, cause to be shown on the return prepared for Mr. Forman, and which is Exhibit 31, the return filed by Mr. Forman, did you cause any additional income to be reported other than that which was reflected on each of the partnership returns you have referred to?

A. No, sir.

Q. Did you in any of the returns of 1942 through 1945 include any part or all of the sum of $86,000 additional income unreported on the books of the four amusement companies?

Mr. Mead: I object——

The Court: The form of the question is objectionable. That is a conclusion we must draw from the other testimony.

Q. (By Mr. Obenour): Did you include any other income that would—any other income received by Mr. Forman which was not reflected on the partnership books, records, and returns? [1621]

(Testimony of William F. Meyer.)

Mr. Mead: That is objected to, your Honor, as it assumes a fact which is not in evidence.

The Court: I think not.

Mr. Mead: It requires a conclusion.

The Court: Well, it is possibly so, but that is remote. I think you can answer the question.

The Witness: Would you mind asking it again, Mr. Obenour?

Q. (By Mr. Obenour): Did you include any other income as received by Mr. Forman and reported by Mr. Forman other than that which was reported on the respective partnership returns?

A. Well, I couldn't say at this date. I presume —in fact I am sure we reported the income that had been reported to us.

The Court: That isn't the question, though. The question is whether or not there was any income reported on Mr. Forman's personal returns for '42 to '45 other than that which was reflected in the partnership returns filed for the various enterprises in which he was interested.

The Witness: That I can't remember. There were times when there was additional administrative income, I believe. I am not sure. Whether it [1622] was on those years or not, I can't recall.

Q. (By Mr. Obenour): Between the periods of '42 to '45, do you have knowledge of any other income of Mr. Forman other than the amusement companies or these theatres?

(Testimony of William F. Meyer.)

The Court: Other than has been reported on the returns?

Q. (By Mr. Obenour): I am not referring to sources of income. Do you know of any other sources of income other than the amusement companies and the theatres which were shown on Exhibit 31?

A. Well, I don't recall. The reason I am being cautious is that this covers a long time. On some returns I remember one time, there was some real property and it came substantially from these partnerships.

Q. And the exception you have is real property?

A. I am not sure, but in that period I am trying to clear it up. I would say substantially the income came from the partnerships.

Q. Did you ever include any money as income to Mr. Forman which was income from the amusement companies over and above that reported on the amusement company return?

A. No, sir. I am sure of that.

Q. And the only exception, then, is the sale of real property to these returns you have been discussing, partnership returns? [1623]

A. No. I am having in mind at sometime that I have a recollection that there might have been some rentals or administrative items from some of the corporations, but that is why I make that exception. I can't recall.

Mr. Obenour: I believe that is all.

The Court: Cross examination?

(Testimony of William F. Meyer.)

Cross Examination

Q. (By Mr. Mead): Mr. Meyer, how large an office do you operate?

A. We have about 45 on our staff.

Q. 45 accountants and employees? A. Yes.

Q. And I think on your direct examination you said you had offices in various cities throughout Oregon and northern California? A. Yes, sir.

Q. Do you have any offices in Washington?

A. No.

Q. And during this period of time that Yergen and Meyer handled these accounts that you described, from 1942 to 1945, your business was a substantial business during those periods too?

A. I didn't understand that.

Q. Was your business a substantial business during those years? Did you have a large number of accounts? [1624] A. Yes, sir.

Q. And a large number of employees?

A. Yes, sir.

Q. Did you have any connection whatsoever, any knowledge, concerning any of the pinball businesses up here that Mr. Forman was interested in in Bremerton or in Kitsap County other than the information that he may have submitted to you by letter and by partnership information returns?

A. None whatsoever.

Q. Did some of the information which was submitted with respect to these partnerships, by these I mean the pinball partnerships, come in the form of letters and other information rather than in the form alone of partnership returns?

(Testimony of William F. Meyer.)

A. That is my recollection.

Q. And this information came, I think you said, directly to Mrs. Endersby and she got up the returns and submitted the returns to you for your approval and final drafting, is that right?

A. In some cases. In others we made them ourselves.

Q. Now, I think you stated it was your usual practice to retain Mr. Forman's copies or the taxpayer's copy of these personal individual returns that you prepared for him over the years, in your files, is that right? [1625] A. Yes, sir.

Q. And whose property was that file, was it your file or Mr. Forman's file?

A. Well, we generally considered that if the client wanted the file, it is his.

Q. And what did that file consist of?

A. Well, as I tried to make it clear before, it was some work sheets that we had used in the preparation of returns, the typed carbon copies of the returns themselves, some partnership returns of the various partnerships, and I think I testified a while ago that to my recollection the retained copies were all typed carbon copies, but it is possible there might have been some returns that were work copies, but in that case there would have been no typed carbon copy. In other words, the returns in the file constitute all of the returns that I know of.

Q. And during this period of time, and by this period I mean 1942 through 1945, did you have occasion to consult with Mr. Forman on any tax

(Testimony of William F. Meyer.)

problems with respect to his returns, that you recall?

A. I don't recall that we ever did. We had very few problems in connection with the returns, and, I don't believe we consulted to any extent.

Q. During this period of time did you ever have occasion to consult with me? [1626]

A. I think at that time you were in the Army and we didn't have any occasion to consult with you.

Mr. Mead: That is all, Mr. Meyer.

Redirect Examination

Q. (By Mr. Obenour): You were referring to your papers. You make duplicate copies of the tax returns?

A. We always make one copy that is filed and one copy for the taxpayer, typed, and then ordinarily, usually, we keep our work copies. There are certain—some clients who do not wish to keep the retained copies for one reason or another. That is their only copy we ordinarily retain. In those cases we put them in the files and destroy our pencil copies.

Q. Why do you keep the pencil copies in those cases where you do?

A. Well, that would be where we didn't receive back from the client the typed retained copies.

Q. What is the purpose of keeping it?

A. Because it would be the only return available.

(Testimony of William F. Meyer.)

Q. I see. And that would be your copy?

A. As I told you before, if he—if the client wants the file, and it happens occasionally, we give them to him. We figure it is his. [1627]

Q. Well, what is the purpose, then, of giving one to the client if he wants it and not giving it to him if he doesn't want it, and using the typed copy instead of work papers?

A. Well, some clients don't want the copies around. Sometimes, I have even known of circumstances where a man doesn't particularly care to have his wife see the return. Sometimes they send them back to us, so we put them in our files and destroy the pencil work copy that we keep.

The Court: The point, though, that you missed, is that apparently you always keep a copy, either your work copy or the retained copy, one or the other, and he wants to know why it is you keep that copy in your files?

The Witness: Well, I suppose for matters of reference, and we would never think of making a return without keeping copies.

Q. (By Mr. Obenour): And as such, wouldn't the copy you keep be yours?

A. Well, as I say, when clients request files, and it happens occasionally, it is not a common thing, but maybe he changes his account, we always give them to him.

Q. However, if they retain copies throughout the period that you would have furnished, if they

(Testimony of William F. Meyer.)

desired, then, [1628] they would have that same information, would they not?

A. That is correct.

Q. And in fact, you did retain these from the beginning of your engagement until they were requested in 1953? A. Yes, sir.

Q. And I believe you also keep what you call your own file of the account, do you not?

A. We keep one file in which all the papers connected with that taxpayer are contained.

Q. And included in that are what you would call work papers?

A. The work papers, everything that was used in working on the account.

Q. What is a work paper as you use the term, Mr. Meyer?

A. Well, it covers a wide category of things. I think, generally, accountants think of them as being most anything they have in the file. Specifically, it probably refers to work that has been done by the accountant. In other words, the work that he has done himself in preparing a return and gathering information and classifying it from the information that has been submited to him frequently and in odd shapes and forms.

Q. And from the work papers would be the completed information which would be furnished to the taxpayer or the client?

A. From the work papers, that is the paper we assemble [1629] the information with which we put on the return. We would put on a pencil copy of

(Testimony of William F. Meyer.)

the return which would be used for checking purposes in our office. From that would be the typed original and the copy for the taxpayer.

Q. Included in your file would be your copy of the return plus all of your papers, your work papers which were used to assemble the information and so prepare the return?

A. All papers that have been used would be there.

Q. And would not those work papers on which you actually did your computations and your accumulation of information be your papers as distinguished from the completed work which you would give the client for his own use, being the tax returns, being the tax return in this instance?

A. Well, as I told you before, the only way I could answer that is that if taxpayers request files, and it is done occasionally, either circumstances like this or where he changes his accountants, by custom we always give him the entire file.

The Court: After that time you have no record whatever of what work you did or where you got the information, or anything of that kind?

The Witness: No, we wouldn't.

Q. (By Mr. Obenour): Then, your entire file of every type [1630] of information received compiled and used by you, made up by you, everything is turned over? A. Yes, sir.

Mr. Obenour: That is all.

Recross Examination

Q. (By Mr. Mead): Mr. Meyer, the court asked

(Testimony of William F. Meyer.)

you with respect to the work you do, you keep your office time sheets with regard to your accounts?

A. We keep time sheets that records the time spent on each client's work.

Q. So that you would have an office record of the time sheets and the work that you did, and so far as that is concerned, your own office record?

A. I didn't understand that there was any reference to that phase of our papers, however, here.

Q. My understanding is that the court asked you the question as to the work that you did. You would keep a time sheet with regard to that, wouldn't you? A. Yes, sir.

Mr. Mead: That is all.

The Court: That is all, Mr. Meyer. You are excused and you may leave whenever you wish.

(Witness excused.) [1631]

WILLARD A. OFTEDAL

recalled as a witness on behalf of the Plaintiff, having been previously sworn, was examined, and testified further:

The Court: You have been previously sworn, Mr. Oftedal. Go ahead, counsel.

Direct Examination—(Continued)

Q. (By Mr. Obenour): Mr. Oftedal, I believe you testified previously on some of this, I am not sure of the entire background. Your occupation is what?

A. Special Agent of the Internal Revenue Service.

(Testimony of Willard A. Oftedal.)

Q. How long? A. Nine years.

Q. And you are presently in Alaska?

A. Yes.

Q. And prior to that time you were where?

A. Seattle.

Q. During the time you were in Seattle, did you have occasion to investigate the tax liability of Armador Seijas? A. Yes, sir.

Q. And when did you first meet him?

A. I first met him in the late summer or early fall of 1950.

Q. Where did you meet him?

A. In his office at 1812 Smith Tower.

Q. Who was with you? [1632]

A. Ed O'Leary.

Q. And who was he?

A. He was at that time a Deputy Collector of the Internal Revenue.

Q. What took place at that first meeting, Mr. Oftedal?

A. Mr. O'Leary had met Mr. Seijas before, I had not, and I identified myself as to what my occupation was and told him that we were interested in going into his tax affairs. We asked him as to the acquirement of his wealth, if it was self-earned, and he said it was his.

Q. Did you ask him as to whether he had received any inheritance or any such thing as that?

A. Yes, sir.

Q. And what were you told?

A. He said everything he had was his.

(Testimony of Willard A. Oftedal.)

Q. And was there any other conversation at that time?

A. No, sir. His phone was so busy that we retired.

Q. When did you next see him?

A. I recall seeing him on July 18, 1951, at which time he—wait a minute, January 19, 1951. He came to our office.

Q. What occurred on that occasion?

A. He told us of his income he had been reporting over a period of years and compared with his net worth which he had at that time that revealed that he was about $75,000 short, $75,000 of unreported income. [1633]

Q. Was there any other conversation?

A. Yes, there was, in regard to another taxpayer.

Q. And did you have occasion to see Mr. Seijas in July of 1951? A. Yes, sir, July 18.

Q. What took place on that occasion?

A. On that occasion he told us—in the meantime Mr. O'Leary had contacted Mr. Seijas and asked him to prepare a comparative net worth statement, and on this July 18 date he told us that, we met him in the hallway just as he was leaving his office, we rode down in the elevator with him, and he said that he was turning the work over to Mr. Whittle. Mr. Jacobson was still sick. Mr. Jacobson had been his first accountant to do the work.

Q. After that did you have occasion to see Mr. Whittle for information?

(Testimony of Willard A. Oftedal.)

A. Yes, sir. I saw Mr. Whittle on August 15.

Q. And what was that occasion?

A. Oh, we went into his office to inquire how he was getting along with his net worth computation.

Q. And after that time, periodically did you have occasion to be in Mr. Whittle's office in order to secure information which Mr. Whittle had?

A. Yes, sir.

Q. When was the next occasion that you saw Mr. Seijas? [1634]

A. On September 6 of 1951 we took a statement —wait a minute, I saw him on August 30 of 1951. Mr. O'Leary was with me.

Q. What was that occasion?

A. We called on Mr. Seijas, Mr. Forman, and Mr. Whittle on that day and asked him, asked Seijas and Mr. Forman to come to our office to give a statement in connection with another taxpayer.

Q. And did you have those conferences with Mr. Seijas and Mr. Forman concerning the other taxpayer? A. Yes, sir.

Q. And when did they take place?

A. September 6 we took a statement from Mr. Seijas, and on September 7 from Mr. Forman.

Q. As a result of your interview with Mr. Forman concerning the other taxpayer, did you have occasion to receive any documents from him?

A. Yes. I received checks.

Q. And what did you do with the checks?

A. They were introduced in evidence.

Q. Did you cause them to be photostated at the

(Testimony of Willard A. Oftedal.)

time you had them? A. Yes.

Q. Handing you Exhibit 133, can you identify those checks? A. Yes, sir. [1635]

Q. And who wrote those checks?

A. Mr. Forman.

Q. Did they in any way concern an adjustment made by an audit performed by revenue agents at a prior audit of the affairs of the amusement companies? A. Yes, sir.

Q. Had these checks been charged on the books of the amusement company as expense?

A. I have no personal knowledge of that.

Q. Have you seen the reviews of the audit reports concerning the matter? A. Yes, sir.

Q. And from the audit reports in the files of the Internal Revenue, were you made aware of the manner in which these checks had been handled?

A. Yes, sir.

Q. And was that the basis under which you were inquiring from Mr. Forman?

A. No, sir. We hadn't seen those audit reports until afterwards.

Q. I see. And did you have conversations with Mr. Forman concerning them?

A. Concerning these checks?

Q. Yes, sir.

A. Only generally because he didn't know how many checks [1636] had been paid.

Q. Did he state whether or not he had knowledge of whether they had been charged as expense and disallowed? A. Yes, sir.

(Testimony of Willard A. Oftedal.)

Q. What did he say concerning the fact that they had been charged?

A. Well, he said—he insisted the checks had been written because he wanted it charged as expense.

Q. And these checks had been charged to the expense, and had any action been taken by the subsequent audit?

A. I know, but where I learned it I don't know.

Q. And as a result of the interview with Mr. Forman, did he then produce the originals of these photostats?

A. It is my recollection that he did, yes.

Mr. Obenour: We offer Exhibit 133, your Honor.

Mr. Mead: They are objected to as having no material bearing or relevancy to the issues involved here, your Honor.

The Court: The top check has been admitted with respect to the handwriting matter, and the others——

Mr. Obenour: Refer to the date, your Honor, December 27, 1944, November 18, 1944, and October 17, 1944.

The Court: Of course, I think the Jury [1637] may consider them to have a bearing on the matter. The remaining checks which were not admitted are now admitted.

(Thereupon, Plaintiff's Exhibit No. 133 for identification was admitted into evidence.)

Q. (By Mr. Obenour): When was the next time you had occasion to see——

(Testimony of Willard A. Oftedal.)

The Court: I don't know if the Jury has been informed what those checks are. Perhaps you had better inform them so that they will know what you are talking about.

Mr. Obenour: In chronological order, the second check is dated October 17, 1944, "Pay to the order of Fred Cohen, $500," signed by William R. Forman and drawn on the Grand and State Theatres in Salem, Oregon; November 18, 1944, drawn on Grand and State Theatres, Salem, Oregon, "Pay to the order of Fred Cohen, $500," signed by William R. Forman; December 27, 1944, Grand and State Theatres account, Salem, Oregon. I guess that is the name of the account. "Pay to the order of Fred Cohen, $500," signed by William R. Forman, and November 27, 1944, "Pay to Seattle First National Bank, $1550," United Amusement Company, W. R. Forman. [1638]

Q. (By Mr. Obenour): Did Mr. Forman state what was the purpose of the top check to the Seattle First National Bank for $1500?

A. No. He told me that he would look it up and let me know. That was on November 23, 1951. He would let me know on Monday, but I don't have any record that he let me know.

Q. Did Mr. Forman state the purpose for which the checks had been given?

A. Political contributions.

Q. Political contributions? A. Yes, sir.

Q. And was this the same contributions which were subsequently disallowed in the audit per-

(Testimony of Willard A. Oftedal.)

formed, rather, which previously had been disallowed by Mr. Riedel? A. Yes, sir.

Q. Did you subsequently receive a net worth statement from Mr. Seijas?

A. Yes, sir. I beg your pardon, I received it from Mr. Whittle on December 29, 1951.

Q. And what did you do then?

A. We examined it, took it to our office and considered it, and subsequently invited them up to give a statement.

Q. Did he appear? A. Yes, sir. [1639]

Q. And this statement was taken when?

A. January 11, 1952.

Q. And what was the subject of that interview?

A. They was basically to find out the sources of income which had apparently been unreported by Mr. Seijas for the period '46, '7 and '8 as reflected by his net worth statement.

Q. Did you have a subsequent interview with Mr. Seijas concerning the same matter?

A. Yes, sir.

Q. And when was that?

A. On January 22, 1952. On that particular occasion he signed his statement of September 6 that he had given previously, and he read and corrected his statement of January 11, 1952, but he refused to sign it.

Q. The basic content of both of the interviews, though, was what?

The Court: What the subject of it was?

Mr. Obenour: Yes, sir.

(Testimony of Willard A. Oftedal.)

The Court: Basically, what was the subject matter of the conferences with Seijas on this occasion?

The Witness: Well, the subject was his liability, to explain the unreported income, the source of it.

Q. At that time, January 11, 1952, and January 29, was it? A. 22.

Q. 22, 1952, did Mr. Seijas in any way give an explanation of the source of this unexplained net worth increase as having come from hold outs or unreported income from the amusement companies in the years '42 to '45?

Mr. Mead: That is objected to, your Honor. The statement calls for a conclusion. It is also a leading question.

The Court: It calls for a conclusion.

Mr. Obenour: I am sorry, your Honor. I am trying to determine what the conclusion was, asking for an act.

The Court: It calls for a conclusion. What Seijas said on that occasion, or any statement he made, that is a conclusion. Whether it did or did not include this subject matter would obviously be a conclusion of the witness.

Q. (By Mr. Obenour): Do you have a copy of the interview you took from him?

A. I am sorry, I didn't understand you.

Q. Do you have a copy of the statement you took from Mr. Seijas at that interview?

A. There is one in my notebook over there.

Q. Would you get them, please? [1641]

A. Pardon me?

(Testimony of Willard A. Oftedal.)

Q. Would you get the statement?

A. May I step down.

The Court: Yes.

(Thereupon, the witness procured a certain document.)

Mr. Obenour: I ask that it be marked.

The Clerk: Plaintiff's Exhibit 139 has been marked for identification.

Q. (By Mr. Obenour): Can you identify Exhibit 139?

A. Yes, sir. This is the statement taken from Army Seijas on January 11, 1952, supplemented by the statement, or a copy of the statement we took on January 28, 1952.

Q. Referring to Exhibit 139, did you inquire from Mr. Seijas as to the source of the income which resulted in the net worth increase?

A. Yes, sir.

Mr. Mead: That is objected to, your Honor, as being incompetent and immaterial and being a time later than is involved in this situation and later than any overt act alleged in the indictment.

The Court: Overruled.

Mr. Obenour: May I point out, your Honor, that this is the date of one of the overt acts.

The Court: I understand it, but there is no need of expatiating on it. Let's go on with it. [1642]

Q. (By Mr. Obenour): What was his answer on that occasion, Mr. Oftedal?

A. That he had no recollection and no way of knowing where it came from.

(Testimony of Willard A. Oftedal.)

Q. And did you inquire on January 11 throughout the interview with regard to the respective items as to where they might have been obtained or the source from which they were obtained?

A. Yes, sir.

Q. And his answer? What was his answer?

A. He couldn't account for it at all.

Q. And on January 22, 1952, what took place then?

A. On January 22 he signed a statement that he had given us on September 6 of 1951, and he read and corrected this statement but he didn't sign it.

Q. On that occasion did he give any explanations as to the source of the income which resulted in the net worth increase?

Mr. Mead: Same objection, your Honor. This is January 28, 1952.

The Court: Overruled. Answer it.

The Witness: No, sir.

Q. (By Mr. Obenour): Did Mr. Seijas acknowledge in either of these interviews the contents of the statements prepared by Mr. Whittle? [1643]

Mr. Mead: That calls for a conclusion and is objected to.

The Court: Well, it would be merely a matter of form of the question.

Q. (By Mr. Obenour): The course of the interview did you inquire from Mr. Seijas as to what information he had furnished Mr. Whittle concerning Whittle's net worth statement?

(Testimony of Willard A. Oftedal.)

A. Yes, sir.

Q. And what did he say?

A. I don't remember in detail, if it was given in detail.

Q. At any time did he ever tell you that any of the information contained in Mr. Whittle's statement was incorrect?

Mr. Mead: That is objected to as a leading question.

The Court: Overruled on that ground.

The Witness: No, sir.

Q. (By Mr. Obenour): Did Mr. Seijas correct his statement of January 11 on the next occasion that he reviewed it but wouldn't sign it?

A. Subsequently we had another interview on January 28 at which time he supplemented his statement.

Q. And what took place on that occasion?

A. He wished to tell us about three different people that he understood had given us information [1644] about him and that we should suspect that information. So he gave that dope or that information about them and we asked him some questions.

Q. When was the next time you saw him?

A. Well, there were a number of occasions.

Q. What were the subject matter of the conversations with Mr. Seijas on these occasions?

A. We were attempting to verify these various items and what to make Mr. Whittle's net worth statement, and I recall one instance that he told us that Mr. Heberling or Mr. Forman handled all

dealings with Mr. Heberling, and he told us that that Crawford interest was a subterfuge but that Heberlings had got what they paid for. I don't recall anything else offhand.

Q. When was the first time you had knowledge of the so-called diaries?

A. On April 17, 1953, I believe.

Q. And what was that occasion?

A. I accompanied Mr. Seijas to the photo lab at the Customs Agency Service in Seattle to photostat them. I may have learned the previous day.

Q. And were you acting on any instructions when you went with Mr. Seijas? A. Yes, sir.

Q. Whose instructions? [1645]

A. Mr. Patten of the Regional Counsel Office, Penal Division of the Internal Revenue Service called us and told us that the diaries would be available for photostating.

Q. Can you identify Exhibits 76, 77, 78, and 79?

A. Yes, sir.

Q. And what are they, sir?

A. They are photostatic copies of the diaries that Mr. Seijas produced that day.

Q. And would you describe, sir, the manner in which these photostats were prepared?

A. Each book was laid on the table open, doubled leafed, and a shot was taken of all four lying like that at one time, then a glass was put over, I should say, also. Then the glass would be raised, Mr. Seijas would turn the page, one, two, or three, or whatever it might be necessary to, until he came to one

(Testimony of Willard A. Oftedal.)

that had some writing on it in each book, and then he would put the glass down and photostat it.

Q. And were there any instances where there was no entries on a particular date?

A. Yes, sir.

Q. And would there be photographs taken of those dates? A. No, sir.

Q. At the time these photostats were taken, did you at any time ever have the original books in your possession? [1646] A. No, sir.

Q. Did you ever have them in your hands or control them in any way? A. No, sir.

Q. Who had actual physical control of the books all the time you were with Mr. Seijas?

A. Army Seijas.

Q. Did you turn any of the pages at all?

A. No, sir.

Q. Were there any portions which were covered? A. Yes, sir.

Q. How were those portions covered?

A. Mr. Seijas took blank pieces of paper and laid over them in the process before they were photostated.

Q. Would you see them before they were covered? A. Usually not, sir.

Q. And did you have any conversation with Mr. Seijas concerning what he was covering up?

A. Yes, sir.

Q. And what was that conversation?

A. I told him that I thought if he was making a disclosure it should be a full and complete dis-

(Testimony of Willard A. Oftedal.)

closure and that we should have a picture of the whole thing.

Q. What did he say?

A. He said those were personal items he was hiding. [1647]

Q. Did he show you any of them?

A. Yes, sir.

Q. Prior to that time had you ever heard of these diaries?

A. Not before April 15, that is for sure, because that is a day I understood they were made available to the Internal Revenue authorities.

The Court: That is 1953?

Mr. Mead: That is objected to as hearsay, your Honor.

The Court: Well, the last part of the answer will be stricken. The first time he heard of them, that part can stand. The first time he heard of them was the date 4-15-53, is that right?

The Witness: Yes.

Q. (By Mr. Obenour): Did Mr. Seijas explain the entries contained in the diaries?

A. Yes, sir.

Q. And what was his explanation of the entries?

They represented holdout money from these various locations where they had been holding out.

Q. And what time?

A. Well, from the period 1942 up through 1945.

Q. When was the first time you heard that there had been any money held out of the receipts of the pinball business from the years '42 to '45? [1648]

(Testimony of Willard A. Oftedal.)

The Court: Just the date.

The Witness: April 15 to 17, 1953.

Mr. Mead: That is objected to as hearsay, your Honor, he stating who he heard it from.

The Court: He hasn't stated who he heard it from. He is giving a date which he affirms was the first time he ever heard of this matter. I think the witness can say that, and he has said it. Overruled. Go ahead.

Q. (By Mr. Obenour): Prior to this time approximately how many times had you had occasion to discuss with Mr. Seijas his tax affairs and net worth statement any unexplained increases in net worth? A. Many, many occasions.

Q. Referring to the diaries, were there any dates, entries of dates which were not made directly to the pages but were appendages?

A. Yes, sir, in 1945.

Q. And would you describe what those appendages were in the original book as you observed them to be?

A. Well, they were slips of paper, adding machine paper or small slips of paper, that were pasted into the book.

Q. How were they pasted into the book?

A. Scotch tape.

Q. Would you describe the scotch tape? [1649]

A. Yes, sir. It was greenish in color.

Q. Was that the green scotch tape or—what was the original color of the scotch tape?

A. It had apparently been colorless before.

(Testimony of Willard A. Oftedal.)

Q. And at the time you observed it, the color was what? A. Greenish tinge.

Q. In your observations of the original books, did you observe anything about the original volumes to indicate that they had been fictionized rather than being authentic records compiled during the period shown on the dates of the diaries?

Mr. Mead: That calls for a conclusion.

The Court: It does, and it is sustained. He can describe them but not give his conclusion about it. That is for the jury.

Q. (By Mr. Obenour): How large were the books, Mr. Oftedal?

A. Three by five when they were closed, roughly.

Q. The color?

A. Four by eight. I should revise that. The color was dark.

Q. What was dark?

A. The outside was black, the cover of the book, and the pages of the book were cream colored, tannish cream.

Q. Would you describe the pages?

A. The pages were split in the middle—first off, they are [1650] bound with wire.

The Court: Do you mean the whole book?

The Witness: The whole book is bound with wire, and each page had two dates on it.

Q. (By Mr. Obenour): Are there any other observations you made as to their condition other than the scotch tape you have described?

(Testimony of Willard A. Oftedal.)

A. Well, it was obvious that they were not written at the same time.

Mr. Mead: That is objected to, your Honor, as being a conclusion.

The Court: Yes. The answer is stricken. You must answer just the question. You must disregard the last answer, it is not responsive. Just describe the physical condition and let the Jury draw their conclusions about it from your description of the physical condition.

Q. (By Mr. Obenour): Did you have any other conversation with Mr. Seijas on that date?

A. Yes, sir.

Q. What was that?

A. When we took a walk to go to lunch——

Mr. Mead: This is objected to as being a time much subsequent to any time involved, I think the 17th of April, the witness has testified, 1953. [1651]

The Court: Go ahead. Overruled.

The Witness: We took a walk, we were going out to lunch together, and he said that lending $100,000 to Forman had been what had gotten him in the jackpot, and if it hadn't been for bringing that $100,000 out in the open we wouldn't have found anything on him.

Q. (By Mr. Obenour): Did he state anything as to why he brought it out?

A. To lend to his friend.

Q. Did he state what that money—what had been the source of that money? A. Yes.

Q. What was that?

(Testimony of Willard A. Oftedal.)

A. Unreported income from the pinball business.

Q. When was the last you saw the originals of the diaries, Exhibits 76, 77, 78, and 79?

A. About 3:30 p.m. on April 18.

The Court: What year?

The Witness: 1953, sir. I beg your pardon.

Q. (By Mr. Obenour): And the next occasion?

A. Well, the next day we continued to photostat the diaries, and the next day we finished up and Mr. Seijas left with the diaries.

The Court: The originals? [1652]

The Witness: With the originals.

Q. (By Mr. Obenour): Did you ever at any time have the originals in your possession?

A. No, sir.

Q. Handing you Exhibits 87 through 91, during the course of your investigation did you have occasion to receive certain documents from either Mr. Seijas or his representatives from which you made copies? A. Yes, sir.

Q. Please refer to the exhibits that I have just handed to you and see if you can identify any of those as-- identify them in any way.

A. Exhibit 87, sir, is the retained copy or a copy of the retained copy of Army Seijas' 1942 tax return which was prepared by me. The other two parts to this same exhibit are copies of 1943 tax returns of Betty L. Seijas and Army Seijas which were prepared by Mr. O'Leary on the same day that I prepared this first one.

Q. And has that been admitted?

(Testimony of Willard A. Oftedal.)

A. It was not admitted.

The Court: None of these exhibits have been admitted.

Mr. Obenour: Offer 87 at this time.

Mr. Mead: May I inquire of the witness, your Honor? [1653]

The Court: Yes, you may.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Oftedal, where were the copies which we will call originals for that purpose because you made them from those, where are they now?

A. I don't know, sir. We saw them in Mr. Whittle's office.

Q. Have you attempted to locate the copies from which these were made?

A. They weren't available to us, sir.

Q. So these are copies from a copy, is that right?

A. Yes, sir, and the first one.

Q. And the first one is in your handwriting and the other two are in Mr. O'Leary's handwriting?

A. Yes, sir.

Mr. Mead: Objected to as the documents from which they were obtained would be the best evidence.

The Court: Well, of course, the only one that would be admissible now is the '42 item. I think I will hear other testimony with respect to it before ruling on that. You might elaborate more particularly and lay a complete foundation.

(Testimony of Willard A. Oftedal.)

Mr. Obenour: On that grounds, your Honor, we submit that the foundation was laid by Burdick and by Seijas' testimony. [1654]

The Court: That the originals from which these were taken are not in existence?

The Witness: The original was destroyed by the government, the ones on file, and Seijas had been subpoenaed to produce his copies and he didn't have them available.

The Court: Go ahead. The point is, as I understand it, Mr. Oftedal, you personally made this 1942 copy?

The Witness: Yes, sir.

The Court: You yourself, using the purported retained copy that was presented to you by Mr. Whittle as being the data from which this net worth statement was made?

The Witness: Whittle made it available to us, sir, and they were retained copies that we requested we be allowed to photostat. We weren't permitted to photostat them but we were allowed to copy them.

Q. (By Mr. Obenour): Where were they furnished to you?

A. In Mr. Whittle's office on the 18th floor of the Smith Tower.

Q. And where was the last time you had seen them? A. On that same spot.

Q. In Mr. Whittle's office? [1655] A. Yes.

Q. And did you ever take them into your custody or possession? A. No, sir.

(Testimony of Willard A. Oftedal.)

Mr. Obenour: As to the '42 portion, we offer that.

The Court: I will rule on the whole matter.

Q. (By Mr. Obenour): Refer to 88, please.

A. Yes, sir. This is copies of 1942 Bremerton Amusement Company, and 1943 and 1944 Bremerton Amusement Company.

Q. Are any copies there that you could identify as having been prepared by you? A. No, sir.

Q. Will you refer to Exhibit 89, please, particularly the return for '42 and '43, either of those copies which have been prepared by you?

A. 1943, United Amusement Company of Bremerton, I prepared that.

Q. And from what did you prepare that copy?

A. Taxpayer's retained copy in Mr. Whittle's office.

Q. And what was the occasion which you made that copy?

A. We had written Mr. Whittle or Mr. Seijas asking him to make certain evidence available that we wanted to check and verify, and the tax returns were one of the items we listed asking for photostatic copies of them.

Q. Was this all on one occasion that you made these copies? [1656] A. Yes, sir.

Q. Was this the same as the one you had referred to in Exhibit 87? A. Yes, sir.

Q. All right. And the one for '42, do you know who prepared that?

A. Yes, sir, Edward J. O'Leary.

(Testimony of Willard A. Oftedal.)

Mr. Obenour: Again we offer the remaining, your Honor.

The Court: I will rule on them all at one time. Do you have further inquiry at this point, Mr. Mead?

Mr. Mead: No, your Honor.

Q. (By Mr. Obenour): Exhibit 90.

A. Yes, sir.

Q. Did you see any documents there which were copies prepared by you? A. No, sir.

Q. And 91, referring particularly to the returns for '42, '45.

A. '45, United Amusement Company, I prepared that copy.

Q. And when was that prepared and from what?

A. May 25, 1953, from the taxpayer's retained copy.

Q. And this was the same occasion you just described? A. Yes, sir. [1657]

Mr. Obenour: We offer 45.

Mr. Mead: Same objection, your Honor, that the best evidence would be the documents from which these were prepared.

The Court: I haven't ruled yet. I am considering it. Go ahead.

Q. (By Mr. Obenour): Did you have occasion to examine the United Amusement Company books concerning checks drawn upon that account to Armador Seijas?

A. That was done in my presence by Mr. O'Leary.

(Testimony of Willard A. Oftedal.)

Q. And did you make any examination of the endorsements upon these checks? A. Yes, sir.

Q. What did you do?

A. I listed the checks and the endorsors.

Mr. Obenour: I ask this be marked.

The Clerk: Plaintiff's Exhibit 140 has been marked for identification.

Q. (By Mr. Obenour): Sir, can you identify Exhibit 140? A. Yes, sir.

Q. What is it, please?

A. It is the copy made of the checks and the endorsements contained thereon from those checks that were available.

The Court: What checks?

The Witness: Available to Armado Seijas. [1658]

The Court: Checks of what concern?

The Witness: United Amusement Company of Bremerton—or, the United Amusement Company.

Q. (By Mr. Obenour): And there are two lists?

A. Yes, sir.

Q. What is the top list?

A. The top list was made from the books and records from the cash book.

Q. By whom? A. By O'Leary.

Q. And when and where were you when this was done? A. Right at the same table.

Q. And the second list is what?

A. Taken from the checks themselves.

Mr. Obenour: Offer Exhibit 140.

Mr. Mead: May I inquire with respect to it, your Honor?

(Testimony of Willard A. Oftedal.)

The Court: You may.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. Oftedal, this Exhibit 140 is a transcript of the checks drawn by United Amusement Company of Bremerton and payable to Armador Seijas?

A. That is, sir, that you are looking at, is the transcript of the account itself in the books. [1659]

Q. It isn't the transcript of checks, it is a transcript taken from some books and records?

A. Yes, the first part is.

Q. That is page number one? A. Yes, sir.

Q. Page number two is a record of salary payments for Armador Seijas per books of United Amusement Company, is that right? A. Yes.

Q. And the last exhibit, that is the one which has the shorter page, is a transcript of checks to Armador Seijas on United Amusement Company checks, is that right? A. Right, sir.

Mr. Mead: Those exhibits are objected to your Honor, on the basis that they are merely a transcript from records which would be the best evidence and which records are not available to us.

The Court: They are not available to anyone, are they?

Mr. Mead: I don't know, your Honor.

The Court: The evidence indicates so.

Mr. Mead: Mr. Seijas, I believe, testified that the last time he saw these records, I thought he said, was at the occasion of his last trial in [1660] Marshal's office.

(Testimony of Willard A. Oftedal.)

The Court: Is it not true that the government has shown that it did everything it could to ascertain the location of these and in that sense they are not available to the government, at least, is that not so?

Mr. Mead: That is so, your Honor, but this is not even a copy or a photostatic copy of the document.

The Court: The rule is that when a record is not shown to be available to the party and he has made such efforts as reasonably indicate, to produce it, that anyone who has seen the records, and particularly someone who has made a record directly from it, who swears that he did that, I think that makes it admissible. That is my impression of the ruling.

Mr. Mead: We are at a disadvantage in not having seen the record and not having had an opportunity to examine it.

The Court: That probably would be taken into account in weighing the evidence, but I think with Mr. Oftedal's testimony that he made that record directly from the books at a time when they were available, I believe is admissible. If you [1661] would like to be heard further, I will give you an opportunity.

Mr. Mead: I think at this time that that objection will suffice.

The Court: Very well. The transcript is admitted.

(Thereupon, Plaintiff's Exhibit 140 for identification was admitted into evidence.)

(Testimony of Willard A. Oftedal.)

Mr. Obenour: This transcript prepared by Oftedal?

The Court: Only the portion prepared by Mr. Oftedal. You have indicated that, haven't you, which part you made?

The Witness: Yes, sir.

The Court: All right. Go ahead.

Q. (By Mr. Obenour): Referring to Exhibit 140, that portion which was prepared by you, are there any—that is a list of endorsements of the checks to whom? To whom were the checks drawn?

A. Drawn on Armador Seijas.

Q. And who is he?

A. Father of Army Seijas.

Q. And Mr. Army Seijas made a statement to you concerning these checks to his father?

A. Originally he said that they were to his father but that [1662] he got the benefit from it.

Q. And they were drawn on what company?

A. United Amusement Company.

Q. And where did you make this list?

A. In Mr. Whittle's office.

Q. Did you ever have them in your possession?

A. Just to copy.

Q. And what did you do with them when you completed your list?

A. Left them at the office.

Q. Were there any endorsements by—on these checks to Armador Seijas by Mr. Forman?

A. Yes, sir.

Q. Would you refer, please, to the checks to

(Testimony of Willard A. Oftedal.)

indicate the amounts which were endorsed by Mr. Forman?

A. There were a limited number of them, of the checks available, only covering the period from December 16, '44, up to and including November 10 of '45. In that period there was one to William R. Forman that he endorsed on December 30, '44.

Q. How much? A. $83.40.

Q. Any others?

A. On July 28, 1945, there was one for $79.10 endorsed by Mr. Forman. On August 18 there was one for $80.10 endorsed by Mr. Forman. On September 8 there was one for $80.10 [1663] endorsed by Mr. Forman. On October 13 there was one for $80.10 endorsed by Mr. Forman.

Q. What year? A. '45.

Q. All the last have been '45?

A. Yes, sir. The first one was '44 and the rest have all been '45.

Q. Did you ever have a conference with Mr. Forman concerning the diaries?

A. I don't know that I understand your question—I did, yes.

Q. When?

A. Well, when he talked to Mr. Seijas on January 11, for example.

Q. No, the diaries——

The Court: Concerning the diaries.

Q. (By Mr. Obenour): The diaries. The books that Mr. Seijas produced.

A. Oh, I would say January 11, 1952.

(Testimony of Willard A. Oftedal.)

Q. Did you know of the diaries January 11, 1952?

A. I beg your pardon—I withdraw that. Yes, sir, I did have a conference with Mr. Whittle concerning those on May——

Q. With Mr. Forman? A. Yes, sir.

Q. When? A. May 29, 1953.

Q. Where? A. Smith Tower.

Q. Who was present?

A. Mr. O'Leary and me.

Q. And were you told by either Mr. Forman or Mr. Mead what Mr. Mead's purpose in being present was? A. I don't believe so.

Q. With whom was the interview?

A. It was with Mr. Mead.

The Court: Mr. Mead?

The Witness: Yes, sir.

The Court: Mr. Forman was present?

The Witness: Yes, sir.

The Court: All right. Go ahead.

Q. (By Mr. Obenour): What took place on that occasion?

A. We had been trying to get in touch with Mr. Forman for a brief period of time to attempt to obtain a statement from him. May I give the details, sir?

The Court: Just tell what happened. That is what the question was. Go ahead.

The Witness: Mr. Mead was told that we didn't wish to summons Mr. Forman at this time but we had intended to summons him if we had to go to

(Testimony of Willard A. Oftedal.)

Los Angeles [1665] or to California in any event, to interview Mr. Forman, but that if we were going to talk to him here in Seattle that that didn't seem appropriate especially in view of the fact that we wished to question him concerning allegations made by Mr. Seijas in connection with the pinball operation. Mr. Mead indicated that he would have to advise his client that there was a three year statute of limitations and to be guided accordingly, and that that could only be opened by voluntary waiver of the three years by the client or by the customer or by proving of substantial fraud.

Q. (By Mr. Obenour): Did you tell them that allegations made by Mr. Seijas would affect Mr. Forman as well as Mr. Seijas for those earlier year of '42 to '45?

Mr. Mead: These are all leading questions, your Honor, and highly objectionable.

The Court: Just indicate the subject matter without going to any detail.

Q. (By Mr. Obenour): Was Mr. Forman or Mr.—were Mr. Forman and Mr. Mead advised of the allegations of Mr. Seijas as they would affect Mr. Forman? A. Yes, sir.

Q. What were they told?

A. Well, I explained to the gentlemen that Mr. Seijas had alleged $172,000 of unreported pinball machine receipts in the years '42 to '45 which had been split between Mr. [1666] Forman and Mr. Seijas, that in addition, he alleged a $10,000 capital gain on the sale of Palace Billiards which had been

(Testimony of Willard A. Oftedal.)

shared equally by Mr. Forman and Mr. Seijas, and that in addition, he had spoken of $11,000 in checks payable to Mr. Amador Seijas by the pinball partnership.

Q. Was any request made at that time for a statement concerning these allegations?

A. Yes, sir.

Q. From Mr. Forman? A. Yes, sir.

Q. What did you say?

A. Well, Mr. Mead answered and said that though this was——

Q. What did they ask, or what did you ask?

A. That the purpose of getting together was to take a statement from Mr. Forman, so there was no question as to its purpose, I don't believe.

Q. Well, what was said then?

A. Well, Mr. Mead said it was opportunity day but that he would be inclined to think we should paddle our own oar.

Q. What happened then?

A. Well, I remembered going over the same three points again, Mr. Mead taking time to write them down and again refusing. However, I suggested that we talk it over and maybe Mr. O'Leary and I could leave the room and give them a chance [1667] to think about it, and Mr. Mead suggested that we all go down and have a cup of coffee, so we did, in the Smith Tower Building, and we went our separate ways, and when we got to the restaurant down below, we had our coffee and met back upstairs about 20 minutes later.

(Testimony of Willard A. Oftedal.)

Q. What happened then?

A. I told Mr. Mead and Mr. Forman that if the allegations of Mr. Seijas were borne out, that it was a very serious thing, tax wise, for Mr. Forman, and Mr. Forman wanted to know if he would have to pay fraud penalties, and he was told that it could be more serious than that.

Q. What happened then?

A. I also mentioned that we had been told that Mr. Seijas and Mr. Forman had decided to get together and hold out $25,000 apiece but once they got started they just couldn't stop.

Q. What was said to that?

A. Mr. Mead asked the source.

Q. And did you tell him?

A. I told him Mr. Seijas.

Q. Was there any other conversation?

A. Basically no, except that Mr. Mead said they would consider the matter further, that he might later decide to advise his client to give a statement, and we asked that they make haste if they were going to because we should [1668] get a report in in about a week.

Q. At that time did you have any conversation concerning the subject of conspiracy?

A. Oh, yes. I mentioned that if Mr. Seijas' allegations were borne out that it would be a conspiracy, it would appear to be a conspiracy.

Mr. Mead: We have objection to this testimony, your Honor. We move that it be stricken, and since it is now almost time for the afternoon recess,

(Testimony of Willard A. Oftedal.)

we ask that it be had now so we can be heard further with respect to it.

The Court: Yes. You made no objection to the question when it was put, Mr. Mead. I will take the afternoon recess at this time.

(Thereupon, the Jury withdrew from the courtroom.)

Mr. Mead: The objection, your Honor, to this testimony, and I believe that I should move for a mistrial at this time, that it is impossible for us to determine just what is going to be adduced by the——

The Court: The question here called for it. The question here particularly called for the subject that was had, and no objection was made until the matter was fully concluded.

Mr. Mead: He could have repeated what I said [1669] your Honor, and that is what he started out to do, but when he got to the point of a statement that Mr. Forman didn't make, it amounts to a declaration in the presence of the Jury that demand was made upon Mr. Forman to testify with respect to the matter and that he didn't give him—or didn't give a statement, and it would the same, the very same effect if he were called upon in open court to do so.

The Court: Mr. Mead, I am at a complete loss to understand your position, and I want to give you a full opportunity to make it. I think, perhaps for the first time during the trial, there has not been an objection entered during the entire dis-

(Testimony of Willard A. Oftedal.)

cussion of this witness concerning this conference. I have been very attentive, and nothing has occurred whatever, and the last question and answer to which you make objection, again, was made not in any hasty manner whatever, and I think the record in all fairness should show that this witness is an extraordinarily deliberate person in his speech and in his responses, and it certainly seems to me on the face of it that you have been remiss in not calling it to my attention promptly.

I think you will agree that throughout this [1670] I have been extremely attentive to any proposition put forward by the defendant or by the prosecution, either one, so on the very face of it, and to begin with, you must say that comes as a great surprise to me that after the event you should make this position.

Now, however, in fairness to you and to your client, I want to make fully whatever record you think is appropriate about it.

Mr. Mead: My point is, your Honor, that the witness was questioned about the discussion that he and I had and he stated that the discussion was with me, and what I said, and the like, and then after that line of questioning was followed and before I could make an objection to it, he talked about his statement and the opportunity to make a statement which was offered to Mr. Forman at the time, and the line of questioning which the witness and the answers which the witness had given to them previously was what I had said. The vice was

(Testimony of Willard A. Oftedal.)

in the witness' answer and not in the question because I could not have anticipated he was going to give the answer with regard to the statement.

I had every reason to believe that this witness, [1671] being an intelligence agent, would be well advised of the dangers attendant upon calling a defendant to testify against himself or to give testimony against him.

The Court: I am not concerned about that phase of it because the fact that the interview was held, that you were present, your client was present, we have been talking about it for the last fifteen minutes without the slightest remonstrance on your part, or no objection. That is what shocks me, to have you at the last minute after all this length of time without any objection, to now claim that there is something prejudicial about it. I think if there were, which I certainly do not concede, that if there were, you would have long since forfeited any right to make that claim, and I must say for the first time I am surprised at the position being taken after that in that belated manner.

Mr. Mead: The reason that the objection was not made before is in the first part of the witness' testimony, your Honor, he stated that the conference was with me and I was the one that made the responses, and he started to tell what I had said, and the matter of the statement was not [1672] inquired into or the giving of a statement, and, therefore, your Honor, I could not anticipate it. I feel to bring the matter to the attention of the Jury

(Testimony of Willard A. Oftedal.)

which was in the answer itself, was tantamount to calling upon the defendant to testify.

The Court: I think the disposition I will make *of is* that I will deny the motion and I will have the reporter give me a transcript of the last few remarks that preceded the incident that you refer to, and if on further reflection I consider that there is more substance to your position, then you may have my word for it that I will give it further attention.

Mr. Obenour: In that regard, it is my position and my understanding that any time a statement is made in the course of an investigation in the presence of the defendant in which there is an allegation alleging certain things as being so, and particularly that a crime has been committed, and he has participated in it, certainly is proper to show the silence or——

The Court: It is certainly a surprising thing in the criminal law if one who voluntarily appears at a conference to discuss the matters of this kind with his counsel, and appears and offers to [1673] discuss it or listen to what is said, that thereafter the matter can't be inquired into? In this instance, no exception was taken at any time during a rather lengthy examination about this conference. That is what surprises me so, is the position now taken. In any event, the motion is denied and an exception is allowed, of course.

We will take the recess at this time.

(Thereupon, a short recess was taken.)

(Testimony of Willard A. Oftedal.)

The Court: Proceed, gentlemen.

Q. (By Mr. Obenour): Mr. Oftedal, this conference on May 29, with whom was the conference requested? A. With Mr. Forman.

Q. And on any other occasions did you ever have conferences with Mr. Forman? A. Yes, sir.

Q. And at those conferences was Mr. Mead present?

A. Yes, except on one occasion when he couldn't be, but Mr. Forman read a brief statement that he had gotten from Mr. Mead, or at least so he told us.

Q. And on the occasion of the 29th of May, '53, what was the position of Mr. Mead in regard to the conference?

Mr. Mead: We object to that as calling for a conclusion of the witness.

The Court: Yes, that is right. It does [1674] call for a conclusion.

Q. (By Mr. Obenour): Had you been told either at that time or on any previous occasion of any relationship between Mr. Mead and Mr. Forman?

A. Yes, sir.

Q. And what was that?

A. Mr. Mead was Mr. Forman's attorney.

Mr. Obenour: That is all. You may examine, Mr. Mead.

Cross Examination

Q. (By Mr. Mead): Mr. Oftedal, how long have you been employed by the Bureau of Internal Revenue? A. 11 years.

Q. And what has been the nature of your employment during that period of time?

(Testimony of Willard A. Oftedal.)

A. The first two years was a general deputy collector for the Unjust Enrichment Division.

Q. The Unjust Enrichment Division?

A. Yes, sir.

Q. Was that here in Seattle or in Tacoma?

A. No, sir. That was all over Oregon and Washington. As a matter of fact, it went back east to Minnesota and Wisconsin.

Q. And following that, sir?

A. Following that I was in the Border Patrol and Immigration Service.

Q. The Unjust Enrichment Division had to do with subsidy tax?

A. It had to do with processing taxes on pork.

Q. Floor taxes is what we call them?

A. Not floor taxes.

Q. In any event, it didn't have anything to do with the [1676] Internal Revenue income tax laws?

A. No, sir.

Q. And you worked for the Immigration Division, is that right, sir? A. Yes, sir.

Q. And you say you have been with the Internal Revenue for 11 years? A. Yes, sir.

Q. Have you been an intelligence agent during most of that time? A. Nine years.

Q. Will you please explain to us what is meant by an intelligence agent? A. Well——

Q. To shorten it, how does an intelligence agent differ from an Internal Revenue agent, if there is a difference?

A. We are responsible for the investigation of

(Testimony of Willard A. Ofteda1.)

frauds against the Treasury Department as distinguished from revenue, as for example, civil taxes.

Q. And so, you are assigned to the investigation of what is generally known as fraud cases, is that right? A. Yes, sir.

Q. And the duties of an intelligence agent are generally known to lawyers and people who deal with tax matters, is that right? [1677]

A. Yes, sir, surely.

Q. And now, when did you first commence your investigation with respect to Armador Seijas or Army Seijas?

A. In the middle—about the middle of 1950, late summer or fall of 1950.

Q. And were you assisted in that investigation during the entire period by Mr. O'Leary who has been here at the counsel table with you?

A. Yes, sir.

Q. When did you first make a contact with Mr. Seijas?

A. In the late summer or early fall of 1950. That was my first contact.

Q. Was that in company with Mr. O'Leary?

A. Yes, sir.

Q. And was that an office call?

A. Yes, sir.

Q. Did Mr. Seijas then retain the services of an accountant or a lawyer to represent him?

A. No, sir.

Q. When did he first obtain the services of an

(Testimony of Willard A. Oftedal.)

accountant or a lawyer to represent him in the course of this investigation, to your knowledge?

A. I believe it was about the first of 1951.

Q. The first of 1951? A. Yes, sir. [1678]

Q. And who was the accountant or lawyer who was retained for that purpose?

A. Mr. Jacobsen, an accountant.

Q. Now, did you have then occasions to meet with Mr. Jacobsen and Mr. Seijas with regard to the matter? A. No, sir.

Q. How do you know that Mr. Jacobsen was retained? A. Mr. Seijas told us.

Q. Now, did you approach the investigation of Mr. Seijas' tax liability on the basis of what is generally known as a net worth approach or net worth basis?

A. No. We didn't take any particular approach.

Q. You didn't take any particular approach?

The Court: I take it initially, is that what you mean?

Mr. Mead: Yes.

The Witness: No, we didn't take any particular approach.

Q. (By Mr. Mead): You didn't take any particular approach? A. No.

Q. Did you ask Mr. Seijas for a net worth statement? A. Subsequently, yes.

Q. When did you first ask him for a net worth statement? A. I don't recall.

Q. Is your memory a little dim about the entire matter, sir? [1679] A. No.

(Testimony of Willard A. Oftedal.)

Q. Did you investigate quite a large number of taxpayers since the investigation of Mr. Seijas started? Have you investigated quite a number?

A. Yes, sir.

Q. So, you are not able to state whether or not you asked for a net worth statement?

A. No, I can say that we did ask for a net worth statement.

Q. But when you asked for it, you are not able to state——

A. I said about the first of '51.

Q. I beg your pardon, sir. When did you first get a net worth statement?

A. December 29, 1951.

Q. December 29, 1951? A. Yes, sir.

Q. And what was the occasion of that?

A. Well, we had heard it was due to be ready. It was supposed to have been ready for quite some time but it was finally typed up and we went and picked it up at Mr. Whittle's office on that day.

Q. And did you have then a conference with Mr. Seijas and Mr. Whittle?

A. On January 11, yes, sir.

Q. On January 11? A. Yes, sir. [1680]

Q. 1951? A. Yes, sir—'52, sir.

Q. What happened on December 27, 1949? Was there any conference at that time?

A. We weren't working on Mr. Seijas at that time, sir.

Q. You weren't working on him at that time?

A. No, sir.

(Testimony of Willard A. Oftedal.)

Q. How about December 29, 1951, was there a conference at that time?

A. That is the date we got our net worth statement from Mr. Whittle.

Q. And that is the Whittle net worth statement that has been referred to? A. Yes, sir.

Q. Was that the first net worth statement, then, that you had received?

A. The first one we received tangibly, yes, sir.

Q. Did you have a meeting with Mr. Whittle and Mr. Seijas on that occasion?

A. I don't believe we saw Mr. Seijas on that day, sir.

Q. So, you had no conference on that date with respect to the net worth statement, is that right?

A. No, sir.

Q. When did you first have a conference with Mr. Seijas after that Whittle net worth statement was furnished to you? [1681]

A. Well, we took a formal statement on January 11, 1952.

Q. So, there was a conference at that time?

A. Yes, sir.

Q. And had you taken a formal statement prior to that time from him which you had not signed?

A. Yes, sir.

Q. And what was the date of that?

A. September 6 of 1951.

Q. All right. Now, what did Mr. Seijas have to say with regard to the net worth statement that Mr. Whittle had furnished you, particularly with re-

gard to the cash on hand at the beginning of 1946?

A. Sir, I haven't seen that statement for some while. I am a little fuzzy on that.

Q. You are fuzzy on this statement?

A. Yes.

Q. Will you show the witness Exhibit 47, I believe it is. Are you familiar with that statement, Mr. Oftedal? A. Yes, sir.

Q. Now, at the meeting that you have described where this statement was discussed, what did Mr. Seijas have to say with regard to the amount of money on hand at the beginning of 1946, shown by that statement?

A. $50,000 of cash on hand.

Q. Yes, sir. What was said with regard to that at that [1682] meeting?

A. I don't recall anything being said particularly in regard to the cash on hand.

Q. This $50,000? A. The $50,000.

Q. Now, until you were handed that exhibit, Mr. Oftedal, all of your testimony was purely from memory, wasn't it? You didn't have any notes that you referred to?

A. No, I didn't refer to any. I had had notes, yes.

Q. But you didn't refer to any when you gave your testimony? A. No, sir.

Q. It is your recollection after looking at that statement, the net worth statement, Exhibit No. 47, that there was no discussion about the $50,000 amount on hand, that you can recall?

(Testimony of Willard A. Oftedal.)

A. I believe there was a general discussion, mainly.

Q. Now, the purpose of this meeting was to discuss an apparent unreported income or tax liability for the years 1946, '7, and '8, was it not, sir?

A. Yes, sir.

Q. And the liability of Seijas was focused on those years? A. Yes, sir.

Q. Is that right? A. That's right.

Q. And the purpose of the meeting was to attempt to secure, [1683] if possible, an explanation for this unreported income as shown by the Whittle statement? A. Yes.

Q. Now, is it not the case, Mr. Oftedal, that when you were questioned just a year ago about this matter with regard to the $50,000, the money on hand shown by Mr. Whittle's statement at the beginning of 1946 with respect to which you have testified now, you could not recall any specific discussion, that you testified in answer to the following questions in the following manner: "Q. Did he say that he himself had any knowledge of how much he actually had in the boxes at any given time? A. He said he did not have any knowledge. Q. Was he asked if he had any knowledge of unreported income in the years 1946, 1947, and 1948? A. Yes, sir. Q. What did he say? A. He said he couldn't account for the apparent unreported income. Q. Was he asked if he had an amount of cash of $50,000 at the end of 1945? A. He said that if Mr. Whittle said it was as shown by the net

(Testimony of Willard A. Oftedal.)

worth statement that he would agree to that, that he thought that was correct." Did you give those answers and responses to questions when this matter was discussed in this court and you testified about a year ago in the Seijas' trial?

A. Yes, sir. [1684]

Q. So, then, there was a discussion at the time of this meeting with respect to the $50,000 of original money shown on the Whittle net worth statement?

A. It was a general discussion, yes, sir.

Q. There was a discussion? A. Yes, sir.

Q. Now, was there any discussion at that time with regard to the borrowings of Mr. Seijas and the loans which had been made to him which you had determined to be the fact at that time?

A. Yes, sir.

Q. And what was said with regard to that?

A. I recall that Mr. Seijas was—had made the statement—now, by gosh, I am not sure it was at this time, but I believe so, that he had made a statement that if he borrowed money it was indicative that he needed money. Now, I am not sure if that answers your question or not, Mr. Mead.

Q. I want to know what the discussion was with regard to the loans that you advised Mr. Seijas he had made, or borrowings that he had made, loans to him, and what his explanation was, if any, at that time of why he would be borrowing money if he had cash, or was there such a discussion?

A. I don't remember. [1685]

(Testimony of Willard A. Oftedal.)

Q. You don't remember? A. No.

Q. By the way, when was the date of this discussion on the Whittle statement that we are talking about? A. January 11, 1951.

Q. Are you sure of that?

A. 1952, sir.

Q. Are you sure of that date? A. Yes, sir.

Q. And that was in the presence of Mr. Whittle and Mr. Seijas and Mr. O'Leary and yourself?

A. Yes, sir.

Q. So, actually, what was said and done there, you are not too sure of, are you, sir?

A. Ours was a more general type discussion attempting to find out why there was a $165,000 of unreported income in the three year period.

Q. But the subject matter of the discussion which you have attempted to relate, you are not too certain about, are you, sir?

A. I am certain.

Q. You know that you went there to attempt to get an explanation as to the shortage of $165,000 for those years? That was the purpose of it, but the exact statements which were made you are not certain of? [1686]

A. I think I can recall a statement fairly well.

Q. What explanation did he make, then, for borrowing money if he had cash on hand, if he did make such an explanation? A. I don't recall.

Q. You don't recall? A. No.

Q. You don't recall him making any explanation? A. No.

(Testimony of Willard A. Oftedal.)

Q. I will ask you Mr. Oftedal, if it is not a fact that at the Seijas trial just a year ago in answer to the following questions you gave the following answers with respect to this conference we are talking about: "Q. Did he say anything further as to why he would not borrow money if he had money? A. I recall he said 'You would have to understand my personality, but I just wouldn't borrow money if I had any.'"

Mr. Obenour: We submit that is the answer that he originally gave.

Mr. Mead: He has given several.

The Court: The Jury will have to follow it closely. Go ahead. Your precise question now is, did he say that at the previous trial?

Mr. Mead: Yes.

Q. (By Mr. Mead): Now, you testified just a year ago——

The Court: He hasn't said he did, yet. [1687]

Q. (By Mr. Mead): Or did you?

The Court: Is that your previous testimony?

The Witness: Yes, sir, I said that.

Q. (By Mr. Mead): And that refreshes your memory so you recall it now?

A. I said that before when you asked me, too.

Q. You said that his explanation was that you would have to understand his personality, is that it?

A. Yes, sir.

Q. Now, with reference to the borrowings which we were talking about and which was the subject matter of that discussion, what were the borrow-

(Testimony of Willard A. Oftedal.)

ings that you were talking about, and from whom had he borrowed money? A. I don't recall.

Q. You don't recall that, sir? A. No, sir.

Q. Did you discuss at that time these borrowings and from whom he had borrowed money and the amounts of money that he had borrowed?

A. We may have.

Q. You may have? A. Yes.

Q. Now, did you or Mr. O'Leary at that time advise Mr. Seijas that your investigation had disclosed that there was an understatement of more [1688] than $160,000 for the years 1946, '7, and '8?

A. I believe that we did so advise him. It was a fact.

Q. And what did you advise him was the amount? A. I don't recall.

Q. You don't recall? A. No.

Q. But it was a fact? A. Yes.

Q. Is it a fact that prior to this meeting you and Mr. O'Leary had advised Mr. Seijas that he was short $75,000 for this period of time?

A. No, sir.

Q. You never advised him of that?

A. No, sir.

Q. Did he ever advise you of that?

A. Yes, sir.

Q. When did he advise you of that?

A. January 19, 1951.

Q. Now, when did you first meet Mr. Forman?

A. I would say shortly after the first of the year '51. Presumably it was shortly after.

(Testimony of Willard A. Oftedal.)

Q. Shortly after the first of the year of 1951?

A. Yes, sir.

Q. And that was on the occasion of the inquiring into the tax liability of the third party, is that right? [1689]

A. I am not sure that that was the first time we saw him. If that was it, that was in August of 1951.

Q. In August of 1951?

A. Yes, sir. I think we had met him before that.

Q. Now, in connection with the inquiry into a third party's liability or possible tax liability, you took a written statement from Mr. Forman, did you not? A. Yes.

Q. And that statement, of course, was reduced to writing and signed by Mr. Forman?

A. Yes, sir.

Q. Now, I think you testified that with regard to that conference in which a written statement was taken, that Mr. Forman stated to you that the payments to this individual were given by check and the purpose of giving those payments by check was so that they would have a record of it and could take it as a deduction for tax purposes?

A. Yes, sir.

Q. And you testified to that on your direct case?

A. Yes, sir.

Q. Do you have a copy of the statement which was taken from Mr. Forman on that occasion?

A. There is one on the table.

Q. Would you please hand it to the witness.

(Testimony of Willard A. Oftedal.)

[1690] That is the statement of September 7, 1951.

Mr. Mead: Do you have a copy of it, Mr. Obenour?

Mr. Obenour: I don't have it here. Wherever it is, it is in these files here.

Mr. Mead: Could we have that marked?

The Clerk: Defendant's Exhibit 505 has been marked for identification.

Mr. Obenour: Can the record show that exhibit marked for the defendants was obtained from our records on the prosecution table?

The Court: Yes. Go ahead.

Q. (By Mr. Mead): Now, Mr. Oftedal, you have before you a written statement which you took from Mr. Forman on September 7, 1951?

A. Yes, sir.

Q. And will you refer to that statement and indicate by the number of the question and the answer, the answer that Mr. Forman gave as the reason for giving this money by check so that he could take it for tax deduction purposes?

A. I don't know—did I say that he said he could take it for tax deduction purposes.

Q. Oh, yes, you just—I didn't mean to quote you that you repeat it again on cross examination or affirm it again on cross examination. [1691]

A. Question 23—24, shows it was given by check.

Q. That's right. The part I am interested in is, where did he give you the answer that it was done for tax deduction purposes?

A. I don't find that.

(Testimony of Willard A. Oftedal.)

Q. Now, in view of the fact that that conference was reduced to writing with questions that were inquired into and the answers given, would you care to correct your testimony as to the fact that he stated that he gave these checks to this third party so that they could be taken for tax deduction purposes?

A. I should correct that statement.

Q. You should correct that, sir? A. Yes.

Q. I don't mean to be critical. I know a lot of time has passed. A. Yes, sir.

Q. Now, you made a schedule, Mr. Oftedal, of some checks which were taken from the books, the accounts of the Bremerton Amusement Company or the United Amusement Company of Bremerton, is that right, sir? A. Yes.

Q. Would you please hand to the witness the last Government's exhibit. Now, you testified, Mr. Oftedal, that you had examined those checks or the [1692] records from which the transcript was taken which was in your handwriting on that exhibit?

A. Yes, sir.

Q. And I think you testified that, was it four or five of those checks that were endorsed by Mr. Forman, or bore his endorsement? A. Five, sir.

Q. Five. How many of those checks bore Mr. Renstrom's endorsement? A. Four, sir.

Q. So, your transcript of those checks show that four of them were endorsed by Mr. Renstrom?

A. These are secondary endorsements.

(Testimony of Willard A. Oftedal.)

Q. Yes. So was Mr. Forman's endorsement, that was a secondary endorsement, wasn't it?

A. Yes, sir.

Q. Four of them were endorsed by Mr. Renstrom and five were endorsed by Mr. Forman out of a total of how many checks, sir?

A. 43 checks.

Q. 43 checks? A. Yes.

Q. That you were able to make a record of?

A. Yes, sir.

Q. Now, did your investigation disclose any [1693] fact that Mr. Renstrom received any part of the money of the checks which bore his endorsement? A. No, sir.

Q. Did your investigation disclose that Mr. Forman received any part of the funds that were covered by the checks with his endorsement?

A. It is my recollection, yes, but I can't tell you how come right now.

Q. Your recollection is yes, but you can't tell how come? A. Yes, sir.

Q. Is that the best answer you can give us?

A. Possibly, at this time.

Q. And, in fact, you can't think of any fact that your investigation disclosed that indicated that Mr. Forman received any part of the proceeds of those checks? A. No, I can't.

Q. You can't? A. No.

Q. Is it not a fact, sir, that the explanation of Mr. Seijas was that he got those proceeds?

A. His original explanation?

(Testimony of Willard A. Oftedal.)

Q. Any explanation.

A. He originally said that he got them.

Q. Originally he said that he got them?

A. Yes. [1694]

Q. When he testified in this case, did he testify to anything different this last week?

A. I don't believe he testified in regard to that.

Q. When he made the disclosure, so-called, to Mr. Patten on April 15, 1952, he claimed that he had received the proceeds of these checks?

A. Yes, sir.

Q. Well, when did he claim otherwise?

A. I don't know, sir.

Q. Did he ever claim otherwise?

A. I am not sure.

Q. You are not sure? A. No.

Q. Now, you refer to the diaries, so-called, and you were present when the photographs of these diaries were made? A. Yes, sir.

Q. And that went on over how many days?

A. Sir, the parts of two days.

Q. Parts of two days? A. Yes, sir.

Q. Were you able to examine the diaries?

A. No. sir.

Q. You were not able to examine them, were you? A. No, sir.

Q. Why not?

A. Well, I was there and observed the process [1695] of photostating, but I was not in the position of actually doing any of the work myself.

(Testimony of Willard A. Oftedal.)

Q. Well, how close was your examination of the diaries? A. The originals?

Q. Yes, sir.

A. Well, I stood alongside the table.

Q. You stood alongside the table, but you were not able to make a close examination of them, were you, sir, of the original diaries? A. No.

Q. You didn't make a close examination?

A. Well, reasonably close, as close as you could make from looking at something.

Q. What insurance company caused to be printed and circulated these original diaries that you saw?

A. I haven't the slightest idea.

Q. You haven't the slightest idea? A. No.

Q. So, your memory of the occasion and your memory of the description of the diaries did not include the name of the company that put them out?

A. No, sir.

Q. Was it the Fidelity and Deposit Company?

A. I wouldn't know.

Q. Do you recollect, however, sir, that the color [1696] of the pages, I think you have stated, were cream colored, is that right? A. Yes, sir.

Q. Will you please show the witness Defendant's Exhibit 500. Was that booklet, Mr. Oftedal, the type of booklet or diary that you saw?

A. Yes, sir.

Q. Was it the same shape? A. Yes, sir.

Q. Referring to the color of it, from the cover, was it the same color?

(Testimony of Willard A. Oftedal.)

A. I would say so, yes.

Q. Was it put out by the same company?

A. I wouldn't know that.

Q. What is the color of the pages in that exhibit that you are looking at, sir?

A. I will take a look. This one is white.

Q. You have a good observation of color? You are not color blind, Mr. O'Leary?

A. My name is Oftedal.

Q. Mr. Oftedal. I get you confused. I am a little confused. Are you sure, however, that the color of this page that you saw was cream colored and not white as in that booklet?

A. I am not sure, but it is my recollection that it was cream colored. [1697]

Q. You are not sure? A. No.

Q. Then, if this was an important matter, Mr. Oftedal, and you had to be sure about it, would you be able to state whether it was cream colored or white?

A. I would say to the best recollection of me, that it was cream.

Q. To your best recollection it was cream colored? A. Yes, sir.

Q. Now, I think you testified that you observed the color of the scotch tape? A. Yes, sir.

Q. By which the slips or documents which were appended to that original instrument were affixed?

A. Yes, sir.

Q. And that applies to Exhibit 79, does it, sir, only? A. Yes, sir.

(Testimony of Willard A. Oftedal.)

Q. When did the color of the scotch tape ever occur to you?

A. The first time I saw it, and the only time I saw it.

Q. Is it not a fact that the matter of the color of that scotch tape did not occur to you until Mr. Conway, or Mr. Conroy, testified or examined these documents here last week?

A. That is not true. [1698]

Q. Did you ever make a report with respect to the description of these diaries? A. Yes, sir.

Q. Do you have that report? A. No.

Q. Can you produce it? Of course, if you don't have it you can't produce it.

A. I don't have the report now, but was included in our report that we sent to Washington.

Q. Did you make some notes which are in your files or is there a report any place where you described these diaries as being yellowish in color and having scotch tape which appeared to be greenish in color? A. No.

Q. That is not in any report, is it? A. No.

Q. So,—you are now then relying upon your memory with regard to the color of the scotch tape, is that right?

A. Well, that is a very clear thing to me.

Q. Very clear to you? A. Yes, sir.

Q. And is it just as clear as the color of the pages, sir?

A. No. It is more clear than the color of the pages.

(Testimony of Willard A. Oftedal.)

Q. More clear than the color of the pages?

A. Yes, sir. [1699]

Q. In other words, you could be in doubt about the color of the pages, but these little pieces of scotch tape which were in the last exhibit, Exhibit 79, for the year 1945, that is perfectly clear to you?

A. Yes, sir.

Q. Will you examine that exhibit which is No. 500, turn it up edgeways, and state whether or not that exhibit has the appearance of having been handled or used? A. No, it hasn't.

Q. Did you examine the originals of these diaries that Mr. Seijas showed you closely enough to determine whether they had the appearance of having been used, the originals, sir? A. No, sir.

Q. You didn't examine it that closely?

A. No.

Q. When did you first report to anyone, Mr. Oftedal, the color of the scotch tape which you observed in these diaries?

A. Oh, back there about the time they were photostated, as I recall it.

Q. And to whom did you make that report?

A. Well, I remember telling O'Leary about it.

Q. You remember telling him about it?

A. Yes, sir.

Q. But neither one of you made any written [1700] notation or written record with regard to the description of these diaries which included either the color of the pages or any fact such as the color of the scotch tape or whether the diaries

(Testimony of Willard A. Oftedal.)

had been handled, whether they showed an appearance of having been handled?

A. No, sir, but you see, we had every reason to believe the originals would be available. That wasn't important at the time.

Q. No, I understand, Mr. Oftedal. I was not being critical of you, sir. I merely wanted to know what you did do at that time. Was there ever any record made by either Mr. O'Leary or yourself with regard to a careful description of the originals of these diaries?

A. Mr. O'Leary never saw the originals, sir.

Q. Mr. O'Leary never saw the originals?

A. No, sir.

Q. Of course, he couldn't describe them, then

A. No, sir.

Q. And your observation of them was not a close, careful observation, was it, sir?

A. Yes, it was pretty close.

Q. Pretty close? A. Yes.

Q. I will ask you, Mr. Oftedal, when you were questioned about these diaries and how closely you [1701] examined them during the course of the Seijas trial just about a year ago, you testified in the following manner to the following questions: "Q. And you examined records and documents including these diaries? A. No, sir. Q. I beg your pardon? A. No, sir. We weren't able to see the originals of the diaries. Q. Well, you saw them as they were photostated, didn't you? A. Yes, sir,

(Testimony of Willard A. Oftedal.)

I saw the photostats, yes, sir." Did you answer in that way? A. Yes, sir.

Q. So, you saw the photostats, but you testified in Mr. Seijas' trial on the issue of these diaries that you didn't see the original diaries?

A. I saw the original diaries. You aren't reading for enough there.

Q. I am sorry. Maybe I haven't. I will read on. You testified, "A. No, sir, we weren't able to see the original diaries. Q. Well, you saw them as they were photostated? A. Yes, sir, and I saw the photostats, yes, sir. Q. Taking your version of how the photostating was done, and limiting your observation to that, at least you saw those records to that extent? A. Yes, sir. Q. Checks were submitted to you for examination—" and it goes on about another subject. You answered in that manner just a year ago, sir? A. Yes, sir. [1702]

Q. Now, with regard to the loans made to Mr. Seijas, what did you ascertain or determine with regard to the monies that Mr. Seijas had borrowed from Mr. Forman, and particularly the $150,000 which Mr. Seijas retained from the sale to Mr. Morin of the so-called city routes in Bremerton?

A. That was a part, I believe, of the original stipulation in this case, if I am not mistaken.

Q. Yes. That was a part of the stipulation. But, at the time you testified in the Seijas case, Mr. Oftedal, you testified at the close of that case, did you not, sir, just as you are testifying here at the close of the case?

(Testimony of Willard A. Oftedal.)

A. I testified three or four times.

Q. Yes, sir. I understand you did. But you testified at the close of the case, too, didn't you?

A. Yes, sir.

Q. And you had the benefit of the investigation that you had made and Mr. O'Leary had made which went on for years into this subject, didn't you, sir? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. Did you establish from your investigation [1703] that there was a loan from Mr. Forman to Mr. Seijas?

A. We were told by Mr. Forman that there was a loan.

Q. And you established that from other sources, didn't you, sir?

A. I don't recall any other sources.

Q. Did Mr. Seijas tell you that it was a loan?

A. Yes, sir.

Q. Were there any other sources that you have checked to determine whether there was such a loan?

A. As I recall, it was only Mr. Seijas and Mr. Forman that would have known.

Q. So, you didn't make any check to determine whether that was a loan or not?

A. We made every effort to check.

Q. You had access to Mr. Seijas' records, didn't you, sir? A. No, sir. Some records.

Q. Some records? A Yes.

Q You had access to his bank accounts?

A. Yes.

(Testimony of Willard A. Oftedal.)

Q. Is that right, sir? A. Yes.

Q. From who else did Mr. Seijas borrow money in 1948? A. I don't remember.

Q. You don't remember that? [1704]

A. No.

Q. A year ago, Mr. Oftedal, did you have a better memory about all these details than you have today?

A. Quite presumably so. Quite possibly because I have refreshed my memory from the statements.

Q. And it is likely that a year prior to that you had still a better memory about these details?

A. That is doubtful.

Q. So, the passage of time, some three years, at least, from the time that some of these discussions have taken place, have dimmed your memory, have they? A. No.

Q. They have not? A. No.

Q. I will ask you, Mr Oftedal, if it is not a fact that at the time of this meeting between yourself, Mr. O'Leary and Mr. Forman and myself, that you advised us that the purpose of the meeting was to notify us with respect to certain allegations that Mr. Seijas had made, or certain facts that he had given you? A. Yes, sir.

Q. Was that not the purpose of the meeting?

A. He had not given them to me, but what you said is basically true.

Q. Basically this information had come to you?

A. Yes, sir.

Q. And that was the purpose of that meeting,

(Testimony of Willard A. Oftedal.)

and you advised us at that time that Mr. Seijas had told you the following points, and this was at a meeting, Mr. Oftedal, in Room 512 of the Smith Tower, May, 1953, 2 p.m. o'clock, do you recall that, sir? A. Yes.

Q. And these points were as follows: "One check payable to Armador Seijas during 1944 to 1945 of approximately $80.10 per week were claimed as having been the property of Army Seijas."

A. Yes, sir.

Q. That was one point? A. Yes.

Q. Now, that point is the point that is covered by the exhibit which you have referred to as the transcript of checks that you have taken, is that right, sir? A Yes, sir.

Q. What did your investigation of that point up to the present time develop?

A. I'm sorry. I didn't understand.

Q. What did your investigation up to the present time of that point develop? Did it not develop the fact that Mr. Seijas did receive that money, and I mean by that, Army Seijas, of course, not the father? Am I confusing you, sir? 1706]

A. No, you are not confusing me at all. I understand what you mean. The only thing is, I don't want to give you a wrong answer. I will have to say, sir, that I just can't answer that except by expression of an opinion.

Q. I only want you to answer with regard to facts, Mr. Oftedal. Now, the second point that you gave us is that Mr. Seijas had stated that the capi-

(Testimony of Willard A. Oftedal.)

tal gain of the Palace Billiards in Bremerton purchased for $20,000 was sold in October of 1944 for $30,000 and that he had realized a capital gain on that transaction, is that right? A. Yes, sir.

Q. Now, what facts did you investigate and determine to substantiate that claim up to the present time? A. Up to the present time?

Q. Yes, sir.

A. During the last trial—gosh, I can't think of his name. It was the gentleman that testified in regard to that—Mr. McGill, and he testified, as I recall, that there was no capital gain. Now, that is speaking from recollection a year ago, and I am not sure.

Q. You agree to the statement, Mr. O'Leary, that it is a fact you were not——

A. Oftedal. [1707]

Q. I am sorry again. I meant it as a compliment, sir. Did you ever determine that it was a fact that Mr. Seijas had received $5,000, $10,000, or any such sum as a capital gain on that transaction?

A. As I recall, he didn't receive anything.

Q. He didn't receive it? A. Yes.

Q. But you heard his testimony here in court, did you not, sir? A. Yes, sir.

Q. You have been sitting here through the trial?

A. Yes.

Q. And his testimony was to the effect that he got $5,000, and that Mr. Forman got $5,000, was it not, sir?

(Testimony of Willard A. Oftedal.)

A. By gosh, I don't remember that.

Q. You don't remember that? A. No.

Q. But that was, I think, last week that he testified? In any event, you were never able to confirm that Seijas received $5,000 or any such capital gain from this situation, were you, sir? A. No, sir.

Q. Now, the third point he raised at that time, or that you raised, and stated that Mr. Seijas had advised you that there was an alleged unreported [1708] pinball receipts shared by Army Seijas and William Forman from 1942 through 1945 inclusive, and that Mr. Seijas had stated to you that he had held a $172,000 off the top out of which he had received $86,000, is that right? A. Yes, sir.

Q. And that was the third point that you advised us about, is that right? A. Yes, sir.

Q. And the fourth point was that Mr. Seijas had stated to you that the original agreement was "to hold out only the $25,000, but once we got started we could not stop," is that right?

A. Yes. Wait a minute, Mr. Seijas didn't say that to me.

Q. It had been reported to you that he had made that statement? A. Yes.

Q. That had come to you? A. Yes.

Q. All right. Now, your investigation up to the present time demonstrated that three of these—two of these things, at least, that Mr. Seijas claimed, were untrue, have they not, sir?

A. One of them, possibly, sir.

Q. Well—one of them? Which one, sir?

(Testimony of Willard A. Oftedal.)

A. Presumably this capital gain on the sale of the Palace Billiard. [1709]

Q. Well, actually, there are only three points because the fourth point is buried in the third one.

A. Yes.

Q. Well, were you ever able to determine that the checks payable to Armador Seijas during 1944 to 1945 were received by anybody else, or the proceeds of those checks were received by anyone else other than Army Seijas? A. No, sir.

Q. The fact that Mr. Forman may have endorsed five of them, and Mr. Renstrom endorsed four of them, would have no significance, would it, sir?

A. No.

Q. You didn't attach any significance to that?

A. No.

Q. Now, isn't it a fact, Mr. Oftedal, that the conferences which we had at that time you merely advised us that these three things had come to your attention? A. Yes, sir.

Q. Isn't that right? A. Yes, sir.

Q. And that I had advised you we would check into the matter, isn't that right? A Yes, sir.

Q. That was generally the substance of our [1710] whole conversation except we did go down and have a cup of coffee? A. Basically, yes.

Q. Basically that is it? A. Yes.

Q. Do you have a written report or a written memorandum on that conference, sir?

A. Yes, sir.

Q. Do you have it here? A. Yes, sir.

(Testimony of William R. Pearson.)

Q. [illegible] A. Yes, sir.

Mr. Osborn: I object. There is no reference made to this correspondence on them.

The Court: Overruled.

Q. (By Mr. Reed:) This statement that you made just before the testimony that you have just given, there, is not true. You are

Mr. Reed: Make you say it was more positive, your Honor.

The Court: Certainly.

Q. (By Mr. Reed:) Mr. Pearson, is it a fact or is it not a fact that on the occasion of this conference with Mr. Wright, when Mr. Wright and myself testified, Mr. Seljan advised you that he could [illegible] the statement and that it was necessary? [1711]

A. Mr. Seljan advised me in a number of different ways on that same occasion, yes.

Q. And he advised you in a number of different ways of that general situation, didn't he, at this time?

A. Probably, yes.

Mr. Reed: That's all.

(Time for noon recess was taken.)

Mr. Osborn: If your Honor please, we will offer [illegible] the testimony of Army Seljan taken on January 21, 1930, and consisting only of a typewritten statement, which, particularly, and signed and sworned to by said

Mr. Reed: We would like an opportunity to examine it, your Honor.

The Court: You may do so at the present

(Testimony of Willard A. Official.)

Redirect Examination

Q. (By Mr. Obenour) [illegible] you have just produced for Mr. Mead, do you have them?

A. Yes, sir.

Q. May I have it, please? A. Yes, sir.

Mr. Obenour: I ask that it be marked. We will offer it as the exhibit next in order.

The Clerk: Plaintiff's Exhibit 141 has been marked for identification.

Mr. Mead: This latter document would be entirely self-serving. The witness has testified with respect to it.

The Court: The same document that was referred to on cross-examination?

Mr. Mead: Yes, your Honor. [1713]

The Court: I will take that under consideration as well.

Mr. Obenour: Might I observe it was over objection that reference was made to it.

The Court: I recall your objection to its being produced, and it was demanded by the defense and referred to in the cross-examination. I am going to look at the statement and concern myself whether you have not invited submission of the document in evidence. Go ahead.

Q. (By Mr. Obenour): There has been reference made to the three points Mr. Mead questioned that were given to him in the conference of May 29, 1952, Mr. Official. A. Yes, sir.

Q. At the time you were advised of Mr. Snijer's,

(Testimony of Willard A. Oftedal.)

Army Seijas' statement concerning the checks to his father, was his father living or dead?

A. Yes.

Q. Was there anyone else other than Mr. Seijas Senior and Army Seijas who had any knowledge from whom you could inquire as to who received the actual proceeds of these checks?

A. No, sir.

Q. And in your investigation was there anything else that you could do that you uncovered [1714] through your entire investigation that would prove or disprove Mr. Seijas', Army Seijas' statements concerning these checks? A. No, sir.

Q. The question as to importance you placed upon the endorsements, did you have an opinion as to who received the proceeds?

Mr. Mead: Objected to as calling for a conclusion.

The Court: Yes. Counsel didn't invite his opinion on cross examination, and I don't think we should enlarge on it now.

Mr. Obenour: I would submit, your Honor——

The Court: I don't recall that counsel asked for his opinion.

Mr. Mead: On the contrary, we cautioned the witness that he didn't——

The Court: Well, as a matter of fact, the witness very fairly observed that he could only give an opinion in one respect. Now, whether it bore on this matter or not——

Mr. Obenour: If your Honor please, I would

(Testimony of Willard A. Oftedal.)

request reference to a question of counsel as to why he attached significance to an endorsement of Forman and not to the endorsement of Renstrom.

The Court: Yes, I recall that, but I think [1715] under the circumstances we will let it rest where it is now.

Mr. Obenour: Yes, sir.

Q. (By Mr. Obenour): Concerning the scotch tape color, is it possible, Mr. Oftedal, you did incorporate that in your report, a supplemental report in 1953?

A. It is possible. I don't remember.

Q. You don't recall? A. No.

Q. Do you recall telling it to Mr. O'Leary?

A. I do.

Q. Do you recall telling anyone else about it prior to last Thursday or when Mr. Conway testified?

A. I remember telling Mr. Mead about it.

Q. Pardon?

A. I remember telling Mr. Mead about it in your office.

Q. And when did you tell Mr. Mead about it in my office?

A. About three days or two days before the trial started.

Q. And had you advised me about this matter before trial? A. Yes, sir.

Q. And did you hear any conversation between me and Mr. Conway prior to his testimony concerning the effect of age on scotch tape and par-

(Testimony of Willard A. Oftedal.)

ticularly as to whether he would be able to form an opinion as to the effect of photostats upon aged scotch tape? [1716]

A. No, I don't recall that.

Q. You do not recall that? A. No.

Q. Do you recall advising me of this matter, though, prior to trial? A. Yes.

Q. On the occasion of the interview was there any request made of Mr. Forman and/or Mr. Mead for records of Mr. Forman?

Mr. Mead: Objected to, your Honor.

The Court: Sustained. It is not redirect.

Mr. Obenour: Subject matter of the reading, if your Honor please.

The Court: I think not.

Q. (By Mr. Obenour): During the entire conference on May 29, 1951, did Mr. Forman make any statement or answer or orally reply at all?

Mr. Mead: That is objected to, your Honor.

The Witness: Yes.

The Court: Well, that, I think, is overruled. Have you answered?

The Witness: Yes, sir.

Q. (By Mr. Obenour): What, sir, was the—or, was there more than one?

A. Only one that I recall. [1717]

Q. Only one? A. Yes.

Q. What was the one statement that Mr. Forman made during that interview?

A. That was——

Mr. Mead: Objected to, your Honor.

(Testimony of Willard A. Oftedal.)

The Court: Overruled.

The Witness: That was after I told them that Mr. Seijas had informed us of this $172,000 split 50-50, and Mr. Forman asked if that meant he would have to pay fraud penalties.

The Court: That was covered on direct, I think.

Mr. Mead: We move it be stricken, your Honor, and it is objected to.

The Court: It wasn't redirect because it was covered on direct.

Mr. Mead: May the answer be stricken?

The Court: The last statement of it, not the prior one. Have you concluded?

Mr. Obenour: Yes, sir.

The Court: Step down.

(Witness excused.)

The Court: Have you had an opportunity to look at that statement now?

Mr. Mead: Could we carry this over to Monday?

The Court: Yes, of course you may, if you wish. I thought from your movements that you might have seen it. We will reserve on that one matter. Gentlemen, would you come to the bar here, please, for just a moment.

(Thereupon, a discussion at the bar was held.)

The Court: I was just concerned in order to be able to tell you something about the plans for the future. I find with great pleasure that my previous predictions concerning concluding the case by mid-week at least are joined by all concerned. We be-

lieve the case will conclude wholly and finally by that time.

Now, we are going to part again for a little longer interval, so I must specially call your attention now to what I have told you before. It is imperative, Ladies and Gentlemen, for the proper administration of justice that you should hear nothing or see nothing concerning this case even in the most remote manner, but keep all that you have heard in your hearts and minds and consciences and discuss it with no one. Be prepared to return Monday morning at 9:30.

(Thereupon, the Jury withdrew from the courtroom.)

The Court: I have a question that I wish to [1719] submit to counsel for the defense with respect of the instructions. I have been studying the requested instructions, of course, in contemplation of ultimately preparing a charge, and I find that the defense instructions, well typified by request 4, seems to make the point that the only offense alleged as the object of the alleged conspiracy is that referred to under the paragraph denominated "c" in the count now on trial; namely, the object referring to the evasion of tax by the defendant Seijas and wife.

I am at a loss to understand this request, particularly since it is followed by various others all committed to the same thought.

I am very anxious to give full consideration to any question to charge, as I invariably do, and

in fairness to you must say that I do not understand the theory upon which you so restrict and limit your request, and I am sure you must have some theory about in mind because repeatedly throughout the trial you have made the same assertion in making objections, and I have on several occasions called your attention to the fact that I did not agree with your view of it, or at least it didn't seem so to me. [1720]

I am sure you have in mind what I am talking about, do you not? There is no need of expatiating further. My thought is, Gentlemen, if you have a theory on which you suggest the charge should be so limited, that is, the charges in the indictment should be so limited here, I would be very pleased to have it together with any citation of authority that you think bear that contention out. I cannot see it so far as I have studied the matter now. I mean, I cannot see your theory, and not knowing your theory, I cannot possibly evaluate its merit. So if you would advise me in some brief form, orally if you prefer, and with the citations of authority concerning what your theory about this is, I would be very happy to consider it before the charge is finally determined upon.

Mr. Bischoff: May we do it the first of the week?

The Court: Oh, yes, of course, and I call this, simply, to your attention in a spirit of fairness to you so that you may advise me on what theory you believe that the only object of this conspiracy could go to the Jury. Do you understand me fully?

Mr. Bischoff: Very fully. May I make one [1721] suggestion in connection with the instructions, that we intend to submit additional instructions based upon the Grunewald case, which I think your Honor has had occasion to examine, in connection with the other matter that we discussed.

The Court: There is no use of suggesting it until I see it. Thank you for calling it to my attention. I don't mean to be abrupt with you.

Mr. Bischoff: I thought your Honor may want to read the decision with that in mind because in there is a specific charge set forth verbatim.

The Court: Was the Grunewald case cited to me in some other connection?

Mr. Bischoff: The constitutional question that we submitted.

The Court: All right.

Mr. Obenour: In that regard, I would suggest the matter of the verdict because there is a conspiracy charge which might be answered either guilty or not guilty, and there are four offenses which should be considered in the event they were to return a verdict, so they would answer yes or no to the four offenses.

The Court: Well, if you want me to consider that matter, you can propose a form of verdict. [1722] Either side is free to do that, and in the last analysis I will determine what the form of verdict should be, but I would be glad to have any suggestions that you want to make with respect to it.

Mr. Mead: With the matter of the last witness,

it wound up very fast and there may be one question that I would like to ask on recross and I didn't have an opportunity to.

The Court: There will be no difficulty there. I rather suspect Mr. Oftedal will be here whether he is especially invited or not.

We will take up again at 9:30 Monday morning.

(Whereupon, the court recessed to reconvene Monday morning, August 13, 1956, at 9:30 a.m.)

(Whereupon on the 13th day of August, 1956, at the hour of 9:30 a.m., the following further proceedings were had.)

The Court: Good morning ladies and gentlemen and counsel, I hope that you all had a pleasant week end.

Are you ready to proceed?

Mr. Mead: Yes, sir.

Mr. Obenour: I request this be affixed to 138. It's the balance of the matter that Thelma Endersby stated at the last trial.

The Court: Oh, yes.

Mr. Mead: We have no issue about the identification. We have the same general objection, but we have no question about the identification. It was agreed between us.

The Court: Exhibit 138 was not offered or admitted in evidence. It's merely a matter of attaching this for the completion of the record.

Mr. Mead: We have no question about the identification.

The Court: It may be attached.

EDWARD J. O'LEARY

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows: [1724]

The Clerk: Please state your full name and spell your last name.

The Witness: Edward J. O'Leary, O'-L-e-a-r-y.

Direct Examination

Q. (By Mr. Obenour): Where do you live, Mr. O'Leary?

A. 411 North Sixty-first Street in Seattle, Washington.

Q. And your occupation?

A. Special Agent of the Internal Revenue Service.

Q. How long have you been so engaged?

A. Since January, 1951.

Q. How long have you been in the Internal Revenue Service? A. Since March, 1942.

Q. What training have you had in preparation for your work in the Internal Revenue Service?

A. I am a graduate of the University of Washington with a major in accounting. After leaving the University, I was one year at Boeing Aircraft as a factory accountant and then I did a turn in the service in March of '42 as Deputy Collector.

Q. How long did you work as Deputy Collector?

A. I was Deputy Collector from 1942 to 1945 at which time I was promoted to an administrative [1725] position, Assistant Chief of Miscellaneous Tax Division.

(Testimony of Edward J. O'Leary.)

Q. What were your duties as Deputy Collector?

A. To audit tax returns, collect tax and enforce the Internal Revenue Laws.

Q. And in pursuance of your duties as Deputy Collector, did you have occasion to make tax computations upon the income taxpayers with whom you would come in contact? A. Yes, I did.

Q. After your work in the administrative position that you referred to as Chief of the Miscellaneous Tax Division, what did you then do?

A. Well, I specialized as a Deputy Collector in the investigation of suspected fraud cases from 1946 through 1950.

Q. And what happened in that time?

A. At that time I transferred to the Intelligence Division as Special Agent.

Q. During your work as a Deputy Collector after—I believe you said you specialized in fraud work or suspected fraud work, did you have occasion to make computations of taxes due upon the income tax of various persons?

A. Yes. During that four-year period, I specialized in a determination of tax, audit of returns and the computation of tax liabilities. [1726]

Q. And in your work as a special agent, has that included audit of returns and preparation of tax computations?

A. It includes the investigation of tax returns. The work itself does not require a tax computation. That is done by the Revenue Agent, although

(Testimony of Edward J. O'Leary.)

in the course of the work, I myself do make that practice.

Q. During the course of your work for the Internal Revenue Service, did you have occasion to investigate the tax liabilities of Armador A. Seijas and William R. Forman? A. Yes, I did.

Q. When did you first meet Mr. Seijas?

A. I met Mr. Seijas the first time, as I recall, in April of 1950.

Q. And where did you meet him?

A. I met him in his office in the Smith Tower.

Q. What was your position at that time?

A. At that time I was Deputy Collector.

Q. And was anyone else with you on the occasion of your first meeting with Mr. Seijas?

A. No, I was by myself.

Q. On that occasion what happened?

A. I advised Mr. Seijas that I had his 1948 income tax return to investigate. I discussed his general background and asked who his bookkeeper was, and he stated it was Mr. Jacobsen, and I asked [1727] him for a general breakdown of his assets and bank accounts.

Q. When did you first meet Mr. Forman?

A. I met Mr. Forman shortly after this. I don't recall the exact date. It was an informal discussion. I believe it was probably one or two months after April of 1950.

Q. Where did you meet him?

A. In his office at 1814 Smith Tower.

Q. And what happened on that occasion?

(Testimony of Edward J. O'Leary.)

A. I called on Mr. Forman and informed him that he was being investigated and his partner, Mr. Seijas, and held a general discussion with him with respect to the business partnerships that he conducted with Mr. Seijas, and I asked him who the bookkeeper was and obtained general information with respect to the investments of Seijas in the theatre operations of Mr. Forman.

Q. What did Mr. Forman say concerning his theatre interests and particularly as it affected Mr. Seijas?

Mr. Mead: That is objected to as immaterial, your Honor.

The Court: Overruled.

The Witness: Well, Mr. Forman indicated or stated that he was interested in the theatre business, primarily, that the pinball business was distasteful to him or words to that effect. [1728]

Q. Did he mention any theatres in which he had any interest with Mr. Seijas?

A. Yes. He mentioned the Duwamish Theatre and mentioned that he had let Army in on that as a good deal for Mr. Seijas.

Q. Who did he say was his bookkeeper?

A. He said that Mr. Gustafson was his bookkeeper.

Q. What happened after that meeting?

A. Well, after that meeting, I continued to investigate Mr. Seijas' tax affairs.

Q. Did you have occasion after that time to see Mr. Seijas?

(Testimony of Edward J. O'Leary.)

A. Yes, I saw Mr. Seijas on a number of occasions and discussed his activities briefly with him. I used to call on his office quite frequently, but those discussions were very unsatisfactory and limited because Mr. Seijas was continually on the telephone or busy with clients, and at some time we informed—Mr. Oftedal and I informed Mr. Seijas that we preferred to see him either in our office or an office of his accountant because he was so busy in his office.

Q. What were some of the occasions that you had such interviews with Mr. Seijas?

A. Well, they were frequent during the years 1950 and '51. He referred to me his bookkeeper, [1729] Mr. Jacobsen, and I did most of the work out of Mr. Jacobsen's office.

Q. Did he at anytime during the investigation engage the services of another accountant?

A. Yes, he did. Sometime in the early part of 1951, he engaged the services of Mr. Whittle.

Q. Had Mr. Seijas made any statement to you as to what prompted his engaging Mr. Whittle rather than Mr. Jacobsen?

A. My recollection is that Mr. Jacobsen was attempting to draw up the net worth of Mr. Seijas but that he was not an experienced accountant, and the job was too much for him as I concluded.

Q. And what happened then?

A. Well, Mr. Seijas engaged Mr. Whittle following our request for a comparative net worth statement.

(Testimony of Edward J. O'Leary.)

Q. Did you obtain such a statement?

A. Yes, we did.

Q. When?

A. We obtained the statement on December 29, 1951, although we had discussed with Mr. Whittle prior to that time the various assets and liabilities that went into that statement. Mr. Whittle spent considerable time preparing it, and we used to call on his office at which time he had rough drafts or work sheets, and we held discussions with him.

Q. Is that what has been known during the trial as the "Whittle Net Worth Statement"?

A. Yes.

Q. After December of 1951, did you have occasion to have a formal interview with Mr. Seijas concerning the contents of the net worth statement?

A. Yes, we did, on January 11, 1952.

Q. And what did that interview consist of?

A. Well, Mr. Seijas came to the office at our request for the purpose of explaining or going over this net worth statement with us.

Q. Did you have any subsequent interview with Mr. Seijas concerning this same statement?

A. Yes, at the latter part of that same month, Mr. Seijas requested that he be allowed to make a supplementary statement. He wanted to make an explanation, and we obliged.

Q. Handing you Exhibit 139 for identification, can you identify the document or documents contained therein?

A. Yes, sir. Exhibit 139 is the reported ques-

(Testimony of Edward J. O'Leary.)

tion and answer statement which Mr. Oftedal took from Mr. Seijas in our office on January 11, 1952.

Q. And attached thereto, is there any other supplemental statement to which you have referred?

A. Yes. Attached is a supplemental statement [1731] of Mr. Seijas taken on January 28, 1952.

Mr. Obenour: I offer 139, your Honor.

Mr. Mead: Objected to, your Honor, on the grounds of competency or materiality. Mr. Seijas has testified with respect to this subject, and we object to it as immaterial.

The Court: My impression is that the witness can relate what occurred on that time, but the document itself would not be admissible as an exhibit, if there be objection on that ground. Now, I am not sure that your objection goes to that. Do you intend it to go to that or not?

Mr. Mead: What particular feature does your Honor refer to?

The Court: I am satisfied that everything that was said on that occasions, as far as I am generally advised, would be admissible, but there may be a difference between the witness relating it and the document itself being admitted as in evidence. Now, on the first ground, I overrule you, as far as materiality is concerned. You did say competency and I wonder if you mean competency in the sense of the document as an exhibit as distinguished from its content. [1732]

Mr. Mead: Yes, I mean that, of course, your Honor.

(Testimony of Edward J. O'Leary.)

The Court: On that ground, at least at this time I would sustain the objection, but the ruling is not to be understood as prohibiting the witness from relating what occurred at that time.

Mr. Obenour: We would submit that it pertains to overt acts 32 and 33, and particularly the document as such would be the best evidence of what transpired.

The Court: I am not entirely sure. Is there a signed statement by Seijas?

Mr. Obenour: The supplemental has been signed, I believe, your Honor.

The Court: The signed statement by the Defendant, I think then the rule of admitting the document as an exhibit would not be applicable, but if it's not a signed statement, then I think the witness may relate what was said in full and in detail, but the document itself as an exhibit, I think under those circumstances would not be admissible, excepting if it were signed. If it were signed, then the document itself is admissible. That is my impression of the ruling.

Mr. Obenour: I believe, your Honor, this [1733] is the original interview dated January 11 and a supplemental dated January 28, 1951, which I believe incorporates by reference the statement itself.

The Court: I am merely telling you what my impression of the ruling is. The content as far as the witness recalls it, and he may use his statement to refresh his recollection if that be needed, but the exhibit itself as a piece of paper is not admis-

(Testimony of Edward J. O'Leary.)

sible unless it was signed. If it were signed, then the document itself, I think is admissible. Now, is it signed or unsigned?

Mr. Obenour: The supplemental, your Honor, is signed, and it incorporates by reference the statement itself.

The Court: Then, I take it, the answer is that it is signed.

Mr. Obenour: I wanted to distinguish, your Honor, that there are two separate physical documents.

The Court: Yes, I understand that. If the later one incorporates the former, why, then, of course, the whole document is signed.

Do you take any different view as far as signature is concerned, Mr. Mead? [1734]

Mr. Mead: Well, your Honor, I think Counsel has stated the fact correctly. The first agreement is not signed or the first statement is not signed. The supplemental is signed.

The Court: Well, the point is, does the supplemental statement make the first one a part of it by reference? If it does, then the whole thing in my judgment is signed.

Mr. Mead: As to that, I couldn't say, your Honor.

The Court: I could be wrong, but that is my view and my ruling.

Mr. Mead: I haven't examined it that closely, and we stand on our objection.

The Court: I understand you are standing on your objection, but I merely wanted to be sure that

(Testimony of Edward J. O'Leary.)

we understood each other. You can examine it more fully to the point I have just indicated if you wish.

While you are doing that, I might explain to you, Ladies and Gentlemen of the Jury, since this is your first occasion as jurors, that the admission of the evidence, making of objections to evidence and so on is a matter that sometimes is misunderstood by lay people. The Jury are to take no [1735] inference of any kind whatever from the fact that an objection is made. That is a perfectly proper thing for either side to do as they see fit, and you must take no inference that an objection is made or a subsequent ruling of the Court one way or another. That in itself has no bearing on your problem. Your problem is just to confine yourself to that part of the evidence that the Court admits, and to take no inference from the fact that other things may be rejected.

These seem to laymen as being very technical statements, and, indeed, sometimes they are, but in general they reflect the wisdom of long time and a matter of what is proper to be heard and what is proper not to be heard and considered in the trial of a jury case. At least, you must assume there there was wisdom in it and follow very closely what the Court ruled with respect to it.

Sometimes, as in the present instance, it seems to be a very fine point, perhaps, to the layman, but there is substantive reason for that ruling, I can assure you without elaborating on what it is now, so, in general, will you keep in mind not only now

(Testimony of Edward J. O'Leary.)

but throughout the trial—I would instruct you more [1736] fully on this at the conclusion, but I might as well do it while the gentlemen are looking at papers—that no inference is to be taken at all by the Jury concerning the making of the objections no matter how frequent they may be, and take no inference from the ruling of the Court excepting only when the Court permits evidence to be considered, and then, of course, the Jury will consider, but you must not consider anything that is excluded from your attention.

Now, this requires sometimes rather very close attention and thought and concern by the Jury, but thus far in the progress of human affairs, we have not figured out any better way of attending to these things, and the law is based on the assumption that jurors will faithfully and carefully and fully in every detail follow the instructions that the Court gives them even when those instructions require very difficult mental exertions at times, so will you please keep that in mind throughout the trial with respect to the making of objections?

Mr. Mead: Your Honor, I have read the supplemental statement as to those portions indicated to me by Counsel. It is a rather lengthy statement, [1737] and I couldn't read the entire matter, and I see in the supplemental statement a statement that it is a supplemental to a previous statement, but there is nothing that has been called to my attention in this so-called supplemental statement that incorporates by reference everything that was said in the previous statement.

(Testimony of Edward J. O'Leary.)

The Court: Well, for the present, we will reserve on it. You may go ahead in the light of the ruling made. Do you have clearly in mind what the ruling is?

Mr. Obenour: Yes, sir.

The Court: All right, go ahead.

Q. (By Mr. Obenour): On the occasion of the interview of January 11, 1952, Mr. O'Leary, did you have occasion to specifically ask Mr. Seijas if in his opinion his income had been correctly reported up through the year 1945? A. Yes, sir.

Mr. Mead: Objected to as leading, and I move that the answer be stricken.

The Court: Overruled. The answer will stand. You say you did ask that?

The Witness: Yes, sir, I did.

Q. (By Mr. Obenour): What answer did Mr. [1738] Seijas make on January 11, 1952, to you and Mr. Oftedal to this question?

A. He replied that his income had been properly reported up through the year 1945. The exact statement I can't recall without referring to the statement.

The Court: You may if you wish refer to any notes you made at the time. I take it these were made at the time?

The Witness: Yes. This was recorded by a stenographer at the time. The question was asked, "Is it your sincere believe that you had properly reported it for income tax purposes up to 1945," and the answer is, "Yes, it is my believe that I paid the

(Testimony of Edward J. O'Leary.)

tax on it, and wherever there was a mistake, the Internal Revenue Department corrected it.".

Q. (By Mr. Obenour): And on the occasion of January 28, 1952, did you ask Mr. Seijas if it was then his belief that his tax returns filed for the years prior to 1945 had been correct?

Mr. Mead: Objected to as a leading question, your Honor.

The Court: Overruled.

The Witness: Yes.

Q. (By Mr. Obenour): And on January 11—[1739] January 28, 1952, what did Mr. Seijas tell you and Mr. Oftedal concerning this question?

A. Could you repeat that question again?

Mr. Obenour: If your Honor please, I would request at this time to sever the supplement from the original interview.

The Court: Why don't we complete the response now and get this settled. What did he say with respect to reporting the income from 1942 to 1945? That was the question, wasn't it?

Mr. Obenour: Yes, sir.

The Witness: As I recall, he stated that the income had been properly reported from the years up through '45.

Q. (By Mr. Obenour): Do you mean he made that statement on both the 28th and the 11th?

A. Yes.

Q. Then on April 2—I have forgotten the date—referring to the last page of Exhibit 138, Mr.

(Testimony of Edward J. O'Leary.)

O'Leary, is there an appendix to the supplemental statement dated April of 1952?

A. Yes, there is, dated April 11, 1952.

Q. On that occasion did he make any statement concerning his belief of the correctness of the returns filed prior to 1945? [1740]

A. Yes.

Q. And what did he say?

A. "Mr. Oftedal has asked me if I filed any income tax returns with intent to evade the payment of income taxes to which I say certainly not. There was absolutely no intent, wilful or otherwise, to evade the payment of taxes rightfully due from me in the preparation and filing of my income tax returns for the years herein involved.

This is a supplement to the statement above made as of January 28, 1952."

Signed "Army Seijas."

Mr. Obenour: We would particularly offer the supplemental statement signed by Mr. Seijas individually, the last page which was a supplemental of April, 1952.

The Court: I will reserve on the exhibit. Go ahead.

Q. (By Mr. Obenour): In the course of your investigation, did you find any records pertaining to a $30,000 deposit in 1946 to the Army Seijas, Trustee, bank account? A. Yes, sir, I did.

Q. Where did you find records pertaining to such a deposit?

A. An examination of the trustee account of

(Testimony of Edward J. O'Leary.)

[1741] Mr. Seijas disclosed a deposit of $30,000, I believe, in August of 1956, and the canceled checks with that statement disclosed a check to William Forman in the sum of $15,000. I questioned Mr. Seijas with respect to this and asked him why he received a $30,000—he first explained that the $30,000 deposit was a check of Mr. Morin covering the sale of Forman's interest in the United Amusement Company, and I asked him why he had deposited the money to his account when the money was apparently intended for Mr. Forman, and he stated it was put into his trustee account and that he acted for Mr. Forman.

Mr. Mead: Could we have the date of this conversation?

The Witness: As far as I can best recall, this conversation took place in February of 1952. This was the time that those bank statements and checks were made available to me by Mr. Whittle.

The Court: Go ahead. I think that you were interrupted there, and we may have lost the train of thought. What was it that you stated about the Morin check?

The Witness: He stated that he had deposited the money to his trustee account because he was acting for Mr. Forman and that it was [1742] Mr. Forman's money. I then pointed out that he had only issued a check to Mr. Forman for $15,000 rather than for $30,000, and he said that Forman had agreed to loan him the remaining $15,000. I then asked him when the money was repaid or

(Testimony of Edward J. O'Leary.)

when he repaid Mr. Forman the remaining $15,000, and he said he couldn't recall. He thought it was the end of '46 or perhaps in '47, but that he didn't have a record of the exact date of payment.

Q. (By Mr. Obenour): Did you make any further inquiry of anyone concerning this transaction?

A. Yes, sir, I did.

Q. What did you do?

A. On March 26, 1952, I called on Mr. Forman in his office with Mr. Oftedal and explained to Mr. Forman what Mr. Seijas had said with respect to this $30,000 which he had received from Mr. Morin. I asked Mr. Forman if he had loaned Mr. Seijas this $15,000, and Mr. Forman said that he had, and I asked him if he had any records or a note respecting it, and he said that he didn't think he did, but he might. I asked him if he knew when the money was repaid and he wasn't sure. He thought '46, '47. I asked him if the money was deposited to his bank account and we might find a record of the dates of repayment, and he said no, he [1743] thought the money was paid to him cash and that he may have used safety deposit boxes.

Q. Did he say anything at all definite as to the manner of repayment or the time of repayment?

A. No, he was indefinite as to the dates and the amounts of repayment and the method of repayment.

Q. Did you have any further conversation with Mr. Forman concerning this transaction?

A. Yes, I did. I believe on April 24, 1952, I

(Testimony of Edward J. O'Leary.)

again called on Mr. Forman and told him that I wanted something in black and white with respect to this matter, and that I would like an affidavit or for him to come to our office for a question and answer statement in order that we could be more exact with respect to the date of the loan and the dates of repayment. Mr. Forman stated that he was on his way to Los Angeles, that he was extremely busy, and that his attorney was in Portland and that it would be greatly inconvenient for him to come to our office.

At that date I had a subpoena prepared requesting or demanding his appearance in our office, I believe, on the 25th, and he explained that that would be a great inconvenience to him, so I agreed to make it for a later date. I believe it was for around May 12 that he was to make appearance in the office. [1744]

Q. Is this a subpoena or a summons?

A. A summons which I served on him on that occasion.

Q. And you did what as to the date?

A. Well, the summons called for his appearance on April 25. I was there on the 24th. He said he was so busy so I changed the date on the summons, I believe, for his appearance on May 12 or at some later date which would be more convenient to him.

Q. What happened then?

A. I received a telephone call from Mr. Mead.

Q. And what did Mr. Mead say?

A. Mr. Mead explained that it was difficult for

(Testimony of Edward J. O'Leary.)

Mr. Forman to get away and for himself and asked if we—if a letter would not suffice instead of an affidavit if we merely wanted an explanation of his loan.

Q. What did you say?

A. I agreed and told him that if it developed that the letter was unsatisfactory, why, we would have a statement later on.

Q. Was such a letter sent? A. Yes, it was.

The Clerk: Plaintiff's Exhibit 142 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 142 for identification, can you identify that document? [1745]

A. Yes. This is a letter dated May 9, 1952, addressed to the Intelligence Division to my attention, signed by William R. Forman.

Q. And did you receive that letter?

A. Yes, sir, I did.

Q. And when did you receive it?

A. Shortly after this date. I believe I received it the next day.

Mr. Obenour: Offer 142.

Mr. Mead: The Defendant has no objection to Exhibit 142, your Honor.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 142 for identification was received in evidence.)

Mr. Obenour: I ask to read Exhibit 142.

The Court: You may do so.

Mr. Obenour: "May 9, 1952. Intelligence Unit,

(Testimony of Edward J. O'Leary.)

United States Treasury Department, 210 United States Court House, Seattle, Washington. Attention: Mr. E. J. O'Leary, Special Agent. Gentlemen: You have inquired as to the matter of the sale by me of my interest in United Amusement Company at Bremerton, Washington.

It is my recollection that this business was sold by me to Henry Morin in the fall of 1946 for [1746] the sum of $30,000.00.

I was represented in this transaction by Army Seijas, attorney of Seattle, Washington, who collected the purchase price in my behalf, Mr. Seijas remitting to me one half of the purchase price or $15,000.00 at the time the sale was consummated and by arrangement with me retaining $15,000.00 for his own use which I believe he repaid to me during the years 1947 and 1948. These payments were made by check and by cash at various times, the exact amount and the exact dates of which I do not now recall.

At the time Mr. Seijas requested that he be permitted to retain $15,000.00 of my funds, he did not advise me as to his reasons for this request.

I trust that the foregoing information will suit your purpose.

Very truly yours, William R. Forman."

Q. (By Mr. Obenour): What further conversations did you have with Mr. Forman concerning this matter, if any?

A. Well, with respect to this same matter, I served a summons on Mr. Forman, I believe, on

(Testimony of Edward J. O'Leary.)

March 9, 1953, for his appearance in our office, and he did appear, I believe, on the 11th of March, 1953, at which time a reported question and answer statement was taken from [1747] him with respect to the same loan.

The Clerk: Plaintiff's Exhibit 143 for identification has been marked.

Q. (By Mr. Obenour): Handing you Exhibit 143 for identification, can you tell us what that document is?

A. Yes. This is a reported question and answer statement taken from Mr. Forman by myself and Mr. Oftedal in our office on March 11, 1953.

Q. And when you say "recorded," by whom was it recorded?

A. By a stenographer in our office.

Q. When? A. On March 11, 1953.

Q. Was this at the time at which the interview actually occurred?

A. Yes. This is similar to it being taken now.

Q. Did Mr. Forman sign this document?

A. No, he did not.

Mr. Obenour: Offer Exhibit 143.

Mr. Mead: May I inquire on voir dire?

The Court: You may.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. O'Leary, this is a question and answer—is a statement of question and [1748] answers propounded to Mr. Forman by your-

(Testimony of Edward J. O'Leary.)

self in your office on the 11th of March, 1953, regarding this loan, is that right? A. Yes.

Q. And at that time, Mr. Forman appeared there alone without an attorney and stated to you that I was ill and could not be there but that I requested him to go and answer any questions that you had to ask concerning the matter, is that right?

A. Yes. As I recall, he had a prepared statement that he brought with him.

Q. That I could not be there and for the reason that I was ill at that time?

A. Yes, sir. It stated you were ill and that he could go ahead and answer questions with respect to that one matter.

Q. And he did that at that time?

A. Yes, sir.

Q. But he did not sign the statement because it wasn't submitted to him for signature, is that right?

A. I believe that we had a hard time getting together. He was out of town a good deal, and our case was completed at that time or substantially completed, and rather than wait and hold it for him to return from Los Angeles, we sent it.

Q. So that is the reason why it was not signed?

A. That is my recollection.

Mr. Mead: We have no objection to the exhibit.

The Court: Very well. Exhibit 143 is admitted.

(Whereupon, Plaintiff's Exhibit No. 143 for identification was received in evidence.)

Mr. Obenour: I ask to read it, your Honor.

The Court: You may do so.

(Testimony of Edward J. O'Leary.)

Mr. Obenour: "Testimony of William R. Forman, Taken in the Office of the Intelligence Division, Bureau of Internal Revenue, Room 501, Smith Tower, Seattle, Washington, at 9:30 A.M. on the 11th day of March 1953, in the matter of the income tax liability to the United States of Army A. Seijas.

Present: William R. Forman, Witness; Edward J. O'Leary, Special Agent; Willard A. Oftedal, Special Agent; Eleanor G. Anderson, Recorder.

Question (By Mr. O'Leary): Mr. Forman, you have been summoned here today to testify in regard to the income tax liability of Army Seijas, and as it is desired that your testimony be under [1750] oath, will you please raise your right hand? Do you swear that the testimony that you are about to give will be the truth, the whole truth and nothing but the truth so help you God?

Answer: I do.

Question: Will you identify yourself by stating your full name and address?

Answer: William R. Forman, 1016 Securities Building, Seattle.

Question: What is your present business?

Answer: Theater owner and operator.

Question: Will you describe your past association with Mr. Seijas so that we will know how long you have known him?

Answer: May I read a statement that Mr. Mead asked me to read?

(Testimony of Edward J. O'Leary.)

Question: Yes.

Answer: "Gentlemen: Now that I have been sworn to testify I want to state for the record that I have consulted my attorney, George Mead, regarding the subpoena that Mr. O'Leary served on me. It is my understanding that this questioning concerns the letter that I wrote to Mr. O'Leary on May 9, 1952, in which I explained the sale of my interest in the United Amusement Company [1751] of Bremerton to Henry Morin. As you know, my attorney, George Mead, is ill and unable to attend here, and I am attending this meeting without counsel although on previous questionings, under oath, I have always been represented by counsel. I have talked to Mr. O'Leary yesterday and advised him what my position would be here today; that I would appear voluntarily without counsel concerning the matter contained in that letter. However, I have been advised by Mr. Mead that if any questions were asked outside of that scope that I should state that I would like to have Mr. Mead present to represent me and that I must not sign anything without Mr. Mead having first passed upon it and approved the same. I am reading this into the record as per the suggestion of my counsel who, as I stated before, is ill and not able to be present at this meeting.

Question: Mr. Forman, if there is any question propounded to you which you do not wish to answer without the advice of your attorney you may so state. Will you describe your past association

(Testimony of Edward J. O'Leary.)

with Mr. Seijas in order that we may know how long you have known him.

Answer: May I ask specifically how I should—

[1752] I don't know——

Question: Just briefly state what your past association has been with Mr. Seijas.

Answer: I have known him for many years. In college and when I started in the theater business independently I shared offices with him for some time.

Question: Have you been a partner with him in a number of businesses?

Answer: I was a partner with him in the United Amusement, well, these companies, the United Amusement Company in Bremerton and he has represented me in legal matters and has been a stockholder in some companies which I started.

Question: Were you an equal partner with Seijas in the United Amusement Company?

Answer: Yes.

Question: What type of business was the United Amusement Company?

Answer: It was leasing amusement machines known as pinball machines in Kitsap County.

Question: When and to whom did you sell your partnership interest in the United Amusement Company?

Answer: It is my recollection that I sold the [1753] United Amusement Company of Bremerton in the fall of 1946.

(Testimony of Edward J. O'Leary.)

Question: What was the sale price of your interest?

Answer: $30,000.

Question: Did Mr. Seijas represent you in this sale to Morin?

Answer: Yes.

Question: Did you loan or advance Seijas the sum of $15,000 during the fall of 1946?

Answer: Yes, I did.

Question: Will you describe the circumstances surrounding this loan?

Answer: He asked me at that time to—he asked me if he could borrow $15,000 and I was grateful for him arranging this deal and I agreed to do so.

Question: Did he say why he needed the money or to what purpose he was going to put it?

Answer: No; he didn't.

Question: Did you take a note from him at that time of the loan?

Answer: I don't remember whether it was a note or a letter. I believe it was one or the other.

Question: Is there any available record covering this loan and the repayment? [1754]

Answer: No, I didn't put it through any books because there was nothing to be reported on. It was a personal arrangement and he paid it back over a period of time and I believe the note or letter was returned to him when it was completed.

Question: In response to our previous inquiries, have you previously made an attempt to locate any

(Testimony of Edward J. O'Leary.)

record relative to this loan and repayments on it?

Answer: No, I haven't.

Question: Do you believe that you could locate a record relative to this loan?

Answer: To the best of my knowledge I don't believe I could.

Question: What is your recollection as to the date of this loan?

Answer: To the best of my recollection it was at the time that the deal was made or shortly thereafter. I cannot remember the date or detail at this time. It was when we sold that route.

Question: According to the records, you sold your interest to Mr. Morin in the fall of 1946. Is that at the time of the loan?

Answer: Yes, to the best of my recollection now.

Question: When did Seijas repay this loan?

Answer: To the best of my recollection it was [1755] repaid in 1947 and 1948.

Question: Could you break down the amount that was paid in 1947 and the amount that was repaid in 1948?

Answer: No, I cannot.

Question: Do you think that the greater portion was repaid in 1947?

Answer: I don't remember.

Question: Your recollection then is that it was paid in the following two years?

Answer: Yes.

Question: Why did you sell your interest in the United Amusement Company?

(Testimony of Edward J. O'Leary.)

Answer: I was devoting all of my time to expanding in the theater business and wished to get rid of my investment in this business.

Question: At the time you were looking for a buyer for your interest did Mr. Seijas indicate that he wished to remain in that business?

Answer: Yes. Well, I wouldn't say that he wished to remain in the business but he didn't want to dispose of his investment at that time.

Question: Had the business been profitable for you?

Answer: Yes. [1756]

Question: (By Mr. Oftedal): Mr. Forman, earlier in this statement when you mentioned that Bremerton Amusement Company leased amusement machines known as pinball machines in Kitsap County, did you not really intend to convey the understanding that the Bremerton Amusement Company actually owned the machines but placed them in various locations throughout the county where they were operated under the supervision of the location?

Answer: Yes, that's right.

Question: And, in fact, the Bremerton Amusement Company handled the collection of the proceeds from those machines and distributed the share of profit between the company and the location owner. Is that correct?

Answer: Yes.

Question: Earlier in this statement when you mentioned a loan was made to Seijas "At the time

(Testimony of Edward J. O'Leary.)

the deal was made or shortly thereafter," you had reference to the sale of your interest to Henry Morin?

Answer: Correct.

Question: (By Mr. O'Leary): Did you or Mr. Seijas take the more [1757] active part in the management of the United Amusement Company?

Answer: The last few years that I was in it Mr. Seijas took the active operating part in it.

Question: Do you have any other comments that you would like to make, Mr. Forman?

Answer: No.

Question: (By Mr. Oftedal): Have you made any other loans to Army Seijas on which he owed you money at the end of any year?

Answer: Well, I don't know. I would have to check that. You mean during this period?

Question: During the period from 1945 up through 1949.

Answer: Mr. Oftedal, I would have to check my records on that.

Mr. Oftedal: Would you check, please, for us on that.

Question: Have you borrowed any money from Seijas during the years 1945 through 1949 on which you would have owed him any money at the end of those years?

Answer: I would like to check my records on this matter. [1758]

Statement concluded at 10:15 A.M."

Q. (By Mr. Obenour): And concerning your

(Testimony of Edward J. O'Leary.)

request for additional information pertaining to loans or transactions, did you receive any communication from Mr. Forman?

A. Yes, I believe we received another letter relating to other loans.

The Clerk: Plaintiff's Exhibit 144 has been marked for identification.

Q. (By Mr. Obenour): Handing you Exhibit 144, can you identify that, sir?

A. This is a letter dated April 24, 1953, addressed to myself, Special Agent, United States Treasury Department signed by William R. Forman.

Mr. Obenour: Offer 144.

Mr. Mead: The Defendant has no objection to Exhibit 144, your Honor.

The Court: It is admitted.

(Whereupon, Plaintiff's Exhibit No. 144 for identification was received in evidence.)

Mr. Obenour: I request to read it.

The Court: Go ahead.

Mr. Obenour: "William R. Forman, 1016 Securities Building, Seattle 1, Washington. April 24, 1953. Mr. Edward J. O'Leary, Special [1759] Agent, United States Treasury Department, Room 515 Smith Tower, Seattle, Washington.

Dear Sir: Heretofore you requested that I furnish information with regard to any substantial personal loans made by me to or received by me

(Testimony of Edward J. O'Leary.)

from Army A. Seijas of Seattle, Washington, during the years 1945 to 1949 inclusive and the dates of repayment of such loans.

I have investigated my records and in addition to the previous information given to you, wish to advise you as to the detail of a substantial loan which was made by Mr. Seijas during the above-mentioned period to myself and various business associates, namely:

On or about November 15, 1948, Mr. Seijas advanced the sum of $50,000 to myself, J. H. Tingle, C. A. Caballero and G. Diamond, all of Los Angeles, California. This indebtedness was evidenced by promissory notes executed by the four of us to Mr. Seijas in the principal sum of $50,000 bearing 5% interest. These four individuals were jointly and severally liable, the obligation was repaid by each of us in the amount of $12,500 and on the following dates:

$5,000, January 15, 1950; $5,000, January 15, [1760] 1951; $2,500, January 15, 1952.

On or about April 25, 1949, Mr. Seijas advanced to the same four individuals, including myself, above mentioned and additional $50,000 which was likewise secured by promissory notes executed by the four individuals who were jointly and severally liable, each of us repaying to Mr. Seijas the sum of $12,500 paid on the following dates, to-wit:

$2,500, January 15, 1952; $10,000, May 25, 1952.

I trust that the foregoing information will suit your purpose and the information hereinabove fur-

(Testimony of Edward J. O'Leary.)

nished is full, true and correct as to the best of my knowledge and belief.

Very truly yours, William R. Forman."

Q. (By Mr. Obenour): Mr. O'Leary, were you present at another subsequent interview with Mr. Forman concerning this investigation?

A. Yes, I was.

Q. And when was that?

A. It was on May 29, 1953.

Q. And who was present?

A. Mr. Mead, Mr. Forman and Mr. Oftedal and myself.

Q. And what was the purpose of the interview?

A. The purpose of the interview was to offer Mr. Forman an opportunity to explain or refute the allegation of Mr. Seijas with respect to the diaries.

Q. And the diaries, are these Exhibits 76 through 79 that have been introduced into this trial?

A. Yes, they are.

Q. What was told, Mr. O'Leary, to Mr. Forman concerning these diaries?

Mr. Mead: Objected to as incompetent and irrelevant and immaterial.

The Court: Overruled.

The Witness: Mr. Forman and Mr. Mead were informed that Mr. Seijas had stated that he had derived approximately $86,000 from unreported pinball receipts and that Mr. Forman had likewise received the same amount, and that there was some $172,000 of pinball receipts held out and not reported during the years 1942 through 1945, that Mr.

(Testimony of Edward J. O'Leary.)

Seijas and Mr. Forman each received half, and in addition to that, Mr. Seijas had alleged that Mr. Forman and Mr. Seijas had sold the Palace Billiards in which they had made a capital gain of $10,000 which was also split equal between Mr. Forman and Mr. Seijas; also, that Mr. Seijas had received checks of his father from United [1762] Amusement Company in the total sum of approximately $11,000, and we informed Mr. Forman that if these facts were true as alleged by Mr. Seijas, that he would be seriously involved, and, of course, would owe considerable tax.

Q. (By Mr. Obenour): Was any request made to an explanation or any statement at all from Mr. Forman concerning the allegations of Mr. Seijas?

Mr. Mead: Objected to, your Honor, for the reasons previously assigned, and the further reason that it is incompetent and immaterial and not having any bearing on the issues involved in this case.

The Court: Overruled.

The Witness: It was explained to Mr. Mead and Mr. Forman that we would like to take a recorded question and answer statement under oath from Mr. Forman and that a stenographer was available with which we could take that statement.

Q. (By Mr. Obenour): Was any answer made to your statement?

Mr. Mead: Same objection, if your Honor please.

The Court: Same ruling.

Mr. Mead: May we have a continuing objection to this line of questioning? [1763]

(Testimony of Edward J. O'Leary.)

The Court: Yes, you may on that ground. If you have any other ground, you must state it, of course.

All right, go ahead.

The Witness: No statement was made by Mr. Forman with one exception, however. Mr. Mead stated that he realized that this was opportunity day, but that he believed that we would have to paddle our own oars, so to speak.

Q. (By Mr. Obenour): What happened then?

A. We informed them that because of the seriousness of the situation that perhaps they would like to talk it over between them without our presence, so it was suggested that they leave the room or we leave the room, and it ended up by Mr. Forman and Mr. Mead going to the restaurant in the basement of that building, and we went also, although at a different table in the back of the room, and we then returned later on, 15 or 20 minutes later, and asked them if they had discussed the matter, and if they would after considering the matter like to give the statement.

Q. Was anything said to that?

A. Well, Mr. Mead similarly as he had before said that he realized it was opportunity day but that we would have to paddle our own oars. [1764]

Q. What happened then?

A. Well, during the discussion which was principally between Mr. Oftedal and Mr. Mead, Mr. Forman more or less blurted out after we had explained the allegation, "Does this mean I have to pay fraud

(Testimony of Edward J. O'Leary.)

penalties?" It was explained to Mr. Forman that it could be much more serious than that.

Q. Did Mr. Forman make any other statement concerning—during this whole interview?

A. During this entire interview, Mr. Forman did not say anything at all. Mr. Mead did all of the talking with the exception of that one statement which he more or less blurted out.

Q. At that time was there any denial made of the allegations of Seijas explained by you during this conversation?

Mr. Mead: Objected to——

The Court: Sustained. All he can say is what occurred.

The Witness: At no account——

Mr. Mead: That is objected to, your Honor, and I would like to be heard on the matter.

The Court: Well, I have sustained the objection, and the start of the answer is stricken and not admissible. [1765]

Anything that was said may be covered, but the form of this question is objectionable.

Mr. Mead: And the answer?

The Court: The start of the answer is stricken. He didn't get very far, but however far it got, it is stricken. Disregard it. I think you misunderstood the ruling.

The Witness: Yes, I did.

Q. (By Mr. Obenour): Was there any other conversation that took place at that time?

A. Yes. At the conclusion of the meeting we

(Testimony of Edward J. O'Leary.)

asked if Mr. Forman would make available to us the retained copies of his income tax returns for the years 1942 through 1945 and also requested that he prepare or have prepared a comparative net worth statement for the years 1942 through 1952.

Q. What was the answer to that question?

Mr. Mead: Objected to, your Honor, as being incompetent and immaterial and having no bearing on this issue, Mr. Forman's tax matter.

The Court: Overruled.

The Witness: At this time Mr. Mead stated they would take that matter under advisement.

Q. (By Mr. Obenour): Did you ever receive any documents from Mr. Forman during the course—— [1766]

Mr. Mead (interrupting): May we have a continuing objection to this?

The Court: Oh, yes. Go ahead.

The Witness: No, we never—the answer is no.

Q. (By Mr. Obenour): When did you first learn, if you did, that the transaction with Mr. Morin was anything more than a loan of $15,000 by Mr. Forman to Mr. Seijas?

The Court: This calls for a date, this answer.

Mr. Obenour: If there were one.

The Court: If there were such a time, answer with respect to the date, and then put another question to the witness.

The Witness: I believe the date was the last day of Seijas' trial a year ago at the time Mr. Rankin, as I recall, was on the stand.

(Testimony of Edward J. O'Leary.)

Q. (By Mr. Obenour): What was the statement or documentation which first apprised you of the sale of the $30,000—rather, the purchase for $30,000 by Morin involved any more than a loan to Mr. Seijas?

A. Well, at that time, and in the course of the trial certain records identified by Mr. Seijas in the presentation of his case or his defense, records which we previously requested but had never received during the [1767] course of our investigation, these records being the ledger of the United Amusement Company and his checkstubs of the Pacific National Bank, and I believe that record is here.

Q. Is that the checkstubs that have been introduced in evidence in this trial, 106? A. Yes.

Q. And in what manner did you or any other government representative first become aware that there was any documentation pertaining to the Morin transaction?

A. Well, as I recall, an examination of the checkstub book reflected checks by Mr. Seijas to Mr. Forman which were marked "Drawing," and also there was a notation covering another check which was described as capital gain which corresponded to the one half of the tax which Mr. Forman paid on his 1946 income tax return covering the sale of his interest in the United Amusement Company.

Q. When did you or any government agent first examine these checkstubs, 106?

(Testimony of Edward J. O'Leary.)

A. It was the afternoon of the date that this was introduced in the trial.

Q. Where?

The Court: Of Seijas, do you mean?

The Witness: Mr. Seijas, yes. [1768]

Q. (By Mr. Obenour): Where?

A. I believe it was down in our office?

The Court: Do you mean after it was introduced as an exhibit in that trial, it was withdrawn for examination in your office?

The Witness: Yes.

Q. (By Mr. Obenour): Was any explanation given to any government representative by either Mr. Seijas or any of his representatives prior to the testimony of Mr. Rankin on this subject on the day following the examination of Exhibit 106?

A. There was testimony with respect to that.

The Court: In the Seijas' trial?

The Witness: In the Seijas' trial.

Mr. Mead: This is objected to, your Honor, as being incompetent and immaterial, beyond any of the times involved here and not proper direct examination.

The Court: Overruled on that ground. We might be just a little confused as to the question now. I think you better restate it.

Q. (By Mr. Obenour): Prior to the testimony of Mr. Rankin, which was, I believe, the day following the examination of Exhibit 106, had any explanation been given concerning the entries in Exhibit 106 or notations therein to [1769] any

(Testimony of Edward J. O'Leary.)

government agency by either Seijas or any of his representatives? A. No, there was not.

Q. And what was the first occasion in which any representative of Mr. Seijas or Mr. Seijas made any statement concerning the Morin transaction as being anything more than a loan?

A. It was not until after this exhibit was introduced at his trial.

Q. And was that explanation given in the direct testimony of Mr. Rankin or in cross-examination?

A. I believe it was under cross.

The Court: It's about time for morning recess, I think. We will have our recess now.

(Thereupon, a short recess was taken.)

The Court: Proceed.

Q. (By Mr. Obenour): Mr. O'Leary, handing you Exhibits 76, 77, 78 and 79, during the course of the investigation and after having been shown the photostatic copies of the original books that have been referred to as the diaries, did you make any schedules or computations as to the amount of income unreported from the records and partnership returns of the respective amusement companies during the years 1942 to 1945?

A. Yes, I did. Shortly after I received the photostats [1770] of the diaries, I made an analysis of the diaries to determine the amount of unreported income of Mr. Seijas for those years.

Q. How did you set up your work papers concerning these items reflected as unreported income in the diaries?

(Testimony of Edward J. O'Leary.)

A. Well, I went through each page by date and made a record of the total amount of hold outs and broke it down by one-half, one-half Seijas and one-half Forman, with notations as to whether Heberling or Meyers brought the money in.

Q. From your examination of the diaries what were the respective amounts held out or unreported from the various collectors for each of the years 1942 through 1945?

A. Well, including the hold outs marked "Goldie" for the year 1942, the total income held out amounted to $15,830.55. For the year 1943, the income held out amounted to $34,940.32, and for the year 1944, it amounted to $54,564.97, and for the year 1945, $59,760.84, and my total for those years is $165,096.68.

Q. How was it broken down in each of the years as between the respective collectors or sources?

A. I have it noted here by halves which would be only——

The Court: Do you mean by half years?

The Witness: By one-half. In other words, [1771] I have the amount——

The Court: Give it as you have it.

The Witness: For the year 1942 by Mr. Heberling, $112.50; total would be twice that. By Mr. Meyers, $7——

Q. (By Mr. Obenour): You say total would be twice that?

The Court: You have it broken down by half the

(Testimony of Edward J. O'Leary.)

amount. All you have to do is multiply by two to get the total, is that the idea?

The Witness: Yes, sir.

By Mr. Meyers, $7,622.77, which again is half the total amount held out that year by Meyers, and Heberling amounted to $15,470.55. The receipts held out by Mr. Goldstein was $360 for the year 1942. For the year 1943, the total held out by Meyers and Heberling was $33,042.98. Mr. Heberling held out one-half as $3,540.15. It would be a total of around $7,000, and Mr. Meyers' one-half, $12,981.34, total would be around $24,000 or $25,000. The amount held out by Mr. Goldstein amounted to $1,897.34.

The Court: That is total for him?

The Witness: Total for him. In 1944 the total pinball receipts held out by Heberling and Meyers amounted to $50,648.75. Of that amount [1772] approximately $4,600 was held out by Heberling and the balance was held out by Mr. Meyers. In 1944 Goldie held out—amounted to $3,916.22. In 1945 the total pinball receipts held out by Heberling and Meyers according to my analysis was $54,802.60, of which Heberling held out a little over $2,000. The Goldie hold outs amounted to $4,958.24. That is the breakdown as I have it.

Q. (By Mr. Obenour): From the evidence entered as exhibits in this trial and from the testimony of the witnesses given at this trial, have you made a computation of the corrected net income and

(Testimony of Edward J. O'Leary.)

the tax due thereon for Army Seijas for the years 1942 through 1945?

A. I have made an analysis of the diaries and on the basis of the income reflected therein I have made a computation of his tax liability.

Q. What is your computation based upon, the returns filed for Army Seijas and your analysis of the diaries as to Mr. Seijas corrected net income and the tax due thereon for each of the years '42 to '45?

A. Well, for the year 1942 Mr. Seijas reported a net income of $40,663.36. The unreported income from the diaries, pinball receipts, held out by Mr. Heberling, $112.50, by Mr. Meyers, $7,622.77, and receipts held out by Mr. Goldstein, $180, which is one-half of the [1773] total gives a total unreported income as Mr. Seijas' share of $7,915.27. Add that to his income reported, and you have a corrected net income of $48,578.63. Mr. Seijas filed separate returns with his wife for that year, giving each of them one-half of the total or $24,289.32 on their respective returns. Mr. Seijas reported on his separate tax return a tax liability of $6,797.58. His corrected tax is $8,991.16, giving a deficiency on his return of $2,193.58. Similarly his wife also reported a tax for the year 1942 of $6,797.58—corrected tax is also $8,991.16, giving a deficiency of $2,193.58. For the two of them, the tax liability would be approximately for the year 1943—would be approximately 43 hundred dollars.

Q. That is what year?

(Testimony of Edward J. O'Leary.)

A. For the year 1942.

Q. Go ahead.

A. For the year 1943 Mr. Seijas reported a net income of $28,237.28. Mr. Seijas' share of the unreported income held out by Meyers, Heberling and Goldstein, his share amounted to $17,470.16, giving a corrected net income of $45,707.44. He again filed separate tax returns with his wife for that year in which they each reported one-half giving them a corrected net income on each of the returns of $22,853.72. Mr. Seijas in his separate [1774] return reported a tax of $4,207.23. His corrected tax liability amounts to $8,863.64, leaving him a deficiency of tax on his separate return of $4,656.41. On his wife's return for the year 1943, she reported a tax of $4,233.81. Her corrected tax is $8,807.69, leaving a deficiency of $4,573.88 on her separate return. Together they would owe approximately 92 hundred dollars for the year 1943.

For the year 1944 Mr. Seijas reported a net income of $32,488.58. His share of the unreported income or hold outs amounted to $27,282.48, giving a corrected net income of $59,771.06. He again filed separate returns with his wife and the corrected net income on each of their returns is $29,885.53. Mr. Seijas for the year 1944 reported a tax of $5,317.15. His corrected tax liability is $13,226.27, leaving a deficiency in tax of $7,909.12. The same amount of tax was reported and is due on the return of his wife for the year 1944. That is a deficiency of $7,909.12, so that together for the year 1944, it's

(Testimony of Edward J. O'Leary.)

approximately $16,000, just under $16,000 for the year 1944, the deficiency in tax.

In 1945 Mr. Seijas reported on his return a net income of $44,448.44. The hold outs as per the diaries, his share amounts to $29,880.42 giving a corrected net income of $74,328.86. He again filed separate returns [1775] with his wife for the year 1945, and the tax on his return that he reported was $8,307.11. His corrected tax liability amounted to $17,316.88 giving a deficiency on his separate return for the year of '45 of $9,009.77. The deficiency for his wife and tax reported by her is identical giving her a deficiency also for the year 1945 of $9,009.77, so that together their deficiency in tax for the year 1945 amounted to $18,000.

In summary for the years 1942 through 1945 Mr. Seijas and his wife reported net income of $145,837.66. The total hold outs, per the diaries per my analysis, reflected unreported income of $82,548.33 giving a corrected income of $228,385.99. For the years 1942 through 1945, for the same years, the total tax reported by Mr. Seijas and his wife amounted to $49,284.72. The deficiency is in the amount of $47,455.23.

Q. What was the total amount—hold out of unreported income for Mr. Seijas for '45 per the diaries? A. Per the diaries, $29,880.42.

Q. Twenty-eight thousand——

A. Eight hundred eighty dollars and forty-two cents.

Q. This was his half?

(Testimony of Edward J. O'Leary.)

A. This is his one-half or share of the hold outs.

Q. Handing you Exhibits 30 and 31, Mr. O'Leary being the [1776] tax returns of William R. Forman and Dorothy Forman, I will ask you, Mr. O'Leary, if you were to assume that all entries of income from other sources reported on the returns of William R. Forman for the year 1945 were correct on the——

The Court: Other sources than the amusement companies?

Mr. Obenour: Other than the amusement companies, and——

Q. (By Mr. Obenour): ——if you were to assume that all deductions claimed therein were correct, and if you were to assume that all expenses shown on that return were correct, and if you were to assume that Mr. Forman received one-half of the income shown on Exhibit 79 to be unreported income of the amusement companies and of Dock Concessions for that period for an amount being one-half of the amount shown there and $29,880.42, what, sir, would be the corrected net income of William R. Forman for the year 1945 and the tax due thereon?

Mr. Mead: If the Court please, we object to the question on the grounds that in addition to the grounds of materiality and relevancy that there is no charge in the indictment of any evasion on the part of this Defendant of his income taxes for any

(Testimony of Edward J. O'Leary.)

of these years in question or [1777] conspiracy to evade taxes for those years.

The Court: The objection is overruled, but in permitting this testimony, since it is the first question of this type, I think I should call your attention, Ladies and Gentlemen, to some considerations you might have in mind.

The question just put is what we lawyers call a hypothetical question. In lay terms that means it's a question predicated on assumed facts. A witness who is an expert in any expert field, but in this instance one familiar with the computation of tax and so forth, may be interrogated by having questions of this character put to him in which he is asked to make certain assumptions of fact.

Now, the fact that this kind of a question is put to the witness, and he is permitted to answer does not, of course, mean that the assumed facts are true. That will be ultimately a question for the jury to decide, whether the assumed facts or hypothetical situation presented to the witness is, in fact, true and correct from all of the evidence and under the instructions that I give, so when a witness is permitted to give an answer to a hypothetical question, the jury [1778] must understand that the facts suggested by the questioner as basis for assumption are still a matter for the jury to decide whether the assumption is or is not correct in whole or in part, and, of course, if the jury finds ultimately that any of the facts suggested to be assumed are not true and correct, then the answer of the witness

(Testimony of Edward J. O'Leary.)

will have to be taken by the jury in the light of the jury's findings of the fact.

I emphasize that because sometimes if this explanation is not given, the jury may think from the fact that the Court permits the question to be answered, that somehow or other that fact has been found. Not so. All facts in the case must be found by the jury.

Now, another matter I want to call your attention to; now, in this particular case the only charge made against Mr. Forman is a charge of conspiracy. He is not charged in this case with evading or defrauding with respect of his own income taxes for any period that we have in any manner referred to in the case. Do you follow me? The charge is conspiracy.

Now, this evidence is admitted here not with respect to any charge against Mr. Forman of [1779] defrauding with respect to his own tax, but only insofar as you may find it has a bearing upon the question of whether or not he was involved in a conspiracy as charged in the indictment. Do you all follow me? That is the only purpose for which this evidence may be considered solely with respect of whether or not you find that it has a bearing in one manner or another upon the particular charge that we are here to consider.

Now, without waiving your objection, of course, are you satisfied with the admonition I have given or find any fault with it?

(Testimony of Edward J. O'Leary.)

Mr. Mead: Well, of course, I don't mean to be critical of your Honor's admonition.

The Court: That is your duty.

Mr. Mead: We have our objection, your Honor, and I think that it would be impossible for me to state that your Honor's charge would eliminate the objectionable part.

The Court: I don't ask you to do that. I only ask you insofar as the admonition that I have given to the jury is concerned. Do you wish me to add anything or detract anything?

Mr. Mead: No, your Honor. I am satisfied with the charge as far as it goes. I don't [1780] believe that it eliminates the objection that we have put.

The Court: No, I understand your position very clearly.

As I told you earlier this morning, you must understand when objections are made, they in no manner reflect any discourtesy to the Court or anything of the kind. It's the lawyer's duty to make objections, and it's the Court's duty to consider them and rule upon them according to judgment and knowledge of the Court, so you must not take any inference from the fact that the objection is made.

My inquiry was limited solely to that matter of whether you felt this admonition considering the ruling I have made is satisfactory. Very well, if you think otherwise you can suggest something further to me later if you think it necessary.

Mr. Mead: Thank you, your Honor.

(Testimony of Edward J. O'Leary.)

The Court: Now, the objection is overruled, and you may answer.

The Witness: Well, assuming that Mr. Forman received a similar one-half share of the receipts that Mr. Seijas did, which for the year [1781] 1945 in Mr. Seijas' case, the one-half was $29,880.42, and assuming that Mr. Forman received a similar amount and that his returns are correct in every other detail, his corrected income would be as follows: The income that he reported on his tax returns amounted to $82,874.79. The unreported income on this assumption would be $29,880.42 leaving a corrected net income of $112,755.21. Mr. Forman also filed separate returns with his wife for the year 1945 in which each reported one-half of the income. The tax reported by Mr. Forman on his separate return for the year 1945 amounted to $20,182.43. The corrected tax based on this income would be $30,993.19 or a deficiency on his separate return of $10,810.76. On the return of his wife her one-half tax that she reported on her return amounted to $20,182.43. Likewise her corrected tax would be $30,993.19 leaving a deficiency of $10,810.76. Together their tax liability would be approximately $21,000 for the year 1945.

Q. (By Mr. Obenour): What percentage of the additional income was—rather, what was the tax percentage of additional income at what you call that bracket for the year 1945 for Mr. Forman?

A. The sur tax bracket that was used here was 72 per cent.

(Testimony of Edward J. O'Leary.)

Q. Seventy-two per cent? A. Yes.

The Court: Do you mean for the added amount on the basis of the assumed question?

The Witness: On the assumed income, the tax rate used here computing this tax liability, the sur tax rate was 72 per cent.

The Court: And I presume that was as provided by the laws in that year, is that right?

The Witness: That is correct.

Q. (By Mr. Obenour): Do you have any knowledge, Mr. O'Leary, of the amounts reported and the contents of the tax returns of Mr. Forman and his wife for the years '42 to '44 inclusive?

Mr. Mead: Same objection, your Honor.

The Court: The question is, does he have any knowledge. He can answer that yes or no.

The Witness: I don't have exact knowledge of the income and deductions reported by Mr. Forman for the years '42 through '44.

Q. (By Mr. Obenour): Assuming, Mr. O'Leary, in each and all of the years, 1942 to 1944, inclusive, Mr. Forman reported either on joint or separate returns as the case may be income from sources other than the [1783] amusement companies which correctly reflected the income received by him, and assuming that each return during this period correctly stated the deductions to be taken by Mr. Forman, and assuming that the respective returns correctly showed the expenses to be taken by Mr. Forman, and assuming that in each of the years '42 to '44, Mr. Forman received a sum equal to that

(Testimony of Edward J. O'Leary.)

received by Mr. Seijas as reflected in Exhibits 76 through 78, and assuming that each of these sums was additional income unreported on the books and partnership returns of the respective companies during this period, would there have been in each year additional or rather corrected net income upon which there would have been additional tax due?

Mr. Mead: That is objected to, your Honor, on the same grounds advanced with respect to the previous question relating to Mr. Forman's income for the year 1945.

The Court: In view of the evidence that the returns were prepared on a basis of the income reported in partnership returns, I think Mrs. Endersby and Mr. Meyer so have testified, the objection is overruled.

The Witness: Yes, there would be additional tax due. [1784]

Q. (By Mr. Obenour): In each year?

A. In each year.

Mr. Obenour: I believe that is all. You may examine.

Cross Examination

Q. (By Mr. Mead): Mr. O'Leary, when did the investigation of Mr. Seijas' income tax liabilities commence to your knowledge?

A. I believe it was shortly before April of 1950.

Q. Shortly before April, 1950? A. Yes.

Q. And did you come into the picture then at that time? A. I began the investigation.

(Testimony of Edward J. O'Leary.)

Q. You began the investigation? A. Yes.

Q. And was Mr. Oftedal associated with you from then on, or when did he come into the picture?

A. Well, I was in the picture first, and Mr. Oftedal came in at a later date.

Q. Could you state approximately when that was, Mr. O'Leary?

The Court: Do you mean when Oftedal came into it?

Mr. Mead: Yes, sir.

The Witness: He was not taking an active [1785] part in the investigation in April of 1950, but I am trying to recall when he had an official assignment. In other words, I did a lot of work on this even after he had an official assignment so that my dates are not clear.

The Court: Can you give an estimate of about when Oftedal came into it?

The Witness: It would be sometime after April of 1950.

Q. (By Mr. Mead): Sometime after April of 1950? A. Yes.

Q. But you couldn't give us an estimate of the time?

A. Well, it would be soon, right soon thereafter.

Q. Well, would it have been May, about May of 1950?

A. Well, right around there, I would say, yes.

Q. And what was your capacity at that time, sir?

A. I was deputy collector.

Q. And Mr. Oftedal?

(Testimony of Edward J. O'Leary.)

A. Was a special agent.

Q. So, then, the matter was not immediately turned over to the Intelligence Division for investigation until Mr. Oftedal came into the picture, is that right, sir? A. Yes.

Q. And you were making what is generally known as a routine check or investigation? [1786]

A. Well, it would be referred to as a routine investigation.

Q. Now, if you were making a routine investigation in April of 1950 of Mr. Seijas' returns, what particular years were you investigating, sir?

A. Well, I began the investigation—I had his tax return for the year 1948, and I believe also 1947, and I expanded it after that.

Q. 1948 and 1947 were the ones that you were making a routine check on, is that right?

A. I didn't consider the investigation routine, but at the time I first called on him, I had his 1948 returns and I believe it was his '47 returns, and that was what he was so informed. They were the ones that were under investigation.

Q. Isn't the checks or investigations made by a Deputy Collector of a routine nature?

A. During this period of time, I was specializing more or less suspected fraud cases, and I don't believe that I would consider this case a routine case.

Q. But you were a Deputy Collector at that time? A. Yes.

Q. Now, when did Mr. Seijas, if you recall, em-

(Testimony of Edward J. O'Leary.)

ploy Mr. Whittle to represent him in this connection?

A. It is my recollection that he was hired around April or [1787] May, '51.

Q. About April or May of 1951? A. Yes.

Q. So that would be about a year after the investigation commenced? A. I would say so.

Q. I think you stated that Mr. Seijas up to that time had another accountant?

A. Mr. Jacobsen.

Q. And during that period you collaborated and worked with Mr. Jacobsen in getting up a net worth statement, is that correct, sir?

A. Yes. Well, I wouldn't say that I collaborated with him. He was doing some net worth work, and I was at his office getting records of Mr. Seijas quite frequently.

Q. And he was working on a net worth statement, is that right? A. Yes, sir, he was.

Q. And you were in his office frequently?

A. Yes.

Q. Did Mr. Seijas file a power of attorney for Mr. Jacobsen to represent him?

A. I don't believe he did.

Q. What is the practice with regard to the requirement [1788] that a power of attorney be filed in connection with the representation of the taxpayer?

A. If an attorney or an accountant is to represent a taxpayer, he is required to file a power of

(Testimony of Edward J. O'Leary.)

attorney with our office in order that the Revenue Agent be free to discuss the matter with him.

Q. And must the accountant or attorney who filed such power of attorney be admitted to practice before the Treasury Department?

A. Yes, he is supposed to have a Treasury card.

Q. And was Mr. Jacobsen admitted to practice before the Treasury Department?

A. I really don't know.

Q. And you are not able to state whether he filed a power of attorney or not in this case?

A. I am sure that he didn't although I can't state positively.

Q. Now, I think you stated, Mr. O'Leary, that the matter of preparing a net worth statement got beyond Mr. Jacobsen, and he was not able to handle it, is that right?

A. Well, that is my opinion that it was too much for him. Whether it was really or not, I couldn't say.

Q. But that was what you testified to?

A. Well, that is my opinion. [1789]

Q. Just your opinion? A. Yes.

Q. Did Mr. Jacobsen hand you a net worth statement or give you access to a net worth statement that he worked on before Mr. Whittle came into the picture a year later?

A. I have a recollection that there was some type of working paper, net worth, which Mr. Jacobsen had.

Q. With which he furnished you?

(Testimony of Edward J. O'Leary.)

A. I don't recall whether he furnished that to us or not, but I do recall looking at one.

Q. All right. Now, what particular years were under investigation with respect to Mr. Seijas during this interval before Mr. Whittle came into the picture?

A. Well, this was a gradual thing. At first the 1947 and 1948 returns were under investigation. Later the investigation expanded to a general net worth examination which didn't cover any specific year, but rather was a covered and entire period. In any net worth case, I almost have to explain that there you have to have a certain starting point and when you know a person's wealth, what he did have, and then work forward to the date that you have, and then after that break it down into years. At least, that was the approach that we made. [1790]

Q. And when did that occur—the investigation reach that stage?

A. Well, I would say almost immediately.

Q. Almost immediately? A. Yes.

Q. At the time Mr. Oftedal came into the picture about a month after April of 1950?

A. Well, at that time the late years were under investigation, the '46-'48 period, and it's kind of hard to just answer that question specifically because it's the approach to the problem rather than the years that were under question.

Q. So your recollection is not too clear on that face of it as to just when it shifted from the years

(Testimony of Edward J. O'Leary.)

'47 and '48 to an investigation going clear back for a number of years? A. Yes.

Q. Did you advise Mr. Seijas or any of his representatives at the time Mr. Jacobsen was handling the matter and attempting to get a net worth statement as to what your opinion of the problem was as to shortage?

A. Well, I can't recall actually discussing a particular shortage with them other than to say that the known net worth of Mr. Seijas was greatly in excess of his reported income and that there was an apparent shortage [1791] either in every year or in the later years, and that somewhere there was a shortage.

Q. But you did not advise what the amount of that shortage was during this period of Mr. Jacobsen's working on the matter?

A. Well, I recall a conversation with Mr. Seijas in January of 1951 in which he was advised that there was an apparent shortage of approximately $75,000.

Q. That is the matter that I was interested in, Mr. O'Leary. About when would that happen?

A. My recollection is January, 1951.

Q. About January of 1951? A. Yes.

Q. Now, was that on occasion of a formal statement from him or one of these casual meetings that you had?

A. Well, that was on an occasion when Mr. Seijas came to our office in regard to another matter, in fact, some other taxpayer, and at the conclu-

(Testimony of Edward J. O'Leary.)

sion of that matter, the question of his net worth and reported income was brought up, and he was informed that it appeared that he was approximately $75,000 short.

Q. Now, was that the occasion that you have described, Mr. O'Leary, with respect to the investigation of another taxpayer, the occasion where Mr. Meyers' statement was taken and where he came to the office? [1792]

The Court: Which Meyers are you speaking of?

Mr. Mead: I am speaking of Jerry Meyers.

The Court: We have another Meyers, I think, who has been a witness.

Mr. Mead: That is Meyer, William Meyer, the other. This is Jerry Meyers, the collector, who was connected with this pinball business.

The Witness: I believe Mr. Meyers was in the office on that same day, Mr. Mead, but I believe that was also in connection with this other matter.

Q. (By Mr. Mead): Yes, I understand that, but Mr. Meyers' statement was taken that day or questions and answers were submitted to him on that day?

A. Yes. My recollection is that he was questioned in the office that day. I don't recall whether it was formal or informal.

Q. Now, who appeared at your office on the occasion of Mr. Meyers coming up to have these questions propounded to him? Who appeared as Mr. Meyers' attorney at that time?

A. I don't recall whether that was on the occa-

(Testimony of Edward J. O'Leary.)

sion that Mr. Ringold appeared with him or not. I don't believe it was. [1793]

Q. Is it not a fact, Mr. O'Leary, that Mr. Seijas appeared as Mr. Meyers' attorney at that time?

A. That is possible. I don't *recall* recall.

Q. Is it also not a fact that due to the fact that Mr. Seijas' income tax returns were being investigated, that Mr. Seijas was excluded by yourself and Mr. Oftedal at that time?

A. I don't recall that that was the occasion that that occurred.

Q. Do you recall that on one occasion, at least, when Mr. Meyers' statement was taken, Mr. Seijas appeared as his attorney and was excluded from a conference by yourself and Mr. Oftedal?

A. That did occur, but I don't believe it's on the same occasion.

Q. When is it your recollection, sir, that that occurred?

A. It's my recollection that that occurred quite a bit later in the investigation, but the date escapes me right now, though.

Q. Was it upon the occasion of taking a statement from Mr. Meyers that this occurred?

A. Yes, it did.

Q. So then this was on a later occasion that Mr. Meyers' statement was taken that Mr. Seijas appeared with him? A. That is my recollection.

Q. Upon that occasion that Mr. Meyers appeared, what was the subject matter of the questions propounded to him?

(Testimony of Edward J. O'Leary.)

The Court: Seijas or Mr. Meyers?

Mr. Mead: To Mr. Meyers.

The Witness: It's my recollection that a statement was taken from Mr. Meyers with respect to certain collections that he was making for or on behalf of Mr. Seijas and Mr. Forman.

Q. (By Mr. Mead): And it was upon that occasion that Mr. Seijas appeared as his attorney?

A. I don't recall excluding Seijas. I thought it was Mr. Ringold we excluded.

Q. You are not able to state whether Seijas ever appeared, then, as attorney for Mr. Meyers at the time he appeared to give a statement in your office?

A. You might refresh my memory My recollection now is vague on this detail.

Q. Is it not a fact, sir, that upon the occasion of the meeting, the first meeting, with Mr. Meyers when the subject matter of another taxpayer's income tax liability was being considered, that Mr. Seijas then appeared at that time with Mr. Meyers?

A. Well, I recall that occasion that Mr. Seijas and Mr. Meyers were both in the office on that same day. Now, whether they appeared together or not, that is where [1795] I am having trouble.

Q. Would it make an impression on you if you were required to exclude an attorney because of his participation in the case?

A. It usually does, yes.

Q. But you are not able to state whether or not you did exclude Mr. Seijas upon that occasion?

(Testimony of Edward J. O'Leary.)

A. I don't recall.

Q. However, you do recall that on that day you discussed with Mr. Seijas the matter of his shortage or indication of unexplained income as a result of a net worth statement to which you had access up to that time? A. Yes.

Q. And those net worth statements were prepared by Mr. Jacobsen?

A. Mr. Mead, that was on the basis of the information that I had developed myself. It was not on the basis of the financial statement submitted to me.

Q. I see, but you have been working with Mr. Jacobsen and had gone to his office on frequent occasions, I think you said?

A. To obtain information.

Q. And as a result of that, by the time of this examination of Mr. Meyers on the first occasion, you had advised Mr. Seijas that it appeared [1796] that he was about $75,000 short over the years that you were inquiring up to, is that right, sir?

A. Yes.

Q. That is correct? A. That is correct.

Q. Now, when was the second occasion that you had to talk with Mr. Meyers about this matter?

A. Now, this first conversation with Meyers had nothing to do with Seijas' tax liability, as I recall.

Q. I understand that.

A. It was a separate matter.

Q. That had to do with a tax liability of a third

(Testimony of Edward J. O'Leary.)

party, no one involved in this proceedings or no one involved but Seijas? A. Correct.

Q. Now, the first time after that that you had occasion to talk with Mr. Meyers and to take a statement from him was when, sir?

A. Well, my date there escapes me, but it would be some time later.

Q. Well, could you say whether it was a year later or two or three months later or two years later?

A. I just can't place it, but I recall that we did.

Q. All right. For what purpose did you have Mr. Meyers come to your office to take a statement? [1797]

A. To obtain whatever information he might have with respect to the tax liability of Mr. Seijas.

Q. Now, you couldn't give us an estimate as to what time that was?

A. That day escapes me. I really can't.

Q. Now, you couldn't even give us an estimate as to what month or what year it occurred in?

A. I am trying to fit it in, the first date we questioned Mr. Meyers. I just can't place the date.

Q. Can you place the year in which it occurred?

A. Well, I would say it was probably—my guess or recollection would be probably in the fall of 1951.

Q. Now, who came to your office with Mr. Meyers upon that occasion to represent him as his attorney?

A. I believe that was the occasion that Mr. Ringold appeared.

(Testimony of Edward J. O'Leary.)

Q. And was Mr. Ringold permitted to attend the conference?

A. No. As I recall, Mr. Ringold was employed by Mr. Seijas and his office, and we felt that he had a conflicting interest in the matter.

Q. And so you refused to permit him to be in attendance at the time Mr. Meyers' statement was taken? A. I believe we did.

Q. And the reason that you did that was because Mr. Ringold was employed by Mr. Seijas at that time? [1798] A. Yes.

Q. And the reason further that you did that was because that investigation was in to Mr. Seijas' income tax liability at that time? A. Correct.

Q. And who arranged the conference with Mr. Meyers? A. I believe Mr. Oftedal did.

Q. Do you know with whom he arranged it?

A. With Mr. Meyers.

Q. Directly with Mr. Meyers? A. Yes.

Q. Do you know whether or not either you or Mr. Oftedal contacted Mr. Seijas to arrange the conference with Meyers?

A. I don't recall doing that.

Q. You don't recall that? A. No.

Q. All right. Now, at the occasion that another meeting was had, the third meeting with Mr. Meyers, when did that occur?

A. We had a meeting with Mr. Meyers shortly after the disclosure by Mr. Seijas in which the diaries were produced.

(Testimony of Edward J. O'Leary.)

Q. That would be, then, in the month of April and in all probability April of 1953? [1799]

A. That is correct.

Q. Where was that conference held?

A. In our office.

Q. And who appeared with Mr. Meyers, if anyone?

A. I believe he came by himself on that occasion.

Q. So he didn't come with an attorney at that time? A. No.

Q. Now, Mr. O'Leary, did Mr. Whittle file a power of attorney to represent Mr. Seijas?

A. I believe he did.

Q. And was Mr. Whittle admitted to practice before the Treasury Department?

A. Yes, he is.

Q. And when did he enter the picture and file a power of attorney to represent Mr. Seijas?

A. I would say in the spring of 1951 he first appeared in the picture. Probably in May.

Q. Of 1951? A. Yes.

Q. And did he have meetings, then, continually with you and with the representatives of the Department including Mr. Oftedal on the matter of Mr. Seijas income tax liability up until the meeting that you had with Mr. Meyers in April of 1953, is that right?

A. Yes. As I explained before, we had [1800] difficulty in getting to see Mr. Seijas alone, and from then on records were made available in the

(Testimony of Edward J. O'Leary.)

office of Mr. Whittle, and we actually talked to Whittle probably more than we did with Mr. Seijas.

Q. And those conferences were rather frequent, were they, sir? A. Yes, we had quite a few.

Q. When was the net worth statement that has been referred to as the Whittle net worth statement furnished to you for the first time?

A. Well, the formal statement itself was furnished on December 29. However, Mr. Whittle had been working on this statement for some time and had a rough draft prepared. I believe we discussed the rough draft probably early—December '51?

Q. You say December 29, was it, that you referred to—of what year, 1951? A. Yes.

Q. And at that time you secure a net worth statement from Whittle, did you?

A. Forman statement, yes.

Q. And how was that delivered to you, sir? And by that I mean, did you go to his office and get it or was it mailed to you, or did Mr. Whittle deliver it to you? How did you get it? [1801]

A. I don't recall that was mailed to us. There was a cover letter from Mr. Seijas on it. I recall that. Whether it was mailed to us in his office or mailed to us, I can't recall. I do recall there was a cover letter with it, though, signed by Mr. Seijas.

Q. There was a cover letter signed by Mr. Seijas? A. Yes.

Q. Was the cover letter signed by Mr. Whittle?

A. My recollection is it was signed by Mr. Seijas on Whittle's letterhead. I could be wrong there.

(Testimony of Edward J. O'Leary.)

Q. You could be wrong about that?

A. Yes.

Mr. Mead: Would you hand the witness Exhibit 74, please?

Q. (By Mr. Mead): Is that the net worth statement that you referred to, sir?

A. Yes, it is.

Q. And the date of the net worth statement is what date, and by that I mean the date that was submitted or prepared?

A. Well, the date on the statement itself on this cover letter is December 28, 1951.

Q. Is that the cover letter, Mr. O'Leary, that you referred to just now?

A. I believe it is. [1802]

Q. All right. Now, that cover letter is actually not a letter signed by Mr. Seijas but is a letter signed by Mr. Whittle directed to Mr. Seijas, is it not, sir?

A. This letter is on the letterhead of Mr. Whittle addressed to Mr. Seijas, and this particular one is not signed at all. It indicates "Whittle and Whittle" as printed in here, but it is not signed.

Q. Not signed? A. No.

Q. Well, it's directed to Mr. Seijas, and it's unlikely that Mr. Seijas would be writing a letter to himself, wouldn't it, sir?

A. I still have a recollection it may be some other statement that there was a cover letter signed by Mr. Seijas.

(Testimony of Edward J. O'Leary.)

Q. Well, is this the cover letter that you referred to, or was there some other cover letter?

A. I recall this cover letter, but there is a recollection that Mr. Seijas also had a cover letter signed by him.

Q. Well, have you got that letter?

The Court: You can look for that at noon, Mr. O'Leary.

We are going to take the noon recess now, Ladies and Gentlemen. I hope you have a pleasant lunch. Keep in mind my previous admonition to you. We will resume at 1:30 this afternoon.

(Whereupon, the Jury withdrew from the court room.) [1803]

The Court: I wish you would call my attention, gentlemen, before the Government's case rests or at that time with respect to these items that have been reserved. There are two or three items reserved, and in the interim look at them sufficiently to advise me of your views.

I might elaborate to this extent on what I said. I wanted to limit my remarks in the presence of the jury to some extent. My thought is that if the statement is a signed statement and otherwise admissible, that the document itself in such instances may be admitted, but where the statement is not a signed statement but merely purports to be a transcript of what was said at that time, the witness may if he wishes, refresh himself by the document if it were made at his instance and for that purpose, just as you would notes taken on a given occasion, but the

(Testimony of Edward J. O'Leary.)

notes themselves as a physical thing do not become admissible as an exhibit except for some other circumstances that may arise from time to time, of course, the notes themselves if there be a question arise as to what is contained in the notes or [1804] something of that kind. Now that is my thought on that one subject, and in view of the facts, while I have looked at it rather hastily, it does seem as though that supplemental statement to some extent is equivocal as concerning whether it purports to be a whole signed statement by the witness.

I would be inclined now to reject admission of the whole document in evidence as an exhibit to go to the jury, but I don't mean to be understood by that as restricting any examination of the witness concerning contents of it if he after examining the document has his independent recollection refreshed to the point of being able to testify. I observe that there are a good many details contained in this statement that I feel will be confusing rather than helpful, and that is why I feel as I do about the admission of the document as an exhibit. Of course, if the Defense consents to its being put in, that is one thing. Then I would. That is for you to decide, but if you stand upon your objection on that limited ground, I would sustain it.

I think there are one or two other exhibits that have not been admitted that you should call my attention to before you rest so that we can [1805] have a final ruling on it.

Mr. Mead: I didn't mean to challenge the state-

(Testimony of Edward J. O'Leary.)

ment of Mr. Obenour. He stated that the supplemental statement referred to the first statement, but I don't believe that it incorporated it.

The Court: Don't concern yourself about it. I am sure that Mr. Obenour is not that touchy and certainly didn't take it to mean you were impuning his statement about it all as sometimes we have different views about what the fact in such a situation is.

I am inclined to think now that since it's not clearly and unmistakably made entirely a part of the later statement, that that is what the ruling should be. In any event, I want to give you a little more information as to my views whether right or wrong so that you could both judge your future conduct accordingly.

Mr. Mead: Thank you, your Honor.

The Court: All right. We will take the noon recess now. [1806]

(Whereupon, the noon recess was taken.)

After Recess

The Court. You may proceed when ready.

Mr. Mead: Thank you, your Honor.

Q. (By Mr. Mead): Mr. O'Leary, I believe when we adjourned for luncheon that we were talking about a covering letter attached to the so-called Whittle net worth statement? A. Yes.

Q. And as I recall your testimony, you had stated that you thought that it was a covering letter from Mr. Seijas on or about December 28 or 29,

(Testimony of Edward J. O'Leary.)

1951, with respect to the Whittle net worth statement? A. Yes, I did.

Q. And were you able to find such a covering letter?

A. I didn't find a covering letter. I did find a couple letters which are almost identical in appearance which I had in my mind which I visualized in my mind as being the letter, the two letters of Mr. Seijas, neither one of which are the particular cover letter. As a matter of fact, I don't believe that there was now a cover letter from Mr. Seijas. I think I am confused with the cover letter that is there and this other letter.

Q. Well, so now then, you would like to correct your testimony that the covering letter which was a part of the net worth statement of Mr. Whittle furnished in [1807] December of 1951, was a covering letter signed by Mr. Whittle addressed to Mr. Seijas, a copy of which was attached to the Exhibit 74, is that right, sir? A. Yes.

Q. And that, of course, I assume was signed by Mr. Whittle rather than Mr. Seijas, the letter being addressed to Mr. Seijas himself?

A. I notice that there is no signature typed in. There is no signature on the original that is here in evidence.

Q. You would agree with the correctness of the assumption that Mr. Seijas wouldn't be writing letters to himself? A. Correct.

Q. Now, following the receipt of this——

(Testimony of Edward J. O'Leary.)

A. (Interrupting): Excuse me. Could I have that net worth statement?

Q. Now, Mr. O'Leary following the receipt of this net worth statement, which, as I understand, was on December 28 or 29, is that correct?

A. On or about that date.

Q. On or about that date. You then had a conference with Mr. Whittle and Mr. Seijas with respect to the net worth statement, is that right?

A. That is correct.

Q. And when was that conference held?

A. January the 11th, 1952. [1808]

Q. January the 11th, 1952? A. Yes.

Q. Now, on that occasion was Mr. Whittle present?

A. As I recall, he was, and Mr. Seijas was present, of course.

Q. And who else was present?

A. Mr. Oftedal and myself.

Q. Now, did you have occasion at that time to reduce to writing the questions which were propounded to Mr. Seijas with respect to this net worth? A. Yes.

Q. I will ask you, Mr. O'Leary, with regard to that particular conference, January 11, 1952, whether or not Mr. Seijas responded to your questioning under oath?

A. No. He declined to do so. As I recall, he requested that the statement not be given under oath.

(Testimony of Edward J. O'Leary.)

Q. So Mr. Seijas at that time requested that the statement not be given under oath?

A. Yes.

Q. I will ask you whether or not at that time Mr. Seijas advised you that he did not believe that the net worth statement stated the true picture?

A. I believe he made that statement—that is a statement out of contention. He made a number of statements and I believe he included that. [1809]

Q. I realize Mr. O'Leary this is a long time ago. Did he state that to you in effect?

A. Yes. I recall that that was one of the statements he made

Q. I will ask you whether or not he also stated at that time to you that he did not believe that the net worth statement correctly reflected his income for the years 1946, '7 and '8 which were the subject matter of that investigation and that it appeared that Mr. Whittle seemed to be working for the government instead of for him? Did he make a statement such as that?

A. I recall his remark about Mr. Whittle, and I believe he thought that the net worth figures as we had them were rather high.

Q. So he did not agree with Mr. Whittle's net worth statement which purported to reflect his income for the years 1946, '7 and '8?

A. Well, he agreed with the total amount of unreported income. As I recall, he thought that the figures were high.

Q. He thought the figures were high? If he

(Testimony of Edward J. O'Leary.)

thought that the figures were high, he didn't agree with them, then, did he, sir?

A. Well, we pursued on that point and I don't believe he pointed out any discrepancy. [1810]

Q. But he expressed that opinion to you, did he not, sir, at that time?

A. That was one of the opinions that I believe he mentioned during the course of that statement.

Q. Yes, sir. Now, I will ask you whether at that time he also said to you that he did not believe that the net worth statement reflected his 1947 income because he couldn't tell where it came from?

A. I believe that he made a similar statement.

Q. A statement to that effect? A. Yes.

Q. And I don't mean the exact words, but substantially, you understand, Mr. O'Leary, you believe he made a statement substantially to that effect?

A. I recall that Mr. Seijas made quite a few comments on that occasion and that we continued to interrogate him following such statements.

Q. But the sum and substance of those comments which he made were that he did not agree with the Whittle statement and could not understand it?

A. I think the sum and substance was that he agreed with the assets and liabilities as they were, but that he felt that the income figures as such were a trifle high.

Q. Didn't he say—isn't it a fact that he also stated to you at that time that he did not agree with

(Testimony of Edward J. O'Leary.)

he shortage [1811] of $165,000 reflected by Mr. Whittle's net worth statement for the years 1946, '7 and '8?

A. I recall that he mentioned that that was high and that particularly the year 1948 which reflected a shortage of approximately $100,000, that he said he didn't make that much money in 1948.

Q. And he stated to you, did he not, that he did not agree with the $165,000 shortage shown by Mr. Whittle's net worth statement for those years, 1946, '7 and '8?

A. Well, he stated that, but throughout the interrogation he offered—actually offered no other explanation or actually disclaimed it other than the fact that he did mention it.

Q. But whether or not he offered any other explanation or disclaimed it, he did state to you that he did not agree with those figures, did he not, sir?

A. He made that comment.

Q. He made that comment? A. Yes, sir.

Q. Now, you were personally present, Mr. O'Leary during the entire trial of Mr. Seijas in this court about a year ago, were you not, sir?

A. Yes, I was.

Q. And both you and Mr. Oftedal participated in that trial to the similar extent that you are participating in this trial? [1812] A. Yes.

Q. The subject matter of that trial was Mr. Seijas' income tax liability for the years 1946, '7 and '8, was it not, sir? A. That's right.

Q. Now, during that trial Mr. Seijas made cer-

(Testimony of Edward J. O'Leary.)

tain explanations for a shortage of some $200,000 of that period which explanation consisted of him having one hundred to $119,000, or thereabouts, of cash on hand at the beginning of the period which came from a number of different sources? First, he stated that there was a hold out in the pinball operations of some $86,000, is that correct, sir?

A. That is correct.

Q. And, second, he stated that he had received some $11,000 proceeds of certain checks which were made payable to his father for work done by his father during this early period of '42 to '45, is that correct, sir? A. That's correct.

Q. Now, with respect to that particular item, did you determine any fact in your investigation which disclosed that Mr. Seijas either received that $11,000 or that he didn't receive it?

A. Well, as I recall, the evidence on that point, Mr. Seijas [1813] had stated that he had received the money originally at the time of his disclosure. During the trial, I believe the same exhibit that is now in evidence here, the exhibit prepared by Mr. Oftedal and myself, which outlines the checks and check stubs which pertain to those particular salary checks of the father, it was also noted that those checks, the ones that we did see, Mr. Oftedal and myself at the time we copied them, bore, as I recall, the signature of Mr. Forman as maker. In addition to that, a few of those checks were endorsed by Mr. Forman, a secondary endorsement, and in one case I believe carried the further endorsement of

(Testimony of Edward J. O'Leary.)

the Rendezvous. The checks themselves were made payable to the father. It was impossible for Mr. Oftedal and myself to tell whether or not Mr. Seijas himself endorsed those checks or whether his father did, but it was concluded that Mr. Seijas—from that evidence, that Mr. Seijas did receive the money as he stated, and that he even shared it with Mr. Forman.

Mr. Mead: Now, I move that be stricken as not being responsive to any fact that you find or found, but that it was a conclusion that you have stated, which is not the question. I move the latter portion be stricken.

The Court: I think so. However, I do so [1814] without chiding the witness because it was a general question, and I am sure Mr. O'Leary didn't intentionally go beyond what he understood the question to be, Mr. Mead. However, regardless of whether he so intended or not, the last statement he made is a conclusion of the witness and I do not think it was called for by the question. Accordingly, that part will be stricken. You will give no further attention to that statement.

Mr. Mead: Thank you, your Honor.

Q. (By Mr. Mead): Did you conclude or determine, Mr. O'Leary, with regard to that problem, how many of these checks that were scheduled bore the secondary endorsement of Mr. Forman?

A. I believe that there were five. That is my best recollection.

(Testimony of Edward J. O'Leary.)

Q. And that was out of a total of how many checks?

A. Approximately 35, I would say. That is a guess.

Q. Could it have been five out of 50 checks?

A. It could have been 50. I don't think it would exceed 50. Up to 50.

Q. It could have been 50 rather than 35?

A. Yes.

Q. Now, out of that 50 checks how many did you determine that Mr. Renstrom signed as endorser? [1815]

A. We have the record here. I can't recall. It was quite a few, probably 20.

Q. Mr. Renstrom signed as endorser?

A. Yes.

Q. Out of that 50 checks? A. Yes.

Q. Is it not a fact, sir, that when questioned on that subject at the last trial you stated that Mr. Renstrom had signed as a secondary endorser only four checks?

The Court: Did he have the exhibit before him at that time in the previous trial? I think in fairness to the witness you ought to call attention to that.

Mr. Mead: I wasn't referring to the exhibit. I was referring to his testimony.

The Court: If on the former trial when he answered he had the exhibit which showed it, before him, I think in fairness that ought to be called attention to.

(Testimony of Edward J. O'Leary.)

The Witness: As I recall, I did have that exhibit before me, and perhaps I should have that exhibit in front of me now.

The Court: No, you haven't been requested to use the exhibit, so your memory now is being all that is called for. [1816]

Mr. Mead: Do you wish the exhibit?

The Court: I don't, unless you wish the witness to have it.

Mr. Mead: I don't wish it, your Honor. I merely asked him what he testified to on the other trial.

The Court: Excuse me. Go forward.

Q. (By Mr. Mead): What was the fact with regard to that, sir?

The Court: He just said he thought he had the exhibit before him at the previous trial. Is that what you mean, or not?

Mr. Mead: No, your Honor, I was asking him specifically about his testimony at the former trial.

The Court: Go ahead.

The Witness: As I recall, at the former trial I did have that exhibit in front of me and I counted them here on the stand, and what I said specifically I do not recall.

Q. (By Mr. Mead): Now, with regard to the other explanation offered by Mr. Seijas with regard to the alleged proceeds from the sale of the Palace Billiard Parlor, did you determine from your investigation any fact which indicated that Mr. Seijas or demonstrated that Mr. Seijas had received $5,000 of his share of those proceeds? [1817]

(Testimony of Edward J. O'Leary.)

A. Are you speaking, Mr. Mead, now of the evidence which was at the trial or from our investigation?

Q. I am speaking of the evidence at the trial and any investigation that you made, and as to fact and not conclusions, sir.

A. We asked Mr. Seijas for certain information to support his allegations, and one of the things that he gave us as I recall, was a letter in which he signed as attorney in fact for one Mrs. Kiesler which indicated that Kiesler had purchased and sold this Palace Billiards and that Seijas had acted for him on his behalf in connection with the sale. However, Mr. Kiesler was deceased at the time. There were certain records of one Mr. McGill, who is also now deceased, which showed that Kiesler was in the business for a very brief span of time showing that Kiesler had purchased an interest and sold an interest over a very short time and had made approximately $10,000. However, there was no proof or evidence to establish that Mr. Seijas himself had actually operated the Palace Billiards and received the profit, only an indication that he acted in behalf of Kiesler who is now deceased.

Q. So there was no evidence, then, that disclosed that Mr. Seijas had received the $5,000?

A. We were unable to prove that he did. [1818]

Q. Now, with respect to the testimony or explanation for the balance of this shortage, and referring particularly to the income alleged to have been received from his brother at the Castle Club, or

(Testimony of Edward J. O'Leary.)

funds paid to his brother, for services performed at the Castle Club, will you state whether or not your investigation disclosed any fact that Mr. Seijas had in fact received those funds? A. Yes.

Q. Your investigation did disclose that?

A. Yes, it did.

Q. Now, with regard to the matter of the alleged inheritance from his father or funds of his father of some $50,000 to $60,000 with respect to which Mr. Seijas testified, did your investigation disclose any evidence that Mr. Seijas had those funds at his disposal at the beginning of 1946?

A. Well, there was no evidence received that Mr. Seijas had received any such sum as $50,000 from his father. There is one exception to that, Mr. Whittle passed on information to us after the net worth had been completed, to the extent that Seijas had told him that his father had given him some $13,500, or some similar figure, and that that money was invested, I believe, in the Southland Theatres in the name of his daughters with [1819] Army Seijas Trustee for his daughters, either seventeen or seventeen-five. That investment was made in the year 1949. If Mr. Seijas' statement was true, as we pointed out to Mr. Whittle, that his father had given this money or made it available to him in the early years and he never brought it into use or in the open until the year 1949, we pointed out to him that actually it made no difference in his net worth in the change of the net worth. He would have the money on hand, that is, cash in the beginning, and

(Testimony of Edward J. O'Leary.)

he would have had it on hand as an investment in the theatre at the end, an item which was not taken into account here at the trial or by Mr. Whittle.

Q. Now, on the occasion of Mr. Seijas' trial, you prepared a net worth statement or calculation on a net worth basis which determined Mr. Seijas' income tax liability for the years 1946, 1947, and 1948, did you not, sir? A. Yes, sir.

Q. And I think that was marked Exhibit 204 in that trial, is that right?

A. There was a statement prepared.

Q. Now, had Mr. Seijas had on hand from the sources that he alleged at the beginning of the year 1946, $86,000 of pinball holdout money as he claimed, $11,000 in funds from his father through services performed, $50,000 to [1820] $60,000 inheritance, $5,000 from the sale of his interest in the Palace Billiard Parlor, capital gain, the proceeds of his brother's services rendered to the Castle Club, some $17,000 or $18,000, I believe, or thereabouts, it it not a fact that Mr. Seijas would in fact have had no unreported income on a net worth basis for the years 1946, 1947, and 1948?

A. You are including the $50,000 which he allegedly received from his father?

Q. Yes.

A. I would say that the net worth understatement of income for those years would have been slight, and if we included all those items including the $50,000 which you mentioned.

Q. Well, it was demonstrated from Mr. Seijas'

(Testimony of Edward J. O'Leary.)

income tax returns for the previous years that he could have had $50,000 on hand by reason of his earnings during that period of time, was it not, on the net worth statement basis?

A. No, I believe Mr. Whittle's statement shows that, but Mr. Whittle's statement is in error there.

Q. Did you allow Mr. Seijas in the year calculations of his unreported income on the basis of the evidence produced at that trial resulting from your investigation, and in the net worth statement which you have referred to [1821] showing his unreported income for the years 1946, 1947, and 1948, the item of inheritance of $50,000 to $60,000, sir?

A. No.

Q. Did you allow him the alleged capital gain of $5,000 on the Palace Billiards Parlor?

A. No.

Q. Did you allow him the alleged receipts from his brother who was employed by the Castle Club, a sum of some $17,000 or $18,000? A. Yes.

Q. Did you allow him the alleged receipts from his brother's employment with United Amusement Company?

A. I believe you are referring to the Smoke Shop?

Q. Yes, sir, Henry's employment.

A. Yes, sir.

Q. Did you allow him his father's services or the proceeds of those services, some $11,000 that we have referred to?

A. Half of them, I believe.

(Testimony of Edward J. O'Leary.)

Q. You allowed him half of them?

A. Yes.

Q. But the rest of the items you disallowed for the purpose of your calculations, of course, excepting the $86,000?

A. I believe that is true. [1822]

Q. Is that true, sir? A. Yes.

Q. And that calculation resulted in an income—unreported income for the years 1946, '7, and '8, pursuant to those net worth statements?

A. Yes.

Q. Is it not a fact also that with regard to the proceeds of the sale of the Palace Billiard Parlor that your investigation disclosed no evidence that Mr. Forman received any portion of that?

A. We were unable to establish that either Mr. Seijas or Mr. Forman received it.

Q. You were unable specifically to determine any fact which indicated that Mr. Forman had received any part, that was the question, is that right, sir?

A. I thought I answered it. We were unable to establish or prove that either Mr. Seijas or Mr. Forman had received any part of the proceeds from the Palace Billiards with the exception of the information I previously gave.

Q. That information was the information that came from Mr. Seijas, of course?

A. Yes, it was.

Q. Now, you testified, Mr. O'Leary, to a so-called breakdown of the collection sources as disclosed by

(Testimony of Edward J. O'Leary.)

these so-called diaries or date book entries? [1823]

A. Yes.

Q. And I think you stated that the Heberling items were relatively minor, is that right?

A. According to my analysis, yes.

Q. And you determined that the amounts testified to by Mr. Seijas with respect to the diaries involving Mr. Meyers were very substantial?

A. Yes.

Q. And I think you gave them year by year?

A. Yes.

Q. And so I will not ask you about that again. Now, those calculations, I assume that you arrived at by running an adding machine tape on the entries themselves, is that right, sir?

A. No. I went through each page, noted the date, the amount of the holdout, and divided it one-half to Forman and one-half to Seijas.

Q. But were the calculations based entirely upon the entries in that book, sir?

A. Oh, yes, entirely on the basis of the diaries.

Q. Entirely upon that? A. Yes.

Q. Now, with regard to these diaries, you have noticed that I had and have referred to some photographs that were in my possession. Do you know how we received [1824] these, or I received them, where they came from? A. Yes, I do.

Q. Will you please state the circumstances?

A. Shortly before the trial——

The Court: This trial?

A. (Continuing): ——this trial, you requested

(Testimony of Edward J. O'Leary.)

if you could have copies of the photostats that we had, and we made the photostats available and they were photostated.

Q. And so these are photostats of the photostats, you might say, which were made available by your office and Mr. Oftedal's office a few days before the trial, to me, is that right, sir?

A. Yes.

Q. That is where they came from?

A. Yes.

Q. Did Meyers ever make a statement to you, and particularly at the time of the interview where inquiry was made into Seijas' tax liability, that he had consulted with Mr. Seijas and discussed this problem with him?

A. That he had discussed this problem?

Q. Or discussed the evidence that he was to give on that day that he was there.

A. I don't recall him ever saying that.

Q. You don't recall either way, is that right?

A. I don't follow you. [1825]

Q. I asked you if you had made such a statement that he had discussed the evidence that he was about to give, the testimony that he was to give on that day, with Mr. Seijas?

A. I might have asked him that question, or Mr. Oftedal might have. We may have asked him the question, but I don't recall him saying that he had.

Q. Do you recall him saying that he had not?

A. I recall him saying so here during this trial.

(Testimony of Edward J. O'Leary.)

Q. Yes, sir. But the occasion I was referring to was the occasion when that statement was taken.

A. I don't recall, to be frank.

Q. You have no recollection of that?

A. I believe the question was asked, but I don't recall which way he answered.

Mr. Mead: I think that is all. Thank you, your Honor.

The Court: Anything further?

Mr. Obenour: Yes, your Honor. Inadvertently one of the items referred to by Mr. O'Leary was one that I intended to have him testify to. He testified to the contents although that was an exhibit that had been entered and withdrawn. I will re-open at this time to offer that exhibit again, and others. [1826]

The Court: Which exhibit are you referring to?

Mr. Mead: I am sorry, your Honor, but I couldn't hear a word he said.

The Court: He said he had overlooked referring to or offering an exhibit that he wished to refer to and has asked leave to re-open for that purpose, and I just now asked him what exhibit he is talking about.

Mr. Obenour: That one particularly to which reference was made by this witness on direct, the '43 return of Mr. Seijas contained in Exhibit 87. There are others of which this witness has knowledge.

The Court: Go ahead with the matter.

(Testimony of Edward J. O'Leary.)

Redirect Examination

Q. (By Mr. Obenour): Handing you Exhibit 87, Mr. O'Leary, can you identify any of the documents contained there?

A. Exhibit 87 is a copy of a 1942 individual tax return of A. A. Seijas and bears the initials of Willard A. Oftedal, dated May 25, 1953. Attached to it is a copy of handwriting of my own, of the 1943 income tax return of Betty L. Seijas, bears my initials, May 25, 1953, and another copy of Army Seijas' 1943 income tax returns [1827] in my handwriting, that bears my initials, dated May 25, 1953.

Q. From what did you make those copies, Mr. O'Leary?

A. These copies were made from retained copies of tax returns of Mr. Seijas which was furnished to us by Mr. Whittle in his office.

Mr. Obenour: Offer Exhibit 87 in its entirety.

Mr. Mead: These have been established to be copies of copies, as I understand it?

The Court: That's right, furnished by Seijas.

Mr. Mead: Furnished by Seijas, and I don't have any recollection as to what happened to the originals, by originals I mean the original copies.

The Court: There is testimony that they are not now in existence, or at least have not been found by anyone. I think that is the testimony, Mr. Mead.

Mr. Mead: If that is the testimony, we have no further objection to this, your Honor.

The Court: They are admitted. Exhibit 87 is admitted in entirety.

(Testimony of Edward J. O'Leary.)

(Thereupon, Plaintiff's Exhibit No. 87 for identification was received into evidence.)

Q. (By Mr. Obenour): Handing you Exhibits 88, 89, 90, and 91, can you refer particularly first to 88, and the [1828] copies of the returns for '42 and '44, can you identify either of those documents?

A. Exhibit 88, 1942 partnership return of income of the Bremerton Amusement Company in my handwriting, and it bears my initials, E.J.O., dated May 25, 1953.

Q. That is for what year?

A. That is for the year 1942. There is a yellow copy of the partnership return of income for the year 1942 of the Bremerton Amusement Company in my handwriting. Again, the initials E.J.O., dated May 25, 1953. There is also a copy of the partnership return for the year 1943 for the Bremerton Amusement Company and bears the initials W.A.O., or Willard A. Oftedal, dated May 25, 1953, and a copy of the partnership return, Bremerton Amusement Company, for the year 1944, bears initials of Willard A. Oftedal, bears the date May 25, 1953.

Mr. Obenour: Offer Exhibit 88 in its entirety.

The Court: Were these made under the same circumstances just related? I notice the date is the same.

The Witness: They were all copied on the same day in Mr. Whittle's office.

The Court: The same as 87?

The Witness: Yes.

Mr. Mead: May I inquire? [1829]

(Testimony of Edward J. O'Leary.)

The Court: Yes.

Examination on Voir Dire

Q. (By Mr. Mead): Mr. O'Leary, I think you stated that these copies of the copies of these returns were copied by Mr. Oftedal in your presence?

A. Yes.

Q. On May 25, 1953? A. That is correct.

Q. Have you made an investigation and an attempt to find the files from which these copies were taken? A. Yes.

Q. Have you been able to locate them?

A. We had originally asked for the originals but they would only let, Mr. Seijas and Mr. Whittle would only let us copy the copy. I believe we made a search of our own income tax files.

The Court: Do you mean the government files?

The Witness: The government's files, and we attempted to get the original at the time this trial commenced by serving a subpoena on Mr. Seijas.

Q. (By Mr. Mead): When you say the originals, do you mean the copies, the retained copies?

A. Yes. [1830]

Q. And you have not been able to locate them or get them from him? A. No.

Q. Have you been able to determine the whereabouts of the books of these partnerships which reflected the income returned here for the various years? A. Never did see the books.

Q. Have you made an investigation in an attempt to locate those books?

(Testimony of Edward J. O'Leary.)

A. Yes, from the inception of the investigation.

Q. And you have never been able to determine their whereabouts?

A. Never received them after repeated requests.

Q. Were they here in the courtroom on the occasion of Mr. Seijas' trial last year, do you know?

A. They were—not the books for those particular partnerships. They have never been found.

Q. Were the books for any of these amusement companies or pinball partnerships for the years 1942 to 1945, have they been found or located?

A. None of those records have ever been found. The only exception is the ledger of one partnership, the Morin-Seijas partnership from 1945 to 1949, the ledger that is here in evidence.

Q. It was here in evidence? [1831]

A. Yes.

Q. It is here now? A. Yes.

Mr. Mead: Very well. Thank you. No additional objection.

The Court: All right. There being no objection Exhibit 88 is admitted in entirety.

(Thereupon, Plaintiff's Exhibit No. 88 for identification was received into evidence.)

The Court: Now, to shorten the matter, is the same thing true of 89, 90, and 91?

The Witness: Yes. 1942 return for United Amusement Company of Bremerton bears my initials and is in my handwriting. 1943 is in the handwriting of Mr. Oftedal, and 1944 return bears Mr. Oftedal's initials, and United Amusement Company

(Testimony of Edward J. O'Leary.)

of Bremerton, and 1945 return also bears initials of Mr. Oftedal.

The Court: Everything you said with respect to Exhibit 88 as far as the copying and time of copying, and availability of the documents from which the copies were made, is applicable here, is it?

The Witness: Yes, sir.

The Court: Do you wish to examine further [1832] with respect to these particular exhibits?

Mr. Mead: Just one question.

Examination on Voir Dire

Q. (By Mr. Mead): Can I assume from your answers, Mr. O'Leary, that with respect to books and records of these amusement companies or pinball partnerships that you have never had a chance to examine any of those books and never saw them with the exception of the Morin interest from 1946 to 1945, is that correct?

A. That is correct.

Mr. Mead: Thank you, sir.

The Court: There being no objection, Exhibits 89, 90, and 91 are admitted in entirety.

(Thereupon, Plaintiff's Exhibits Nos. 89, 90, and 91 for identification, were received into evidence.)

Q. (By Mr. Obenour): Handing you Exhibit 75, Mr. O'Leary, can you identify that document?

A. Yes. This document is an audit report of Mr. Army Seijas' income tax returns for the year 1943 which I first obtained from Mr. Whittle during the

(Testimony of Edward J. O'Leary.)

course of our investigation at the time he was making up the net worth statement.

The Court: This particular paper that you have here? [1833]

The Witness: Yes. This particular audit report I borrowed from Mr. Whittle and returned it to him shortly before the last trial. I believe he introduced it in evidence at that time.

Mr. Obenour: Offer 75.

Mr. Mead: We have no further objection.

The Court: Very well, there being no objection, Exhibit 75 is now admitted in evidence.

(Thereupon, Plaintiff's Exhibit No. 75 for identification was received in evidence.)

Mr. Obenour: This is not in the face of the record. However, we ask to re-open on this your Honor, one other matter.

The Court: All right. Go ahead.

Q. (By Mr. Obenour): After the meeting of Mr. Seijas, Mr. Sager, Mr. Whittle, with Mr. Paine —with Mr. Patten, was there any request made upon you and Mr. Oftedal in the way of further investigation?

A. Yes. We received a communication from Mr. Patten.

Q. And what was the content of the communication?

Mr. Mead: That is objected to as being improper.

The Court: That is right, unless the communica-

(Testimony of Edward J. O'Leary.)

tion is here. If he did something as a result of that, he can go forward and say what it was he did.

Mr. Obenour: I also submit this particular part be opened.

The Court: The basis of it is that apparently refers to a communication which is not here, and until we know where it is, why oral testimony or parol evidence about it can't be admitted. However, if he wants to go forward and relate something that he did as a result of the instructions received from Patten, he may do that.

Q. (By Mr. Obenour): Did you take any action pursuant to this communication?

A. Yes, we immediately——

Mr. Mead: This is objected to as being incompetent and immaterial and not involving any of the matters involved here, and subsequent to April 15, 1953.

The Court: Overruled.

The Witness: Yes. We made an investigation of the items which Mr. Seijas stated he had received, pinball receipts, for the Castle Club money, Smoke Shop, and the item which he had outlined, to determine the veracity of Mr. Seijas' statements to determine his tax liability for the years 1942 to '45, and to obtain evidence to prove the allegations that he admitted at that time. [1835]

Q. (By Mr. Obenour): At that time did you at any other time see the original diaries of Exhibit 76, 77, 78, and 79?

A. I myself have never seen the originals.

(Testimony of Edward J. O'Leary.)

Q. Who did? A. Mr. Oftedal.

Q. At the time that Mr. Oftedal saw the original documents, did he make any statement to you concerning his observations of the appearance of the scotch tape by which the slips were appended to the original exhibits? A. Yes, he did.

Q. When was that?

A. Well, shortly after he had the diaries photostated we had a number of conversations with respect to those diaries, and on more than one occasion he mentioned particularly the appearance of the tapes that appeared in the diaries and mentioned that they had a greenish tinge and which gave the appearance of age.

Q. Had that information been conveyed to me prior to the arrival of Mr. Conway in Tacoma on Monday, August 6? A. Yes, it had.

Q. Were you present at any conversations between Mr. Conway and myself concerning his ability to form an opinion from the appearance of the tape as it showed on the photostat, in reference to the change of such tape because of age? [1836]

Mr. Mead: That is objected to.

The Court: Yes, I think so. I think, of course, that that is not redirect.

Mr. Obenour: No, sir. I requested to re-open on that score.

The Court: Well, secondarily I think that we get too remote from it.

Mr. Obenour: If your Honor please, on the basis of cross examination put to Oftedal it was stated

(Testimony of Edward J. O'Leary.)

that it never had been mentioned to anyone before I asked Conway on the appearance.

The Court: I had forgotten that. If that is correct, I think, then, perhaps the fact that mention was made of it, not what was said about it, but the fact that there was reference to it, under the circumstances may be answered yes or no.

Mr. Mead: This, your Honor, is going into a conversation with Mr. Conway.

The Court: Not what the conversation was, merely yes or no whether there was reference to it at the time the question refers to.

Q. (By Mr. Obenour): Were you present at any such conversation between Mr. Conway and me? A. Yes, I was.

Q. When did such conversation or conversations take place? [1837]

A. That took place, as I recall, last week in the hotel room of Mr. Conway.

Q. When?

A. I believe it was Monday evening.

Mr. Obenour: And that is all the matter of reopening.

The Court: Are you going back to redirect?

Mr. Obenour: Yes, sir.

The Court: Do you want to cross on that while we are on the subject?

Mr. Mead: If I may be permitted to ask one or two questions when he is finished.

The Court: Do it as you prefer. Go ahead.

(Testimony of Edward J. O'Leary.)

Redirect Examination—(Continuing)

Q. (By Mr. Obenour): Now, the question of evidence that you found in the course of your investigation pertaining to the allegations of Seijas to his acquisition of cash on hand as of 12-31-45, had you found evidence pertaining to any of these allegations referred to by Mr. Seijas? A. Yes.

Q. Which ones had you found evidence pertaining to?

A. Well, with respect to the Castle Club and the money obtained by his brother, Louie. The records of the Castle Club disclosed payments to Army Seijas as [1838] trustee for Louis Seijas, and I believe that the checks totalled the approximate sum of $14,000 or the amount that Mr. Seijas claimed that he had received from that source. With respect to the Smoke Shop, the partnership return of the Smoke Shop itself reflected the name of Army Seijas rather than Henry Seijas, and it was apparent right on the surface of the partnership return itself that that income was the income of Mr. Seijas as supported by the statement of Mr. Arnold and the partners themselves. He said that Mr. Seijas was the legitimate partner. That accounted for $21,000. With respect to the diaries, we contacted both Mr. Meyers and Mr. Heberling and obtained their testimony which supported the entries in the diaries. With respect to the checks of the father, we did examine the checks and check stubs which showed that there was $11,000 in checks, or close to it, paid to Armador Seijas, the father of Army, although it

(Testimony of Edward J. O'Leary.)

was difficult for us to know who had actually endorsed those particular checks.

Q. In that regard, handing you Exhibit 140, can you identify those documents?

A. Yes. This work sheet is a copy of checks and check stubs which we made in the office of Mr. Whittle which were made available to us at our request shortly after [1839] Mr. Seijas' disclosure.

Q. What portion is in your writing and what portion is not?

A. The first three pages are in my handwriting and the last two in the handwriting of Mr. Oftedal.

Q. And from what records did you prepare the first three pages?

A. I believe I had the check stubs and certain payroll records, and Mr. Oftedal copied them, I believe, from the checks themselves.

Mr. Obenour: Offer 140.

The Court: Do you wish to inquire?

Mr. Mead: May I inquire?

The Court: Yes.

Examination on Voir Dire

Q. (By Mr. Mead): Where are the originals of these documents from which this transcript was made?

A. We tried without success to obtain the originals, and since the date that they were copied, I have never been able to obtain them.

Q. Were these originals subpoenaed by the gov-

(Testimony of Edward J. O'Leary.)

ernment from Mr. Seijas? Was he directed to produce them here? A. Yes, he was.

Q. And did he produce them? [1840]

A. No, he did not.

Q. You made an investigation to determine whether they were lost or whatever happened to them?

A. Yes, I made an investigation and an attempt to obtain those checks even before this trial.

Q. So this transcript, then, refers to checks which to your knowledge are lost and destroyed along with the other records of these various amusement companies? A. As far as I know.

Q. And Mr. Seijas has not produced them?

A. No, he has not.

Q. Were they in his possession?

A. The last time we saw them they were in the office of Mr. Whittle.

Mr. Mead: No additional objection.

The Court: Very well, Exhibit 140 is admitted in entirety:

(Thereupon, Plaintiff's Exhibit No. 140 for identification was received in evidence.)

Redirect Examination—(Continuing)

Q. (By Mr. Obenour): Now, in addition to the examination—first of all, referring to 140, who is the payee of those checks, Mr. O'Leary?

A. These checks are payable to Mr. Armador Seijas. [1841]

Q. And there is some reference there as to per-

(Testimony of Edward J. O'Leary.)

sons signing the checks for the company, the drawer of the checks, and also reference to your testimony at the other trial? A. As maker?

Q. Yes, sir.

A. It is my recollection that the person who signed the checks as maker was Mr. Forman.

Q. Were there any checks that had also been endorsed as secondary endorser by Mr. Forman?

A. Yes. There were four checks signed by Mr. Forman—five checks. Excuse me.

Q. Did you ever ask Mr. Forman concerning this matter?

A. No, I never had an opportunity to ask Mr. Forman any information with respect to the en-endorsements on these checks.

Q. Was Mr. Seijas, in other words, Army Seijas' father, living or dead at the time you saw these checks?

A. At this time Mr. Seijas had passed away.

Q. Was there anyone other than Mr. Seijas who was then deceased who, to your knowledge, would know anything about this matter?

Mr. Mead: That calls for a conclusion, your Honor.

The Court: Yes, it does.

The Witness: I found no one who could. [1842]

Mr. Mead: I am sorry, I didn't hear the answer.

The Court: He said he found no one that did.

Q. (By Mr. Obenour): In your computation in the last trial, do you recall, Mr. O'Leary, were any

(Testimony of Edward J. O'Leary.)

of these items accepted or given credit in computation for cash on hand as of 1-1-46?

A. Yes, the items which they were able to establish included the pinball holdout per the diaries, the income received by Mr. Seijas as trustee for his brother Louie Seijas from the Castle Club, the $21,000 of income received from the Smoke Shop partnership which was reported by his brother Henry Seijas, the salary checks per this exhibit payable to his father.

Q. Was the entire amount of that taken?

A. One half of the amount was taken into account.

Q. What was the basis under which only one half was credited as beginning cash to Mr. Seijas?

A. The basis was that the pinball partnership or the alleged scheme of tax evasion practiced by Mr. Seijas according to him, was shared equally by his partner, Mr. Forman. It was a 50-50 partnership. The fact that Mr. Forman had signed some of the checks indicated that he was aware of these payments to his father or——

Mr. Mead: I move to strike these answers [1843] which are conclusions.

The Court: Yes, I think so.

Mr. Obenour: If your Honor please, he went into great detail.

The Court: I realize the cross examination was extremely broad and the phraseology of the questions then put was very broad, but I think we should not go into it too extensively. State just

(Testimony of Edward J. O'Leary.)

briefly what items were allowed and briefly the substance of their allowance and why they were allowed, and not so a detailed statement of it.

Q. (By Mr. Obenour): Of the four sources claimed as the sources of accounting for the beginning net worth as of 1-1-46 were four?

A. I would say independent of Mr. Seijas' own statement we were able to establish the income from the Castle Club, the income from the Smoke Shop, the pinball income from the diaries, and the statements of the collectors, the income from these checks that we were able to establish independently of those four items. We were not able to prove or establish the Palace Billiards income, but in that instance the only record made available was the record pertaining to one Kiesler who was deceased. Also, the 1944 tax return of Army Seijas, I believe, reflected approximately $5,000, or close to [1844] that, a figure I forget. At least it reflected a sale of Palace Billiards machines, and it indicated that that money rather than being a tax evasion scheme, was actually reported. At least those were the factors that were considered, but, at any rate, we were not able to establish the Palace Billiard income.

Q. In giving credit for these items which you had mentioned, did you then make a computation which although crediting these sources as being responsible for beginning cash as of 1-1-46, did you still compute unreported income and tax due thereon for the years '46, '47, and '48 at Mr. Seijas' last trial?

(Testimony of Edward J. O'Leary.)

A. Yes, we did. We computed the amount of cash that Mr. Seijas could have had on hand as of December 31, 1945, by taking all of his reported income plus this alleged income, less what showed that he spend during that period, and in that manner arrived at a figure, I believe, of around $120,000 of cash that he could have had on hand in some unknown place.

Mr. Obenour: I believe that is all.

Recross Examination

Q. (By Mr. Mead): Mr. O'Leary, can you fix the time that Mr. Oftedal told you that these scotch tape strips that were affixed, [1845] that affixed the slips in these books were green in color?

A. Yes.

Q. What was the time, sir?

A. It was immediately after we—I seen the photostats. We had a number of discussions with respect to these diaries. There are other significant things, and he described them to me.

Q. Did he also tell you that the pages were yellow at that time?

A. I can recall a conversation with Mr. Oftedal which went like this——

Mr. Mead: Now, I would like to have him answer the question.

The Court: Confine yourself to the question, Mr. O'Leary.

The Witness: Excuse me. I don't recall him saying that the sheets were yellow, no.

(Testimony of Edward J. O'Leary.)

Q. (By Mr. Mead): Well——

A. He may have said that. He made a number of observations with respect to the diaries which indicated age to me.

Mr. Mead: I think the answer should be stricken.

The Court: You have answered.

Mr. Mead: And the Jury instructed to disregard it. [1846]

The Court: The last answer is stricken.

Q. (By Mr. Mead): Did you make a determination as to what insurance firm had issued these so-called diaries or daybooks? A. I did.

Q. Did you call upon them to find out whether they had issued these books to Mr. Seijas and the numbers of the books which they had issued to him?

The Court: Do you mean the quantity?

Mr. Mead: Yes, sir.

The Witness: We never called on any insurance company to determine whether or not they had mailed such a book to Mr. Seijas.

Q. (By Mr. Mead): No, nor did you determine the quantity of the books which had been mailed to Seijas? You didn't determine that?

A. We didn't contact — I believe, as I recall, there were two insurance companies.

Q. Did you contact either one of them to find out anything about these books?

A. We didn't contact either one of them, no.

Q. So, then, you made no inquiry to determine when these books were obtained by Mr. Seijas or how many he had obtained, sir?

(Testimony of Edward J. O'Leary.)

A. No, we didn't. [1847]

Q. Now, you stated, Mr. O'Leary, that the item that we could establish included pinball receipts or pinball holdouts? A. Yes.

Q. Is it not a fact, Mr. O'Leary, that you never did establish that fact right up to the present time?

A. We established it to my satisfaction.

Q. Is it not a fact, Mr. O'Leary, that in Mr. Seijas' trial where this was in issue and he was attempting to prove that he had this $86,000, in answer to the following questions you gave the following answers, "Question: You didn't know anything about the cash on hand from the holdouts on pinball machines or these other sources prior to the time Mr. Seijas made the disclosure to you or to Mr. Patten? Answer: We couldn't identify the unreported income during these years. Question: You have not answered my question. Did you not know that cash on hand prior to the time Mr. Seijas told Patten? Answer: Well, now, this cash on hand is something that we never did know about, and to this day we have never been able to see or know it existed." Did you answer those questions in that manner, Mr. O'Leary?

A. I believe I did.

Q. You did, sir?

A. Yes. In other words, we never did see or count as cash [1848] which was allegedly on hand in these boxes or other places.

Q. But you answered those questions on the occasion of this trial?

(Testimony of Edward J. O'Leary.)

The Court: He said he did.

The Witness: Yes.

Mr. Mead: That is all. Thank you.

The Court: That is all, Mr. O'Leary. You may step down.

(Witness excused.)

The Court: Call another witness.

Mr. Obenour: We would request to go through the exhibit list and re-offer——

The Court: We can do that at the recess. We will have our recess fairly shortly.

Mr. Obenour: With the reservations as to certain exhibits that are still outstanding, the government rests.

The Court: Well, all right. I think we are not too far from the recess time, so we will just attend to this work while you Ladies and Gentlemen take a recess.

(Thereupon, the Jury withdrew from the courtroom.)

The Court: Mr. Obenour?

Mr. Obenour: As our record of the exhibits [1849] indicates, everything has now been admitted for the government——

The Court: Everything has been offered, do you mean?

Mr. Obenour: Everything offered has been admitted up to 92 which was the Phalen affidavit, is that correct?

The Clerk: My record shows, your Honor, 81 is admitted only in part.

The Court: Yes. That is the Kitsap County Commissioners Resolution, and I think there were some attached papers. I don't recall what they were. There were so many attachments to that that apparently related to something else, as I recall. Do you remember that?

Mr. Mead: I have got an ordinance prepared by Mr. Cohen for Kitsap County, the pinball ordinance prepared by Mr. Cohen. That is all my notes indicate.

The Court: My notes show that there were some pages of that that apparently were not found particularly objectionable but they related to something else, or something of the kind, and I just made that note that you should look into it and see whether you wanted it taken out of there. [1850]

Mr. Obenour: I recall now, your Honor, in addition to the original resolution of 1942 in which Mr. Seijas to some extent participated, there was a copy of the resolution of 1950 which supplemented. It is still here. There has been no reference made to it, and we——

The Court: Do you want to take a look at it or are you satisfied?

Mr. Mead: I don't think the resolution of 1950 has anything to do with it.

The Court: Are you satisfied that the sheet he is about to tear out is that?

Mr. Mead: Oh, yes.

The Court: Just take that sheet out or cut it out.

Mr. Obenour: That was exemplified copy from

the Clerk, and as such she sent the entire resolution.

The Court: We understand that. There has been no suggestion there has been any impropriety. It is just that Clerk sent more than was called for. You can just cut that out or make arrangements for it to be kept. Is there any need of keeping it?

Mr. Mead: No, your Honor.

The Court: That takes care of 81. [1851]

Mr. Obenour: The next one is 92, the Phalen affidavit.

The Court: Yes, objection was sustained to that.

Mr. Obenour: We would offer it as the document being the evidence, that it was in fact prepared and submitted rather than simply the statement of Seijas alone that such an affidavit was prepared.

Mr. Mead: Well, this exhibit, as I recall it, your Honor, is a yellow office copy of an affidavit prepared by an attorney by the name of Phalen, who is now deceased, with regard to certain records which he said were thrown out or destroyed in his office, and I think we objected it on the ground of materiality and relevancy, and that also the affidavit would be the best evidence.

The Court: We are not concerned about relevancy or materiality, but if you object on some other ground, I will hear that.

Mr. Mead: On the grounds that the original would be the best evidence, and I think that the record has clearly established the original was in the hands of the government.

The Court: Well, it is not clear to me whether there has been any showing as to whatever [1852]

happened to the original of that affidavit or even to show that it ever was actually filed. So on the basis of the record now, 92 is rejected.

(Thereupon, Plaintiff's Exhibit No. 92 for identification was rejected.)

The Court: The next one I have is 97, a profit and loss statement, Seijas and Morin. It was offered early in the case before the testimony came in with respect of it.

Mr. Obenour: It was offered through Mr. Seijas as being a copy of the profit and loss statement for 1948 as prepared by the bookkeeper and submitted to the partners.

The Court: Well, it was offered prior to 111, as we can tell from the number, consecutive numbers, and I think in view of 111 and the testimony of Seijas with respect thereto, this exhibit is now admissible. Do you wish to make any objection to it?

Mr. Mead: I believe the testimony, your Honor, of the bookkeeper, Mr. Renstrom, this is a profit and loss statement which covered the Seijas-Morin partnership, and there is no evidence that it was ever delivered to Mr. Forman. I think on the contrary he said that he did not [1853] deliver copies, as I recall, to Mr. Forman after this sale.

The Court: I think your statement is correct excepting that there is substantial evidence in which it can be inferred that Mr. Forman was a partner, continued as a partner in this enterprise at that time. Whether that inference is drawn, is another matter, but the inference may be drawn, and ac-

cordingly I think this statement now is admissible. 97 is admitted.

(Thereupon, Plaintiff's Exhibit No. 97 for identification was admitted in evidence.)

Mr. Obenour: The next one would be 99, the safe deposit card.

The Court: That is in. My record shows it has been admitted.

The Clerk: Yes, your Honor, my record does too.

Mr. Obenour: 103, Seijas' receipt for the Castle Club checks.

The Court: I don't think that is admissible. That is excluded.

(Thereupon, Plaintiff's Exhibit 103 for identification was rejected.)

Mr. Obenour: 105, records of the Castle Club.

The Court: It has never been offered.

Mr. Obenour: 107, the chattel mortgage.

The Court: That is in. 110 is the next one I have that is not in, Seijas' work papers concerning his 1946 income tax return.

Mr. Obenour: Yes, sir. We would offer that again, your Honor, as a record that showed that there was a one-half of the office expense charged to the operation of the Morin-Seijas partnership.

The Court: Well, for that limited purpose I wouldn't admit it, and it is my recollection, and I may be in error, that Mr. Seijas himself never identified those papers as anything he personally did, but were records of someone that he did not identify, as I recall it. That being the case, I think they should not be admitted. Of course, the oral

testimony to that effect is very voluminous that that was done. Accordingly, Exhibit 110 is rejected.

(Thereupon, Plaintiff's Exhibit No. 110 for identification was rejected.)

Mr. Obenour: 114.

The Court: 114 is in. The next one I have is 125, the ledger sheet of the American Discount Company, Forman, Heberling, Palace Billiards. It wasn't sufficiently identified, as I recall. If there be any of these, Mr. Mead, that you want to withdraw objection to, why state so because, of course, should you withdraw objection in any case the exhibit will be admitted.

Mr. Mead: Thank you, your Honor.

The Court: 125 is rejected.

(Thereupon, Plaintiff's Exhibit No. 125 for identification was rejected.)

Mr. Obenour: 129 and 132 were admitted for a limited purpose of comparison.

The Court: Yes.

Mr. Obenour: 130 and 131, your Honor, we would offer as written documentation submitted to third parties for purposes outside any possible anticipated matter of the investigation as statements of Seijas and Forman to Mr. Baldwin that each had $25,000 in cash in safe deposit boxes over and above any bank loans, that these statements were signed by the respective persons, Mr. Seijas in one instance and Mr. Forman in the other, and that after having made such a statement Mr. Seijas then requested that his entry as to—rather the entry on his appli-

cation of $25,000 be scratched out, and that the documents as such would be the [1856] best evidence of representations made there by each of those persons and signed by them, and being direct record, records that each had a like amount of currency.

The Court: Of course, the evidence of Mr. Baldwin to that effect is already before the Jury. The only question is whether these documents as exhibits are admissible.

Mr. Obenour: Yes, sir. There is an instance where they have the actual written documentation signed by the respective parties with given dates and which they have set forth on their representations on the same time that each has $25,000.

The basis I had in mind at the time of reserving on these items, 130 and 131, Mr. Mead, was the possibility that there might be something other than this matter involved in those exhibits somehow or other prejudicial.

Mr. Mead: I wonder if we may see them.

The Court: If there is anything in either document that appears to be prejudicial beyond the matter that already is admitted in the testimony of Baldwin, of course, I will hear it. You still stand on your basic objection on the admission of that material; namely, the fact that [1857] each of these parties had that amount of money on hand that time. However, if there be anything otherwise objectionable in those documents, I will hear from you.

Mr. Mead: I believe our objection to them was

that it had to do with another partnership and that it had no bearing on the pinball operations, as I recall it.

The Court: You made a general objection to that effect and I permitted Mr. Baldwin to testify.

Mr. Mead: He testified to the contents.

The Court: If there is any other objection, that you find anything prejudicial in these documents other than that, I will hear you.

Mr. Mead: We have no further objection.

The Court: In that case Exhibits 130 and 131 are admitted.

(Thereupon, Plaintiff's Exhibits Nos. 130 and 131 for identification were received in evidence.)

Mr. Mead: I should say no additional objection rather than no further objection.

The Court: Yes, I understand.

Mr. Obenour: 138 was not offered. 139, if I understood the Court's prior ruling, could be separated and marked possibly 139 and 139-A, and [1858] that that portion designated supplemental statement which was signed by Mr. Seijas was admitted.

The Court: No, I do not think either one of the statements as an exhibit was admitted, at least according to my record. What is your position on 139, Mr. Mead?

Mr. Mead: Well, I believe 130, your Honor, is a typed statement, a typed question and answer statement of Mr. Seijas presumably made on January 11, 1952, and there is a supplemental statement

attached to it made on January 28, 1952, which is signed. That is the one we had the discussion about as to whether there was reference to it. I think we objected, your Honor, to the statement of January 11, 1952, on the grounds that it was not signed and merely, then, was a record of the conversation, particularly in view of the fact that it was not under oath, and the second part of it, I think is objected to on the grounds of materiality and relevancy, your Honor.

The Court: The latter objection is overruled and the former is sustained. The copy of the 1/28/52 statement, which, I understand is the signed statement, is now admitted as Exhibit 139.

(Thereupon, Plaintiff's Exhibit No. 139 for identification was admitted into evidence.)

The former part can be detached and designated as 139-A which will not be admitted.

(Thereupon, Plaintiff's Exhibit No. 139-A for identification was rejected.)

The Court: The notes of Mr. Oftedal concerning his interview with Mr. Forman, No. 141, I think is not admissible. The fact that he had notes has been brought before the Jury's attention, and counsel has offered to examine them, but that is all that the situation requires, as I see it.

(Thereupon, Plaintiff's Exhibit No. 141 for identification was rejected.)

Mr. Obenour: No. 143 would be the record of Mr. Forman's interview.

The Court: That is in. No objection was inter-

posed to that nor to 144. I think all items, then, have been covered?

Mr. Obenour: Yes, sir.

The Court: Do you rest?

Mr. Obenour: Yes, sir.

The Clerk: May I check my record on Exhibit 115 which I do not show in evidence.

The Court: Exhibit 115 are cancelled checks Seijas to Forman concerning the United Amusement-Morin transaction. They have been admitted.

Mr. Obenour: Yes, sir.

The Clerk: I was wrong.

The Court: That is all right. It is perfectly desirable to make sure we have no mistakes.

Mr. Obenour: That is all, your Honor, and we rest.

The Court: All right. Would you like to make your statement now or shall we take a recess?

Mr. Bischoff: We would like a recess.

The Court: That will give you an opportunity to make your position plainer in fewer words.

Mr. Bischoff: May we make the presentation before the Jury is brought in?

The Court: Oh, of course, certainly. We will recess for 10 minutes and then resume and hear what you have to say.

(Thereupon, a short recess was taken.)

The Court: Mr. Bischoff, you may proceed.

Mr. Bischoff: May it please the Court, I have a number of motions to present and I don't know whether it is your Honor's practice and desire that

I state all of the motions at one time or whether you prefer to dispose of each motion.

The Court: You might as well state them one [1861] at a time unless you prefer it otherwise. I will leave it entirely up to you.

Mr. Bischoff: It would be agreeable to me to state them all.

At this time the defendant Forman moves that a mistrial be declared and the Jury be discharged on the ground that the defendant has been deprived of the protection of the Fifth Amendment and the self-incrimination clause of the Constitution of the United States in that the Court permitted the introduction of evidence by the government over the objection of the defendant in the following respects: A——

The Court: Excuse me Mr. Bischoff, it just occurs to me that we might shorten this, if you have them all drafted why not file them, file the motion, and I will examine it and rule on it unless you prefer to state it orally. You do as you please, Mr. Bischoff.

Mr. Bischoff: I had intended to present it in written form, but I noticed upon the examination after it was done that one paragraph was omitted, and if I can state that portion in the record, then I will submit it with that inclusion.

The Court: You may do that, and I think it [1862] would expedite the matter.

Mr. Bischoff: In that case, I will present the written motions for a mistrial, and if that is denied, to strike parts of the indictment and to strike

portions of the evidence, and motion for judgment of acquittal, and if those are all denied, that the motion that the court withdraw from the Jury the issues relating to paragraphs A, B, and D.

I will file the written motion and ask that there be added to it on page three at line five there—pardon me, page two, at line 9, C, that the witness Albert Forman was subpoenaed by the government and was permitted in the presence of the Jury over defendant's objection, to testify that he was served with a subpoena duces tecum to appear at the trial and to produce certain records described therein, records and documents described therein which were the property and in the possession of the defendant Forman and his attorney, and was permitted to testify that the records were in the possession of the defendant, and that the documents were in court, and was permitted to give testimony in relation thereto.

The Court: Yes, that additional may be deemed [1863] incorporated in the motion, and if you would like, you may have leave to substitute a page including what you have just stated so that it will all be in one piece, if you would like.

Mr. Bischoff: I will give counsel a copy.

Mr. Obenour: Is that Albert Forman's testimony?

The Court: Yes, Albert Forman. The greater part of the motion refers to points that have been raised at various times during the pretrial motions and during the course of the trial and to which I

have already given my attention and thought and have ruled adversely to the defendant.

Insofar as the motion is predicated on a failure of proof, the motion is denied.

Similarly, with respect of the barring of the action of the statute of limitations, denied, and accordingly, the whole of the motion is denied. Exception allowed.

Are you ready to proceed?

Mr. Mead: Yes, your Honor.

The Court: Call in the Jury.

(Thereupon, the Jury resumed the box.)

The Court: As I recall, Mr. Mead, you made your opening statement? [1864]

Mr. Mead: Yes, your Honor, that is correct.

The Court: Ladies and Gentlemen, the government has rested the presentation of its evidence, and you will recall that Mr. Mead made the opening statement for the defendant at the beginning of the trial. Accordingly, we now proceed to such evidence as the defense desires to present. Call a witness, please.

Mr. Mead: Call Mr. Zimmerman.

LORIS ZIMMERMAN

called as a witness on behalf of the Defendant Forman, being first duly sworn, was examined, and testified as follows:

The Clerk: State your full name and spell your last name.

The Witness: Loris Zimmerman, Z-i-m-m-e-r-m-a-n, Loris, L-o-r-i-s.

(Testimony of Loris Zimmerman.)

Direct Examination

Q. (By Mr. Mead): Where do you live, please, Mr. Zimmerman? A. Bremerton.

Q. And how long have you been a resident of Bremerton? A. Approximately 30 years.

Q. How do you appear here today in behalf of the defendant, by subpoena? [1865] A. Yes, sir.

Q. Were you also subpoenaed by the Government as a witness in this case? A. Yes.

Q. But you were not called by them to testify?

A. That is right.

Q. Were you subpoenaed by the Government or did you appear as a witness in the case of United States against Army Seijas tried last year in this court? A. Yes.

Q. And were you subpoenaed by the Government in that case? A. Yes.

Q. During the years of 1942 to 1945, Mr. Zimmerman, what was the nature of the business in which you were engaged? A. Tavern business.

Q. And during that period of time, what taverns did you own and operate?

A. Owned the Blue Moon Tavern and Pop's Inn Tavern.

Q. Where was the Blue Moon Tavern located?

A. Kitsap County, on the edge of Bremerton.

Q. Where was Pop's Inn Tavern located?

A. Bremerton.

Q. What type of business are you now engaged in, sir? A. Restaurant business. [1866]

Q. Where is that business located?

(Testimony of Loris Zimmerman.)

A. Bremerton.

Q. Were you acquainted during the years 1942 and 1945 with Army Seijas and William Forman?

A. Yes.

Q. What was the nature of your acquaintance?

A. Well, I was acquainted with Army Seijas in the operation of pinballs and also sold my business to him. I didn't have any business dealings with Mr. Forman, and I met him a couple times is all.

Q. Specifically, with regard to the operation of the pinball business and the contact that you had with Mr. Seijas, when did you first meet him?

A. I think about 1941, latter part of the year.

Q. What were the circumstances, sir?

A. He wanted to put pinballs in.

Q. And they were to be put in what establishment? A. The Blue Moon.

Q. And who contacted you to make arrangements for that purpose? A. Mr. Seijas.

Q. Did you put pinball machines in the Blue Moon Tavern? A. Yes.

Q. By whom were those pinball machines operated?

A. Well, it was supposed to be a company but Mr. Seijas [1867] did the business. I don't recall the name of the company now.

Q. Was it a business in which Mr. Seijas and Mr. Forman were interested? A. Yes.

Q. When did you have contact with either Mr.

(Testimony of Loris Zimmerman.)

Seijas or Mr. Forman to put pinball machines in the tavern known as Pop's Inn?

A. Oh, I don't recall. It wasn't at that time, though, but I don't recall when the pinballs went in Pop's Inn, but it was a later date, I believe.

Q. Sometime after 1941?

A. Yes, I think it was.

Q. Was it during the year 1942?

A. Yes.

Q. With whom did you make the arrangements to put the pinball machines in the tavern known as Pop's Inn? A. Mr. Seijas.

Q. How many machines were put into that estabment? A. Pop's Inn?

Q. Yes, sir.

A. Two. I believe one at first and another one later.

Q. Where was the establishment located?

A. It's on Farragut.

Q. Would that be in the incorporated limits of the City of [1868] Bremerton? A. Yes.

Q. And the other tavern, the Blue Moon, where was that located?

A. Located on the Silverdale Highway.

Q. Is that in Kitsap County?

A. That is known as Westgate.

Q. And that is outside the incorporated limits of the City of Bremerton? A. Yes.

Q. How long did the business of Seijas and Forman continue their pinball machines that you know of in that location?

(Testimony of Loris Zimmerman.)

A. I don't know. I sold out to them, and they were still in there in '45.

Q. When did you sell the Blue Moon Tavern?

A. I sold the Blue Moon in June of '45.

Q. And to whom did you sell it, sir?

A. Army Seijas.

Q. And when did you sell the tavern known as Pop's Inn? A. I sold that in March.

Q. To whom did you sell it?

A. I sold that to Army Seijas.

Q. Did Army Seijas pay you for the purchase price of both of these establishments on or about the time that [1869] you mentioned?

A. Yes.

Q. Do you recall, sir, what the purchase price was of the Blue Moon?

A. The purchase price of the Blue Moon was $25,000.

Q. What was the purchase price of the tavern known as Pop's Inn? A. $15,000.

Q. Were you an owner of the building in which the tavern was located known as Pop's Inn?

A. Yes.

Q. Did you at that time, and when I say "at that time," did you make a lease to the purchaser of that tavern? A. Yes.

Q. With whom did you make the lease?

A. Army Seijas.

Q. And what was the situation with regard to the ownership of the real property?

A. Can I go back to the other question?

(Testimony of Loris Zimmerman.)

Q. Yes, sir.

A. That least was negotiated by Army Seijas. Whether it was made out to his name or the amusement company, I don't know.

Q. You have the lease, sir?

A. No, I haven't. [1870]

Q. And in any event the tavern was sold to Army Seijas? A. Yes.

Q. And that is Pop's Inn? A. Yes.

Q. And likewise the Blue Moon? A. Yes.

Q. What was the purchase price of the Blue Moon? A. $25,000.

Q. And what was the purchase price of Pop's Inn? A. $15,000.

Q. Now, Mr. Zimmerman, during the period of time that you owned and operated these two taverns and these pinball machines were installed in them, what was the practice with regard to collecting funds from these machines?

A. They collected the funds about once a week. I don't know or remember what date it was. It was once a week.

Q. Do you recall by whom these funds were collected?

A. Well, I think most of the time they were collected by Jerry Meyers, and I wasn't always there when they collected.

Q. Was there an accounting made at the time the funds were collected with the owner of the establishment?

(Testimony of Loris Zimmerman.)

A. Yes. They left a receipt of monies taken out and taxes for our part. [1871]

Q. They left receipts for monies held — withheld for taxes and licenses? A. Yes.

Q. Were monies withheld for those purposes?

A. Yes.

Q. I will ask you, Mr. Zimmerman, if at any time during that period when you were operating these establishments from 1942 through 1945 to your knowledge was there any hold outs of funds by the operators of these machines? A. No.

Q. Was there any division of funds by the operators of these machines with you and lesser amounts of money reported on the slip which was turned in?

A. No. I had made my slip or my cash according to my slip. My cash had to balance with that slip. I was very seldom there when the pinballs were checked. I had a manager at one place, and I used to make the cash up there, and then I had a girl working the other place, and she was always there when the pinball money was counted. They would leave the slip with her, and I would check the slip against my cash to see that it come out right.

Q. So your manager or someone in authority would usually be there when the pinball receipts were counted?

A. I only had a manager at Pop's Inn. [1872]

Q. But when the pinball receipts were counted at the other location, were you usually there?

A. I, no.

(Testimony of Loris Zimmerman.)

Q. Were you not?

A. No. I had a very dependable girl there, and she had no authority, but usually when she was on shift, the money was usually counted.

Q. When she was usually there and on shift, the money was usually counted? A. Yes.

Mr. Mead: You made inquire.

Cross Examination

Q. (By Mr. Obenour): Mr. Zimmerman, you testified substantially the same in the trial a year ago, didn't you? A. I believe so.

Q. And at that time you were walking on crutches on that occasion, too?

A. That is right.

Q. And on that occasion we attempted to contact you, and you had quite a bit of difficulty getting around? A. Yes.

Q. And we were apprised of your continued difficulty at this trial in getting about, were we not?

A. Sir?

Q. We knew in this trial also that you had difficulty getting about on crutches? A. Yes.

Q. You had made that known to the Government agents? A. Yes.

Q. And were you told anything concerning if you did not answer the subpoena because of your difficulty in getting about with crutches? Were you told anything about not appearing? A. No.

Q. Nothing was said to you that you did not have to appear under the subpoena?

(Testimony of Loris Zimmerman.)

A. No, nobody told me I didn't have to appear.

Q. Were you told to appear?

A. Yes. The subpoena told me to appear.

Q. Did you? A. Yes.

Q. When?

A. Well, I was supposed to appear—I think it was a week ago today at 9 o'clock or 9:30, and I come over and I went in the office.

Q. I didn't know that.

A. They wrote my name down in there. They wrote my name down in there. They told me to go home. [1874]

Mr. Mead: What I assume——

The Court: You followed those instructions?

The Witness: I followed those instructions, and that is where I went, home.

The Court: Anything else?

Q. (By Mr. Obenour): Did you receive a telephone call that you didn't have to appear—that you were so advised when you did come over on Monday?

A. No. Mr. O'Leary, I talked to him in the office, and I said I called him in Seattle about appearing, and I asked him if I could appear and be called and go right back home because I was too uncomfortable to sit around, and he was to call me back. If he called me back, I didn't get the message so we come over that Monday morning, and I talked to him in the office there.

Q. I believe you stated you were very seldom there when the pinball receipts were counted.

(Testimony of Loris Zimmerman.)

A. I wasn't there very much. Oh, I would say maybe I was once every two or three months when they come and counted it. That was at the time when I would be away from the tavern usually.

Q. You would make up your cash with the receipts which were left for you by the collector?

A. Yes, and the receipt.

Q. You would have no knowledge, then, as to [1875] whether the receipts represented all of the money that was in the machines or not?

A. The only money I ever known was taken out of the machine was the odd nickels. When they counted machines the odd nickels he always give to his girl to play in the machine.

Mr. Obenour: That is all. Thank you.

Redirect Examination

Q. (By Mr. Mead): About your physical situation, your leg was broken sometime ago, was it?

A. Yes, over two years ago.

Q. And when you came here to testify during the Seijas trial, you were in the same condition that you are substantially in today, is that right?

A. Only this time I will know in six weeks if I am going to lose my leg or keep it.

Q. I am sorry to hear that. That's all.

The Court: Our good wishes to you in that regard.

Mr. Obenour: That is all.

The Court: That is all, Mr. Zimmerman. You may leave now whenever you wish.

(Witness excused.) [1876]

ROBERT B. RANKIN

called as a witness on behalf of the Defendant Forman, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Robert B. Rankin, R-a-n-k-i-n.

Direct Examination

Q. (By Mr. Mead): Where do you live, Mr. Rankin? A. Seattle, Washington.

Q. And what is the nature of your occupation or profession? A. Certified public accountant.

Q. And how long have you followed that occupation, sir? A. Since 1921.

Q. And are you a graduate of any college or university?

A. Well, I am a charter accountant, certified public accountant of the State of Washington.

Q. How long have you followed that occupation or profession in the State of Washington?

A. Since 1934.

Q. And where is your office located?

A. Seattle.

Q. How do you appear here today, sir, by subpoena? A. I do. [1877]

Q. I will ask you, Mr. Rankin, if you are acquainted with Mr. Army Seijas? A. I am.

Q. And I will ask you whether or not you are acquainted with Mr. Forman?

A. I have met Mr. Forman on one occasion.

(Testimony of Robert B. Rankin.)

Q. I will ask you whether you are acquainted with me.

A. I have met you on one occasion.

Q. And that was on the occasion of the service of the subpoena upon you, was it, sir?

A. That is correct.

Q. Were you ever employed by Mr. Seijas with respect to his income tax problems? A. I was.

Q. When were you employed, sir?

A. About three or four weeks prior to the start of his trial as I recall.

Q. And that would be sometime in June or July of 1955, would it, sir?

A. I believe that would be correct.

Q. For what purpose were you employed?

A. To prepare a net worth statement as of the end of the years '45, '46, '47 and '48.

Q. And did you do that, sir?

A. I did. [1878]

Q. And do you have a copy of the net worth statement which you prepared?

A. I have a typing draft.

Q. Could you produce that typing draft, Mr. Rankin, please? A. Yes.

The Clerk: Defendant's Exhibit 506 has been marked for identification.

Q. (By Mr. Mead): Mr. Rankin, you have been handed the papers which you produced which you have identified as a typing draft of a net worth statement marked Defendant's Exhibit 506 for identification? A. Yes, I have.

(Testimony of Robert B. Rankin.)

Q. From what information and from what sources did you prepare that net worth statement?

A. Well, it was prepared from many sources. It was prepared from an analysis of the various bank accounts of Army Seijas, from the records or some of the records of the various businesses in which he was interested, from the records of his law practice, and various other documents is about the best way I can describe it.

Q. Now, Mr. Rankin, was the original of that document introduced in evidence at the time of Mr. Seijas' trial last year? A. Yes, it was.

Q. Did you testify with respect to it at the trial?

A. I did.

Q. Did you sit at the counsel table of Mr. Seijas during the course of that trial when this particular subject matter was involved? A. I did.

Q. Who were the counsel for Mr. Seijas who represented him during the course of his trial?

A. Mr. Griffin and Mr. Sager.

Q. Now, I will ask you, Mr. Rankin, whether or not in the preparation of that net worth statement you had access to the records, the check stubs and the journal entries of the company known as the Bremerton Amusement Company or the United Amusement Company of Bremerton?

A. I had access to the books of the United Amusement Company. I do not recall definitely whether or not the checks and checkbooks for that company were available. They may have been. I am not sure.

(Testimony of Robert B. Rankin.)

Q. You are not certain of that? A. No.

Q. But in any event you had reference to and access to the books of that company?

A. I did.

Q. What particular books, sir, did you have access to?

A. As I recall, they would be the general ledger of that partnership and a check register, and I [1880] believe cash receipts book. I am not sure.

Q. Do you remember the parties who were interested in that particular venture, that partnership? A. Yes.

Q. On the net worth statement which you prepared, and by the way, for whom was that particular net worth statement prepared?

A. It was prepared for Mr. Seijas.

Q. And does that statement set forth the statement of his assets and liabilities of Mr. Seijas for the various years of 1945, 1946, 1947 and 1948?

A. It does.

Mr. Mead: We offer the exhibit in evidence, your Honor.

Mr. Obenour: I fail to see the materiality, your Honor.

Mr. Mead: I think that will develop, your Honor.

The Court: You may do so. We will admit it.

(Whereupon, Defendant's Exhibit No. 506 for identification was received in evidence.)

Mr. Mead: Hand the exhibit to the witness, please.

Q. (By Mr. Mead): Mr. Rankin, I will ask

(Testimony of Robert B. Rankin.)

you with respect to the exhibit, if that exhibit [1881] shows a loan payable from Army Seijas to W. R. Forman in the years 1946, 1947 and 1948?

A. It shows a loan payable as of the end of 1946 and 1947, but not '48.

Q. What is the loan that is shown payable to Mr. Forman at the end of the year 1946?

A. $13,343.78.

Q. What is the amount of the loan shown payable at the end of 1947? A. $9,276.03.

Q. And I think you stated there was nothing shown payable at the end of '48, is that correct?

A. That is correct.

Q. What was your source of information as a certified public accountant which enabled you to place that liability upon Mr. Seijas' net worth statement?

A. It was partly information shown on the books of the United Amusement Company of Bremerton indicating the closing of one partnership and the start of a new one, and I am quite sure the payment to Mr. Forman or payments to Mr. Forman as shown either by canceled checks or by entries on the checkstubs of Seijas' bank accounts—I can't recall which bank accounts—indicating that there was the presence of a loan, and Seijas, when I asked him the details of the [1882] transaction, he explained that this was a loan to him by Forman which had come about as a result of the sale by Forman to Morin of his equity in certain assets of the partnership.

(Testimony of Robert B. Rankin.)

Q. And did you have access to Mr. Seijas' checkbook and his canceled checkstubs for the checks in his checkbook? A. I did.

Q. Now, Mr. Rankin, what is the explanation, if you have one, why there were several payments in the checkbook stubs which coincided to one half of the draws of Mr. Seijas from the partnership of Seijas and Morin?

A. Well, Seijas explained to me that when Forman sold his equity to Morin——

Mr. Obenour: Objection, if your Honor please, as hearsay. The records would be the best evidence.

The Court: Overruled. The question was on what basis, and your answer, I take it, is what Seijas told you about it, is that right?

The Witness: That is correct.

Q. (By Mr. Mead): Would you proceed, Mr. Rankin. I don't think you finished your explanation.

A. He explained that when Forman sold this interest to Morin that it was agreed between he [1883] and Forman that Seijas would be allowed to retain one half of the proceeds of that sale, and that he was to regard it as a loan, and that he was to repay Forman as he withdrew money from the new partnership, and my memory is that, and Seijas' records bore it out, that as he drew money from the partnership, he would pay one half of that to Forman in repayment of the loan.

Q. And was that the explanation which Mr. Seijas made to you at that time?

(Testimony of Robert B. Rankin.)

A. That is correct.

Q. And was that also borne out by your examination of Seijas' records including his checkstubs and the records and books of the amusement company which were then available?

A. That is right.

Q. Now, what is the explanation, if you have one, why there was one item of payment which was in an odd amount and which I believe added up to $3,287.14? Is my question confusing, Mr. Rankin?

A. No, I think the payment you are referring to is at the outset. Every payment that Seijas made to Forman was exactly one half of the monthly or periodic sums that he withdrew from the United Amusement Company, but in March of '47 he paid a sum in addition to those withdrawals, and I asked [1884] Seijas about this departure, and he informed me that Mr. Forman had insisted that he receive additional payment to help him pay the income tax which he had due upon the sale of his interest or equity in those assets. It was in March, as I recall, March of '47.

Q. Was that in payment of a loan, and did it apply on the loan?

A. It was so applied on the loan.

Q. Now, in addition to that, did he pay an amount of $1,000 which was added to that odd amount that you have described?

A. I believe he did.

(Testimony of Robert B. Rankin.)

Mr. Mead: That is all. You may inquire.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Obenour): Sir, handing you Exhibits 106 and 113, were those the records to which you had access at the last trial?

A. This is one of them, yes, sir.

The Court: You are referring to what?

The Witness: To 106.

Q. (By Mr. Obenour): That is a checkstub for Mr. Seijas' personal account?

A. That is correct. [1885]

Q. And 113?

A. Well, these first sheets here are general journal. These sheets from a general ledger, but of what company, I do not know. I have no way of identifying it. I don't know what enterprise this is.

Q. You say you saw the books of the Bremerton Amusement Company. Were you referring to particularly the Bremerton Amusement Company or were you referring to the amusement companies located in the City of Bremerton?

A. It was the Bremerton Amusement Company. My memory is that is what business form under which it was carried on.

Q. Is that the same business which Mr. Forman sold to Mr. Morin? A. That is correct.

Q. Was that a single company or was that four companies?

A. That was a single company.

(Testimony of Robert B. Rankin.)

Q. Was that the only company which Mr. Forman sold to Mr. Morin to your knowledge?

A. It was.

Q. And what is your understanding of the interest of Mr. Forman and the other three companies? Did he continue to hold that or what?

A. Well, I don't know which other companies you are referring to. [1886]

Q. Well, what is your understanding of Mr. Forman's interest in pinball routes in Bremerton, Mr. Rankin?

A. It was my understanding or memory that in the years I covered that this was the only company in which he had an interest as of '46. That is my recollection.

Q. And it was which one?

A. United Amusement Company—or Bremerton—can I refer to my statement here? I have the name there. United Amusement Company of Bremerton.

Q. Is that the only one of which you had knowledge then?

A. That Mr. Forman had any interest in. That is the only one that I recall he had an interest in in the years in which I covered in this examination.

Q. And that was what years?

A. 1946, '47 and '48.

Q. You made reference to a Bremerton Amusement Company. Did Mr. Forman then continue to have an interest in the Bremerton Amusement Company?

(Testimony of Robert B. Rankin.)

A. Are you speaking of this United Amusement Company of Bremerton?

A. No, sir, I was referring, if I understood you correctly, to your testimony on direct examination that you saw the general ledger, the check register and you weren't sure what other documents pertaining to Bremerton Amusement Company. [1887]

A. I misspoke myself. This is the company here, United Amusement Company of Bremerton.

Q. Then, your reference to any entries that you have made on your exhibit—what is the number you have there? A. 506.

Q. Then your reference was to United Amusement Company of Bremerton?

A. That is correct.

Q. And then the books to which you made reference in order to show the loan to Mr. Forman from Mr. Seijas was the book or books of the United Amusement Company of Bremerton and Mr. Seijas' personal checkstub book, is that correct?

A. That is correct.

Q. And one of them is before you, 106?

A. That is right.

Q. And you do not know whether 113 is that book or not?

A. Well, there is no name on here. I may—just a moment. I may be able to identify it.

The Court: Do you recognize it as having seen it before?

The Witness: Yes, I recognize it as having seen it before, but I just don't know which particular

(Testimony of Robert B. Rankin.)

company it is. I am trying to see if I can trace [1888] that from the capital account and identify it. Yes, this apparently is the general ledger of the United Amusement Company of Bremerton.

The Court: That is Exhibit 113?

The Witness: Exhibit 113, yes.

Q. (By Mr. Obenour): Your net worth statement has no reference to any interest of Mr. Forman in any amusement company, does it?

A. No.

Q. What is the only reference to Mr. Forman in your net worth statement you prepared for the Seijas' trial?

A. The amount of the loan due him.

Q. The amount of the loan due him?

A. Yes.

Q. And any information you had, then, as to what this liability you entered there was strictly what Mr. Seijas then told you?

A. That together with the evidence of payments to Mr. Forman.

Q. And you say you have an amount of $13,340 or some such figure at the end of 1946?

A. That is right.

Q. And how did you arrive at that sum?

A. That was the original amount of $15,000 less the payments which had been made between [1889] September, 1946, and December 31, 1946.

Q. And what were those payments that you credited to the loan?

A. That I charged against the loan?

(Testimony of Robert B. Rankin.)

Q. Yes, sir.

A. They were payments made by Seijas as shown by his checkstubs.

Q. Would you please refer to the checks which was your basis of reaching the amount of $13,340 some dollars?

A. I don't know whether I can find them all.

The Court: Refer to the check number readily, and get on with it.

Q. (By Mr. Obenour): Refer to Check 35.

A. Check 35 is dated November 15, '46, and payable in favor of cash, and it's marked "Streptomyecin."

Q. Check 35? A. Yes.

Q. Do you have a check for November 16, '46?

A. Oh, I beg your pardon. There are two number 35's here—Bill Forman drawing $750.

Q. All right, sir, and '38?

A. Bill Forman drawing $500.

Q. And that totals $1,250?

A. That totals $1,250.

Q. Was there any other check during 1946 made by Mr. Seijas to Mr. Forman? [1890]

The Court: As shown by this exhibit?

Mr. Obenour: Yes, sir.

The Witness: Here's a check No. 24, September 13, 1946, W. R. Forman marked for refund, $406.22.

Q. (By Mr. Obenour): Marked "refund"?

A. It's marked "refund."

Q. Did you include that in your reduction of the loan?

(Testimony of Robert B. Rankin.)

A. That I cannot say. I do not have any file. I had a file in which I had this completely detailed as to all the payments which were made on the loan, and that I do not no longer have.

Q. However, the only ones that you have there were $500 and $750?

A. That is correct, and that item here of $406.22.

Q. Now, sir, would you refer to Exhibit 113, the capital drawing account for Army Seijas, and is there any comparable draw of any $812 item of September 13, 1946? A. No, there is not.

Q. However, isn't there a draw on November 15 or 16 for 15 hundred dollars?

A. November 21, 15 hundred dollars.

Q. And for December 13 of $1,000? [1891]

A. That is right.

Q. However, there is no other draw during 1946 to Army Seijas, is there?

A. There is one small amount here, $102.04.

Q. Is there any other basis to account for your item which reduced the loan of $15,000 to $13,343.73 from the evidence you have stated was a source of your information; namely, the capital accounts of the United Amusement Company and Seijas' personal checkbook?

A. Not to my knowledge, there isn't.

Q. Now, then, sir, did you reach the amount of $13,343.73 as being balance due on a loan stated by Seijas to be due Forman because of the Morin transaction?

A. Well, I say I have only got my memory to

(Testimony of Robert B. Rankin.)

go by, but I do recall that I did have a detailed schedule of all the payments made against the loan. Now, there is maybe some others. I do not know. I cannot recall.

Q. Did you not state that the only basis of it were the two documents before you, Seijas' personal checkbook and the capital accounts?

A. That was my recollection, but he had several bank accounts.

Q. However, there were no other draws at that time upon the amusement company which was your understanding was to be the basis of the loan repayment? A. No. [1892]

Q. For 1947, sir, how did you reach the amount of $9,276.03 for the balance due on the $15,000 loan?

A. Again these were—if my memory is correct—payments of the same nature, that is one half of the monies which he withdrew from this company here plus those additional payments which he made in March of '47.

Q. Additional payments made in March of '47?

A. Yes.

Q. All right, sir——

A. That is my memory.

Q. Now, your understanding is that you were told that Mr. Forman loaned Mr. Seijas $15,000 at the time he sold his interest to Morin?

A. That is correct.

Q. It was your understanding he was to be repaid from draws of this amusement company, that

(Testimony of Robert B. Rankin.)

is, one half of any draws which Seijas was to subsequently make?

A. That was supposed to be the method of repayment.

Q. All right. Now, do you have the ledger before you for the capital accounts? A. I do.

Q. Would you total the draws made by Mr. Seijas in 1946 and 1947 and take one half thereof?

A. '46 and '47, is that correct? [1893]

Q. Yes, sir.

A. That would be $4,810.17—wait a minute—eight cents.

Q. That is one half of it?

A. That is one half of it.

Q. And how did you reach the—that is how much again, sir? A. $4,810.08.

Q. And you added what to it?

The Court: Do you mean in computing?

Q. (By Mr. Obenour): How, then, was this used to reach your figure of $9,276.03?

A. Well, that I can't recall without my file. I can merely say what my memory was. With that one exception of that additional payment, that from the outset this method of repayment or payments coincided with withdrawals from this partnership, and I think he continued that. I cannot be positive, but I think he continued that up until sometime in the early part of '48 or maybe he discontinued it at the end of '47.

Q. Are there any other draws shown there on the Exhibit 113?

(Testimony of Robert B. Rankin.)

A. Yes. In '48 he withdrew $3,575.46.

Q. Mr. Rankin, how, then, did you arrive at your figure of $9,276.03 from the two documents?

A. I have already explained I started with the [1894] $15,000, and I applied these certain payments which I have described. Now, there may have been others. I do not know. Not having the detail here, I can't explain it in detail.

Q. What was the balance after reducing the $15,000 by reducing your figure, which was your computation of one half?

A. That would have left $10,189.92.

Q. However, you used the figure of $9,276.03 in your exhibit, did you not?

A. That is correct. It's a difference of $913.89.

Q. And it was during your testimony at the last trial, was it not, Mr. Rankin, when it was first revealed to the Government that Mr. Seijas paid half of the capital gain tax paid by Mr. Forman on the sale of the half interest in the amusement company to Mr. Morin or an amount of $2,287.14?

Mr. Mead: Objected to as calling for a conclusion of the witness.

The Court: Yes, the form of the question is to the knowledge of the Government as far as this witness knows.

Mr. Obenour: As far as this witness knows.

The Court: Go ahead.

The Witness: As I recall, there was some [1895] similarity in the March payment with the amount of tax that would have been due, I believe.

(Testimony of Robert B. Rankin.)

Q. (By Mr. Obenour): Now, the amounts you have included from the checkstubs, Exhibit 106, is any of them marked "repayment of loan," Mr. Rankin?

A. Could you give me those numbers?

Q. Check 35, November 16, 1946.

A. Well, it is described as "Bill Forman drawing."

The Court: The question is, is there any of them labeled in the manner the question calls for, "Repayment of Loan"?

The Witness: Well, I am looking to see, your Honor.

Q. (By Mr. Obenour): 38?

A. No, 38 is marked "drawing."

Q. 47? A. 47 is marked "drawing."

Q. 54?

A. It is just marked "William R. Forman," and then someone has written "Void, see 57"—54, just "W. R. Forman, void, see 57."

Q. And 57?

A. No. 57 is "William R. Forman, drawing."

Q. And on that in the back of the preceding page, there is a notation of $2287.14 capital gain?

A. That is right.

Q. "1,000-B r b e d i v i."

A. That is what it appears to be.

Q. And that is the explanation of the $3,287.14 check? A. That is correct.

Q. And Mr. Rankin, on the occasion of your testimony in the Seijas trial, did you not so state

(Testimony of Robert B. Rankin.)

that it was your understanding that that check was given by Mr. Seijas to Mr. Forman to pay half of the capital gain tax paid by Mr. Forman for his sale of the interest in the amusement company plus a thousand dollars which was half of the draw taken by Seijas on March 12, 1947, which was shown by the Check 54 which was voided?

A. I believe that is correct.

Q. And on that occasion you stated that the check was paid or half of the capital gain tax made by Mr. Forman, and it was half paid by Mr. Seijas?

A. Half was paid by Seijas?

Q. Yes.

A. No, sir, I do not say that I said that this amount which was marked "capital gain" was included in the amounts which I had treated as repayments of the loan, but I didn't say that.

Q. You did not so testify in the other trial?

A. That is not my memory. [1897]

Q. Check 90, Mr. Rankin.

A. Check 90 is dated 12-18-'47. "William R. Forman, refund, U. Co. Cashed and paid to Bill in the amount of $1195.45." Then it is written across it, "Void."

Q. And on the back of the preceding page is there any reference?

A. There are some penciled figures here, $2,040 to which has been added $351.90. Then the total is $2,391.90, and then below that is 1195, 11 hundred 95 dollars.

Q. Do you know what those computations re-

(Testimony of Robert B. Rankin.)

fer to? A. I don't recall.

Q. You do not recall? A. No.

Q. Would you refer to Exhibit 113. Would you refer to the capital account of Army Seijas, and I will ask you if there was not a draw on December 17, 1947, of $2,040, a figure first shown in the back of the preceding page.

A. That is correct, December 17, $2,040.

Q. And was there not on the same date a draw of $351.90? A. That is correct.

Q. And is that not the second figure shown on the preceding page? A. That is right.

Q. And I will ask you, sir, if the check there is not for one half of the two draws made by Seijas on that date? A. Approximately. [1898]

Q. Is there any reference, then, on any of those checks of repayment on loans?

A. Not here unless on this check it is marked "refund."

Q. Would you call in your experience as a chartered accountant and certified public accountant that a "refund" in a payment of loan, sir?

A. Well, no, I guess not.

Q. Yet you reduced the loan of $15,000 by one, two, three, four, five, six checks, five of which are marked "drawing" and the sixth marked "refund," is that correct? A. That is right.

Q. And what was your engagement in that last trial by Mr. Seijas, Mr. Rankin?

A. I don't understand that. What was what?

The Court: What were you employed to do?

(Testimony of Robert B. Rankin.)

The Witness: I was employed to prepare this net worth statement.

Q. (By Mr. Obenour): For what purpose?

A. For presentation in connection with this trial.

Q. For presentation in connection with the trial, and by your computations, sir, what was the beginning cash you used? A. $180,844.68. [1899]

Q. One hundred eighty thousand?

A. That is right—844.68.

Q. How did you reach that figure?

A. That was the total that—that was the total of various payments which he made in acquiring properties and in other expenses throughout the years covered by me.

Q. And you made a computation in reaching $180,000?

A. That is right. It is the total of those various——

Q. Were you aware of the previous net worth statement made by Mr. Whittle?

A. Yes, I believe I was. I think I saw something that had been prepared by Mr. Whittle.

Q. By your computation, Mr. Rankin, was there any unreported income in any of the years '46, '47 or '48? A. There was.

Q. There was. What year?

A. In 1946 there was.

Mr. Mead: This is objected to as being beyond the scope of the direct examination which has to do with just this one loan.

(Testimony of Robert B. Rankin.)

The Court: Well, I think not. Go ahead.

Q. (By Mr. Obenour): Yes, sir.

A. In 1946 there was unreported income of $1,390.53, and in 1947 there was $3,801.41, and in 1948, $8,855.43.

Q. And that was based upon a beginning cash of $180,000? [1900]

A. No, these were specific items of unreported income.

Q. However, by your computation—what is a specific item?

A. Well, there were, as I recall, again I must just speak from the best of my memory without having my file——

Q. What is a specific item in the terminology of tax questions?

The Court: As related.

The Witness: A particular item of income.

Q. (By Mr. Obenour): Which was omitted?

A. My memory is there were some legal fees.

Q. But in the parlance of prosecution for tax evasion, there are at least two different methods, the net worth method and a specific item method?

A. Yes, that would be true.

Q. And there is no connection, is there, on the specific item method or the net worth method?

A. You are now speaking of methods. I was speaking of specific items.

The Court: Yes, but the question called for, perhaps you didn't hear it or understand it cor-

(Testimony of Robert B. Rankin.)

rectly, whether by your net worth computation there was any deficiency of tax.

Mr. Mead: I don't understand. I thought it was if there was any unreported income. [1901]

The Court: Restate it again so we will have it clearly, and we will all know what you want to know.

Q. (By Mr. Obenour): By your net worth computation of $180,000 beginning cash, and by net worth method alone, was there any unreported income for any of the three years?

The Court: According to your computation.

The Witness: According to my computation, there was $2,118 increase in net worth which I could not account for. In addition to that, there were deposits in the bank account of which I was unable to determine the nature of in any shape or form amounting to $7,364.

Q. (By Mr. Obenour): And at the time of that testimony, sir, were you asked these questions and made these answers——

The Court: You are referring to the Seijas trial?

Mr. Obenour: Yes, sir, the Seijas trial.

Mr. Mead: What page?

Mr. Obenour: 2,786.

Q. (By Mr. Obenour): Referring to your conclusion of the amount due at the end of 1947——

The Court: Amount due on the note now? [1902]

Mr. Obenour: Yes, sir, as reached by the Rankin computation.

The Court: On this Morin transaction?

(Testimony of Robert B. Rankin.)

Mr. Obenour: Yes, sir.

Q. (By Mr. Obenour): Did you make these answers, "Yes, I assumed we arrived at the figure of $9,200—$9,276.

Question: By including that?

Answer: By including that and Mr. Seijas' information to me was that he had paid off the balance to Mr. Forman in currency.

Question: Mr. Forman was not paid his half of the draw of December 18 from the amusement company on that time?

Answer: Not by check so far as I know.

Question: But he was paid $2,287.14 for half of the capital gains tax by Forman for the sale to Morin?

Answer: That is right. I understand that was according to their agreement or arrangement.

Question: And a payment of a capital gains tax is when someone sells his property to someone else and makes a profit?

Answer: That is right.

Question: And if, you said, income is taxable to the owner, is that right?

Answer: That is right.

Question: And isn't that a fact why Mr. Forman [1903] received half of the capital gains tax of two thousand two hundred some dollars from Mr. Seijas because Seijas was paying his half of the capital gains tax of half of the amusement company to Mr. Morin under the guise of a sale by Mr. Forman?

(Testimony of Robert B. Rankin.)

Answer: Well, I haven't treated it as such."

Mr. Mead: Read further, Mr. Obenour.

Q. (By Mr. Obenour): "The Court: Could it be treated as such, let's put it that way, on the face of the data that you have excluding what Seijas told you?

Answer: No, I do not think so. I think, in other words, there is originally a loan of $15,000 which is repaid in three different steps. One, he pays him one half of the money that he withdraws from the partnership. Number two, at tax time Forman must have said, "Look, I have got to pay all of this capital gains tax so give me one half of the tax which is really out of the half of the original sales proceeds that I loaned you," because Forman now has to pay it out so he therefore pays him the one half.

Question: But you didn't credit the $2,200 against the loan, did you?

Answer: Yes, I did.

Question: You did.

Answer: That was included in these figures that we are putting together. [1904]

Question: You don't pay half of a capital gains tax on a loan, do you?

Answer: Well, I don't think the thing was a loan. There was no interest paid on it."

Did you make those answers?

A. I must assume I did.

Q. Actually, were you ever told that Mr. Forman ever made such demand at that time for one

(Testimony of Robert B. Rankin.)

half of this because he needed the money?

A. My recollection is that Seijas told me that.

Mr. Obenour: I believe that is all. Thank you.

The Court: Anything further?

Mr. Mead: Yes.

Redirect Examination

Q. (By Mr. Mead): I think you stated, Mr. Rankin, that Mr. Seijas told you that the arrangement was that he was to apply one half of the draws until this $15,000 loan was repaid, is that right, sir? A. That is correct.

Q. And I think you just stated that your recollection is that Mr. Seijas said that Mr. Forman [1905] wanted him to apply at least half of the amount of the taxes that Mr. Forman had to lay out at that time because the loan had not been repaid, is that correct, sir? A. That is correct.

Q. And did you treat this as a loan?

A. I did.

Q. Were you advised by Mr. Seijas that it was a loan? A. I was.

Q. Did you testify to that at the previous trial?

A. I did.

Mr. Mead: Thank you, sir.

The Court: That is all, Gentlemen?

Mr. Mead: Yes.

Mr. Obenour: Yes.

The Court: You are excused, Mr. Rankin, and may leave whenever you wish.

(Witness excused.)

The Court: We shall suspend for the day, Ladies and Gentlemen.

Keep in mind my admonition.

(Whereupon, the court recessed to reconvene the following morning, August 14, 1956, at 9:30 a.m.) [1906]

(Whereupon, on the 14th day of August, 1956, at the hour of 9:30 a.m., the following further proceedings were had:)

The Court: Good morning, Ladies and Gentlemen and Counsel.

Are you ready, Gentlemen?

Mr. Mead: Yes, your Honor.

The Court: Proceed.

Mr. Mead: Call Mr. Patten.

WOOLVIN PATTEN

called as a witness on behalf of the Defendant Forman, having been previously duly sworn, was examined and testified as follows:

The Clerk: You have been previously sworn, Mr. Patten. Just resume the stand.

Direct Examination

Q. (By Mr. Mead): Mr. Patten, I believe you previously identified yourself as to your connection with this matter and your position in the year 1953. You were an attorney, were you, sir, with the Revenue Service at that time? A. That is correct.

Q. And how do you appear here today as a witness, Mr. Patten? Have you been subpoenaed by the Defendant? [1907]

(Testimony of Woolvin Patten.)

A. By both parties.

Q. So you were subpoenaed both by the Government and the Defendant, William Forman, is that correct? A. Yes, sir.

Q. Mr. Patten, you gave some testimony on your direct case for the Government with respect to a conference which was held in the Smith Tower on April 15, 1953? A. Yes.

Q. Do you recall that conference?

A. Yes, sir.

Q. Where was that meeting held? By that I mean in whose office?

A. In the office of Wilfred Paine.

Q. And who was Mr. Paine, sir?

A. Mr. Paine was then District Counsel of the Internal Revenue Service.

Q. And on what floor of the Smith Tower Building was Mr. Paine's office located?

A. I don't recall, sir.

Q. Was it on the same floor with Mr. Seijas' office, do you know?

A. I don't know where Mr. Seijas' office was.

Q. In any event, the meeting was held in Mr. Paine's office? A. Yes, sir. [1908]

Q. And I think you stated that Mr. Whittle and Mr. Seijas and Mr. Paine and yourself and Mr. Sager were present? A. That is correct?

Q. This meeting, then, sir, was not held in Mr. Whittle's office?

A. No, sir. I am familiar with Mr. Whittle's office. It is on a different floor. I think they are

(Testimony of Woolvin Patten.)

identical offices, merely a difference in floors.

Q. But, then, Mr. Whittle's office is not on the same floor as Mr. Paine's office? A. No, sir.

Q. Was your office on the same floor as Mr. Paine's office?

A. No. My office was in the United States Court House.

Q. I see. Now, I think you have described the purpose of that meeting, Mr. Patten, and how it came about, and you stated that the purpose of that meeting was when Mr. Seijas attempted to explain apparently unreported income for the years 1946, 1947 and 1948? A. Yes, sir.

Q. Both net worth statements prepared by Mr. Whittle and the net worth calculations of the Government indicated that there was a substantial unreported income for those years, did it not, sir?

A. Yes, sir.

Q. And I believe you likewise testified that you [1909] had prior to that time recommended prosecution of Mr. Seijas for the years 1946, 1947 and 1948? A. I had, sir.

Q. And that fact was known to Mr. Seijas?

A. Yes, sir.

Q. Now, what explanation did Mr. Seijas offer at that time with respect to the alleged accumulations of cash from pinball operations during the years 1942 to 1945, and by that, sir, I mean how did he explain the accumulations of cash for that period?

A. He explained that during the years you have

(Testimony of Woolvin Patten.)

mentioned he had received approximately eighty-six or eighty-seven thousand dollars from the pinball business which he had kept in safety deposit boxes and had expended these sums in 1946-7 and '48 which acccounted for that portion of the increase in his net worth during those years.

Q. Did he state that those funds *had stolen* from the location owners, or did he state that those funds were accumulated by reason of splitting the proceeds from the machines 50 per cent with the location owners, and then giving the location owners a slip for less than the full amount?

A. He told me that the actual take from the pinball machines had been directly split with the location owners, but that they had given them a [1910] slip showing a lesser amount than had been taken out of the—actually taken out of the pinball machines, and that on the stated slip was the businesses upon which the partnership returns had been prepared and the excess funds—was the excess funds which he had accumulated.

Q. Was there ever made to you at that time a statement, Mr. Patten, to the effect that the bulk of these alleged accumulations of funds were acquired by taking the money off the top, so to speak, and undisclosed to the location owners?

A. That representation was never made to me.

Q. Nor was that explanation offered to you at that time? A. No, sir.

Q. Do you recall, sir, a portion of the conversation at that time which had to do with Mr. Seijas'

(Testimony of Woolvin Patten.)

alleged proceeds from a business known as the Smoke Shop during the years 1942 to 1945?

A. Yes.

Q. Did Mr. Seijas tell you that he owned and operated the Smoke Shop and kept the income during that period of time?

A. Yes, he did. I remember the amount was about $23,000.

Q. And he stated to you that he was the owner of that establishment?

A. Yes, that it appeared that his brother was [1911] the owner of the establishment when in truth and in fact he was the owner and derived the profits from that business.

Q. And he stated that to you, sir?

A. Yes, sir.

Q. What did Mr. Seijas state to you that he had in the way of verification with regard to this so-called hold out?

A. From the pinball business?

Q. Yes, sir.

A. He had the books showing the amounts which had been held out which he offered to me.

Q. Now, when you say "books," Mr. Patten, do you refer to the originals of these documents that have been called diaries?

A. Yes, sir. There were diaries with notations in them to show the amounts which had been held out.

Q. Now, at the time that he stated that he had

(Testimony of Woolvin Patten.)

that verification as to those items, did he then immediately produce the books?

A. My memory is that he had the books with him and produced them almost simultaneously with his remarks.

Q. At that time? A. Yes, sir.

Q. I will ask you, Mr. Patten, whether or not it was a fact that at the time the question of verification of those items was mentioned, Mr. Seijas [1912] excused himself from the meeting and Mr. Sager excused himself from the meeting and that they went out of the office and were gone for a considerable period of time, and then came back with the books?

A. I do not recall that. My memory is that they had the books with them.

Q. Your recollection is that they had the books with them and produced them at that time?

A. That is my best memory.

Q. Now, what excuse did Mr. Seijas advance to you for borrowing funds in the years 1946 and 1947 while at the same time he told you he had substantial cash on hand?

A. Well, we were talking about very substantial amounts of cash. The background is, I asked Mr. Seijas if it was then his intention that he had something over $200,000 in cash in 1946, and he said first—demurred to it, and then later said he must have had that amount of cash, and I told him I found it a little difficult to believe that he had that amount of cash since early in 1946 he

(Testimony of Woolvin Patten.)

borrowed some money, and he admitted that he had borrowed some money, and I asked him why he borrowed money if he had all that cash, and he said he was just too lazy to go to his safety deposit box.

Q. Now, recalling that portion, Mr. Patten, of [1913] the conversation which had to do with the alleged profit of $5,000 made on the sale of the Palace Cafe during these earlier years, '42 to '45, what did Mr. Seijas tell you with respect to whether or not the profit on that transaction had been or had not been reported on his income tax returns for that year?

A. He told me that the profit on the Palace Cafe had not been reported.

Q. He told you that it had not been reported?

A. Yes, sir. I believe that was a profit of about $5,000.

Q. Yes, sir. Did Mr. Seijas advise you at that time that his alleged cash or hoard of cash which he claimed amounted to some $86,000 at the beginning of the year 1946 could be verified by talking to any particular individual?

A. Yes, sir. I asked him if this $86,000 — I reminded him that he was in partnership with Mr. Forman during the war years and asked him if $86,000 was the total amount the partnership had held out or merely his portion, and he said it was merely his portion, that Mr. Forman had also received $86,000, and I asked him then what Mr. Forman would say if I asked Mr. Forman about

(Testimony of Woolvin Patten.)

this, and he said, "He will probably deny it," and I said, "Well, is there any way we can check this?" He said, "Yes, sir, you could talk to a Mr. Jerry [1914] Meyers who was a collector on the route, and he would confirm it," and we could talk to a Mr. Heberling and he would confirm it.

Q. So he suggested to you that you should talk to Mr. Jerry Meyers and Mr. Heberling at that time? A. Yes.

Q. Now, did Mr. Seijas explain that he had received the proceeds of certain checks which were made payable to his father during the earlier years 1942 to 1945?

A. Yes. He said his father had been carried on the payroll as an employee of the partnership and had received a salary of approximately a hundred a month, I believe, for checking on people who were trying to beat the pinball machines, my memory of it, when in truth and in fact, the father had not actually received these checks but had turned them over to Mr. Seijas, and Mr. Seijas had cashed the checks and had accumulated currency by that means.

Q. And did Mr. Seijas state to you that he had accumulated these funds from his father?

A. Yes, sir, about $11,000.

Q. Now, what explanation did Mr. Seijas offer with respect to how Mr. Seijas, senior, had lived during this period of time if he had the proceeds of these checks?

A. Yes. I asked Mr. Seijas how has father was

(Testimony of Woolvin Patten.)

[1915] living if he was turning over his salary checks to him, and he said his father was either on relief or old age assistance during those years.

Q. Now, Mr. Patten, with regard to the amount of those checks, I think you testified that it was one hundred dollars a month. Could it have been a hundred dollars a week or some similar amount, do you know?

A. I wonder if I could look at my memorandum. I believe the Government has it.

Q. Yes.

Mr. Mead: Would you please produce his memorandum?

The Court: I take it this is a memorandum made at the time, Mr. Patten?

The Witness: Yes, sir, it was made that afternoon.

The Court: Yes, you may use it to refresh your recollection. Of course, when you testify, it must be your independent memory now about it.

The Witness: I remember it was a hundred dollars a week.

Q. (By Mr. Mead): A hundred a week approximately? A. Yes, sir.

Q. And this memorandum was made by you about three years ago, wasn't it, or more than three years ago? [1916] A. Yes, sir.

Mr. Mead: I believe that is all. Thank you, Mr. Patten.

The Court: Any cross?

(Testimony of Woolvin Patten.)

Cross Examination

Q. (By Mr. Obenour): The loans you had reference to there, do you recall what the loans were?

A. No, I do not recall the specific loans.

Q. The object, of course, is that there was a shortage of income from which the assets acquired during '46 to '48 would be acquired, wasn't that it?

A. Yes, sir.

Q. And there was a net worth computation showed that he acquired in excess of $150,000 worth of property over what he had reported during those years?

A. Yes. I remember it was a higher figure.

Q. Yes.

The Court: He said in excess.

The Witness: Yes.

Q. (By Mr. Obenour): So that in discussing $200,000 to $250,000 the answer was that if he had such a sum from $200,000 to $250,000, that would account for the source of the assets he acquired in later years? [1917] A. That is correct.

Q. And the Statute of Limitations would have barred prosecution for the years supposedly prior to 1946, or is that right?

A. Could you rephrase the question?

Q. At the time you had the conference, this was in 1953, the Statute of Limitations would have run theoretically from the date of the filing of the returns prior to the year 1946?

A. Yes, normally, it would have.

Q. And in the running statute for prior years,

(Testimony of Woolvin Patten.)

and regardless of the manner in which the money in prior years had been obtained, there could theoretically have been no prosecution for the evasion of that money? A. Yes, that is right.

Q. And the explanation, then, was that while he spent in excess of $150,000 in 1946 through '48, this money had been obtained in prior years, and accordingly there should be no prosecution?

A. Yes. His position was there had been merely an increase in '46, '47 and '48 in his visible assets which accounted for by expenditures from a hoard of currency in his safe deposit boxes.

Q. However, about that time there was a case that had been determined in the Second Circuit of Appeals known as Beacon Grass, wasn't it, Mr. Patten? [1918]

A. Yes, it appeared in the advance sheets about that time.

Q. And that case provided that a man could be prosecuted for false statements——

Mr. Mead: I think this is improper cross examination as to what some decision provided. That is a debatable issue in this case.

The Court: The only question was, was this discussed at the meeting. If it was discussed, then it may be gone into.

The Witness: I did not mention the Beacon Grass case.

Q. (By Mr. Obenour): It has to do with the subsequent——

The Court: The witness on direct examination

(Testimony of Woolvin Patten.)

has been interrogated only about that meeting, and accordingly it's not proper cross examination. That is the grounds of the objection, not that it might not be interesting or something of the kind, but it's not cross examination.

Q. (By Mr. Obenour): The question of two hundred to two hundred fifty thousand dollars, do you recall, Mr. Patten, if you first asked Mr. Seijas if he had had the $250,000 in safety deposit boxes at that time?

A. Yes, I asked Mr. Seijas if it was his contention that he had approximately a quarter of a million dollars in safety deposit boxes at the [1919] beginning of 1946, and he at first denied that and said he never had seen that much money, and Mr. Whittle spoke up and said, "Why, Army, you must have had that money. Otherwise, how could you have acquired all those assets?" Then Seijas said he must have had it then.

Q. And if he could have accounted for two hundred to two hundred fifty thousand dollars that would have explained the increase during the indictment years — for the years he had open for prosecution? A. Yes.

Q. How much was the explanation given by the diaries?

A. Eighty-six to eighty-seven thousand is my memory.

Q. What would have been the effect if he had simply stated he had received the entire amount

(Testimony of Woolvin Patten.)

of the hold outs from the diaries rather than simply a half?

Mr. Mead: Objected to as calling for a conclusion of the witness.

The Court: That is within the general field. Overruled.

The Witness: It wouldn't have made any difference where the money came from if he could have proven that he had approximately a quarter of a million dollars at the beginning. It would have explained his expenditures during subsequent years.

Q. (By Mr. Obenour): However, if he had stated he had received the entire amount of the hold outs or $172,000 rather than simply $86,000, that would not have accounted for the biggest portion of the increase in assets?

Mr. Mead: Objected to as argumentative and calling for a conclusion.

The Court: It's a conclusion that the trier of fact will have to consider. Accordingly, I will sustain the objection.

Q. (By Mr. Obenour): At that time I believe the information you had from the agents was that there was a $204,000 increase? A. Yes.

Q. And Mr. Whittle had $165,000 increase?

A. Yes.

Q. The loan to which you referred, Mr. Patten, do you recall that you had—I believe you told Mr. Seijas it was difficult to believe his contention that he had such currency because he borrowed money in 1946? A. Yes.

(Testimony of Woolvin Patten.)

Q. And at that time was that loan not involved in a transaction in Moses Lake, Washington, to do with the tavern and building acquisition that had been financed for about three months?

A. I don't recall the specific loan. I recall that [1921] the net worth statement showed some loans on there.

Q. You don't recall at all this loan being discussed? A. No, I don't.

Q. After this conference, do you recall what you did, Mr. Patten?

Mr. Mead: This is going beyond the scope of the direct.

The Court: No, I think it could be within the scope. Overruled.

The Witness: Well, I wrote up a memorandum of the interview and asked the agents, Mr. Oftedal and Mr. O'Leary, to contact Mr. Seijas and obtain photostatic copies of these records.

Q. (By Mr. Obenour): You also requested what is called a supplemental?

A. Yes. I wrote the Intelligence Division and advised them of the explanation which Mr. Seijas had given and asked them to conduct a supplemental investigation to determine its veracity.

Q. Did you do so?

A. Yes, sir, I received one.

Q. And do you recall whether or not they verified any or all of the factors given by Seijas in explanation of the increase?

Mr. Mead: Objected to—— [1922]

(Testimony of Woolvin Patten.)

The Court: Yes, I think that goes beyond the direct examination, and, furthermore, I think that was pretty well covered when Mr. Patten testified before, but in any case, it's beyond the direct examination.

Q. (By Mr. Obenour): Do you recall receiving information concerning the color of the scotch tape in the diaries?

A. I believe that was mentioned in it.

Q. What.

A. I believe that was mentioned in the report which we received.

Mr. Obenour: I believe that is all. Thank you.

The Court: Anything further?

Q. (By Mr. Obenour): What did it indicate as to the scotch tape in the diaries?

Mr. Mead: I called you to produce that report. If he is going to refer to it, please produce it.

Mr. Obenour: He has not referred to it.

Mr. Mead: He is now asked to testify what is in the report, which the Agents have testified did not, as I recall, contain any reference to color of scotch tape.

The Court: It is my recollection that this [1923] is going beyond the direct examination in any case, and I sustained an objection on that ground, didn't I?

Mr. Mead: And I move the testimony of the witness with regard to what was in these reports be stricken.

(Testimony of Woolvin Patten.)

The Court: Yes, as not proper cross-examination as to the data contained in direct.

I should explain to you, Ladies and Gentlemen, so you will understand what is involved in this particular situation. A witness may only be cross-examined with respect to matters covered in the direct examination. No matter how interesting it might be or whatever, that is the rule. That is what we are dealing with at the moment. I think this is not proper cross examination, and accordingly now strike the last testimony, which I believe came in after a ruling sustaining that objection.

In any case, I now strike the last testimony given to you. Is that clear to you, this business about that report and so forth and the scotch tape? That is stricken. Give no further consideration to it.

Mr. Obenour: That is all. [1924]

Redirect Examination

Q. (By Mr. Mead): Mr. Patten, I think you stated on cross examination that there was a discrepancy or difference between Mr. Whittle's net worth statement showing undisclosed income for the years 1946 to 1949 and the Government's figures that you had at that time, Whittle's being $165,000 and the Government's $204,000? A. Yes, sir.

Q. I will ask you whether that was accounted for, largely that difference by reason of the fact that Mr. Whittle had $50,000 of cash shown on hand at the beginning of his 1946 calculations whereas the Government had no cash on hand?

(Testimony of Woolvin Patten.)

A. That is a major difference.

Q. That was the major difference?

A. Yes, sir.

Mr. Mead: Thank you, sir.

The Court: That is all, Mr. Patten, and you may be excused and leave whenever you wish.

(Witness excused.)

Mr. Mead: Call Mr. Whittle. [1925]

GEORGE V. WHITTLE

called as a witness on behalf of the Defendant Forman, being previously duly sworn, was examined and testified as follows:

The Clerk: You have been previously sworn, Mr. Whittle. Just resume the stand.

Direct Examination

Q. (By Mr. Mead): Mr. Whittle, I think you have been sworn and you have previously identified yourself as to name and as to occupation. How do you appear here today, Mr. Whittle, by subpoena?

A. By subpoena, sir.

Q. And you were subpoenaed to appear by the Defendant, Bill Forman? A. That is correct.

Q. And you were also subpoenaed to appear previously by the Government, is that correct, sir?

A. That is correct, sir.

Q. Mr. Whittle, will you please give us a short resume of your experiences as an accountant? How long have you practiced your profession, and where has that been, sir?

A. I was trained in Nottingham, England, in the

(Testimony of George V. Whittle.)

profession and came to New York in 1904, and after being with certain national firms, I opened [1926] up an office in New York and was there for several years. I left there in '15 to come to Seattle and have been in Seattle ever since.

Q. And you have been practicing the work of accountancy since 1915? A. Yes, sir.

Q. Are you what is known as a certified public accountant, sir? A. Yes, sir.

Q. And how long have you been a certified public accountant? A. Since 1918.

Q. And have you occupied any formal position with regard to the State Board of Accountancy?

A. Yes, sir. I was Chairman of the State Board of Accountantcy for eight years.

Q. Is that the Washington State Board of Accountancy? A. Yes, sir, it is.

Q. And, now, Mr. Whittle, will you state what information Mr. Seijas gave you with respect to an alleged fifty or *six* thousand dollars that he claimed to have on hand at the beginning of 1946?

A. Presumably he received from his father, as an inheritance from his father.

Q. Did he make that assertion to you, sir, during [1927] the time you were working on this net worth statement?

A. Yes. He told me of an inheritance that his father had brought from Spain. I forget now the year when it was. It was sometime prior to '41.

Q. How much did he tell you this inheritance was, sir? A. $17,500.

(Testimony of George V. Whittle.)

Q. He told you the inheritance was $17,500?

A. Yes, sir.

Q. Did he then later tell you that the inheritance was in a greater amount? A. Yes, he did.

Q. And why did you not include that inheritance, then, in the net worth statement that you prepared?

A. Well, I saw no evidence of it, and I couldn't quite believe it.

Q. Mr. Whittle, during the course of your preparation of the net worth statement which has been referred to here, did you ever consult with Mr. Forman with regard to Mr. Seijas' affairs or have any meetings with Mr. Forman during that period of time? A. Not one.

Q. Did you ever give a copy of the net worth statement to Mr. Forman? A. No, sir.

Q. Did Mr. Forman ever pay you any sum [1928] whatsoever as part of your compensation for the preparation of this net worth statement or any other work that you did for Mr. Seijas?

A. Not one penny of any description.

Q. Did Mr. Forman ever pay you any money at any time for any purpose?

A. Never at any time.

Q. Did you ever have any business connection or do any work for Mr. Forman at any time?

A. None whatever.

Q. Now, Mr. Whittle, with regard to money, following the indictment of Mr. Seijas in 1953, I believe in November of 1953, up to the time of

(Testimony of George V. Whittle.)

the trial of Mr. Seijas in July of 1955, did Mr. Seijas ever make any statement to you with regard to getting money from William Forman?

A. On several occasions he told me that he was trying to get some money from Mr. Forman.

Q. And what did he say?

A. He volunteered the information.

A. I beg your pardon?

A. He volunteered the information mostly.

Q. And what did he say was the result of those attempts?

A. He didn't get any money from him.

Q. Did he tell you that?

A. Yes, sir. [1929]

Q. What is the situation with regard to the charges that you made to Mr. Seijas? Have those charges been paid?

A. No, sir, not completely.

Mr. Mead: I think that is all. You may inquire.

Cross Examination

Q. (By Mr. Obenour): Mr. Whittle, when did you begin the work for Mr. Seijas?

A. I beg your pardon?

Q. When did you being work for Mr. Seijas?

The Court: Speak up, Mr. Obenour. We have a little traffic out there this morning.

The Witness: I think it was around July of 1951.

Q. (By Mr. Obenour): July, 1951?

A. I thing it was, yes.

(Testimony of George V. Whittle.)

Q. And in the course of your net worth statement, you worked from July to December of 1951?

A. Yes, sir.

Q. And by that net worth statement it showed an increase of about $65,000?

A. That is correct.

Q. And by that you have concluded also between the period of '42 to '49, there would be [1930] additional tax owed, did you not?

A. Yes, between the years.

Q. And did you advise Mr. Seijas that he should pay money to the Government in escrow or in their suspense account?

Mr. Mead: Objected to as going beyond the scope of direct examination.

The Witness: Yes, sir.

The Court: Overruled. Go ahead.

The Witness: Yes, I made a gentleman's agreement with Mr. Oftedal to pay a hundred thousand dollars and save the necessity of issuing jeopardy assessments.

Q. (By Mr. Obenour): What is a jeopardy assessment?

A. That is a notice to the taxpayer to pay within ten days and notice of liens on all the properties and assets of the taxpayer.

Q. In other words, unless so much money is paid into the suspense account, they would attach everything the taxpayer had?

A. That is correct.

Q. And a hundred thousand dollars was an esti-

(Testimony of George V. Whittle.)

mate of how much would be the taxes owned by Seijas?

A. Well, it was a partial payment in our opinion.

Q. In other words, it would be sort of like [1931] putting up a security, the Government would get at least that much money? A. Yes.

Q. And that is paid into a suspense account which means it is simply held there and not applied to anything. It's not paid on tax, but simply stops the interest from running for a hundred thousand or whatever is paid in?

A. That is right.

Q. Now, at the time when you talked to Mr. Seijas, did you inquire as to this hundred thousand dollars?

A. Yes. He was going to secure the loan from the theatres in Los Angeles.

Q. So at that time was when you were talking to Mr. Seijas trying to get some money from Mr. Forman, is that right?

A. Well, it could be, but I don't think there was any difficulty in getting that one hundred thousand dollars.

Q. But wasn't this the time that Mr. Seijas said he was going to try to get some money from Mr. Forman?

A. Well, he could have been at that time but also subsequent.

Q. Now, as a matter of fact, at that time, Mr. Seijas had loaned a hundred thousand dollars—

(Testimony of George V. Whittle.)

had a hundred thousand dollars in loans outstanding to the people in California, didn't he? [1932]

A. Yes, sir.

Q. So in getting a hundred thousand dollars from Mr. Forman, he would be simply getting the money back he loaned to them?

A. Yes, although I don't believe it was due.

Q. Pardon?

A. I don't think that it was due at that time.

Q. It wasn't due at that time? A. No.

Q. Did he say anything that he was going to do anything to Mr. Forman if he didn't pay it back? A. No.

Q. Do you know of any agreement between Mr. Seijas and Mr. Forman as to consideration by Mr. Forman for a partial payment of your fee?

A. No.

Mr. Obenour: That is all. Thank you.

Redirect Examination

Q. (By Mr. Mead): Mr. Whittle, do you know when the hundred thousand-dollar loan was repaid to Mr. Seijas?

A. I have forgotten when it was to be paid.

The Court: Not when it was to be paid. Do you know when it was paid? [1933]

The Witness: When it was paid, it was paid in the spring of 1952.

Q. (By Mr. Mead): So that loan was repaid to Mr. Seijas in the spring of 1952 and that was prior to the time of the indictment, Mr. Seijas?

(Testimony of George V. Whittle.)

A. That is correct.

Q. And were the conversations which you testified to on your direct testimony had with Mr. Seijas subsequent to the time of the indictment and prior to the trial?

A. Yes, I would say so.

Mr. Mead: Thank you, sir.

Recross Examination

Q. (By Mr. Obenour): Didn't you simply state in conversations you were trying to raise money for it?

A. It wasn't tied to one time, Mr. Obenour.

Q. That was more than once? A. Yes.

Q. Was there still additional tax due?

A. Yes.

Q. And this conversation, do you recall where and when it took place, the subsequent ones, the conversations about getting money from Mr. Forman, when did they take place?

A. Oh, between '53 and '55. There was reasons [1934] —I remember it because I was trying to get from Mr. Seijas further money on account of my fees. I didn't get any fees between March of '53 and March of '55. His excuse was to me that he was going to try to get some funds from Mr. Forman, and he would then pay me something on account.

Q. That was after he had already made the disclosure to the Government as to the $86,000 that he split—was his share and $86,000 to Mr. For-

(Testimony of George V. Whittle.)

man? A. I would say so.

Q. He was attempting to get this money according to the conversation with you after he had already told the Government about Mr. Forman's participation? A. Yes, sir.

Mr. Obenour: That is all.

Mr. Mead: That is all.

The Court: That is all, Mr. Whittle. You may leave whenever you wish.

(Witness excused.) [1935]

MORTON PINCH

called as a witness on behalf of the Defendant Forman, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Morton Pinch, P-i-n-c-h.

Direct Examination

Q. (By Mr. Mead): Where do you live, Mr. Pinch? A. Seattle.

Q. And what is the nature of your business?

A. Insurance broker and agent.

Q. And how long have you been in that business? A. Since 1924.

Q. Were you ever associated or connected with a firm of Lipman and Esfeld?

A. Well, I worked for Lipman and Esfeld for a period of about 20 years.

Q. And what period of time was covered by that employment, sir?

(Testimony of Morton Pinch.)

A. 1924 to 1944, about six months off there.

Q. 1924 to 1944? A. Yes.

Q. And where was the office of Lipman and [1936] Esfeld located during that period?

A. They were located at what was then known as the Pacific Block now known as the Smith Tower.

Mr. Mead: Could you hand the witness Plaintiff's Exhibits 76, 77, 78 and 79?

Q. (By Mr. Mead): Would you refer, Mr. Pinch, to the exhibit which is identified as Exhibit No. 76? A. Yes.

Q. Do you have it before you, sir? A. Yes.

Q. What is that original document which is reproduced there?

A. Well, it's what is known, I suppose, as a diary or appointment book, day book.

Q. A day book or diary or appointment book?

A. Yes.

Q. What name appears on the cover of that book?

A. Well, there is the initials of the company, "A. B.," which is American Bonding Company.

Q. American Bonding Company? A. Yes.

Q. And does the name of the insurance agent or broker who put out that book and circulated the book appear?

A. Yes. At the bottom of the book, "Compliments of Lipman and Esfeld." [1937]

Q. What connection or association did you have with the circulation of the original of that booklet?

(Testimony of Morton Pinch.)

A. Well, I had something to do with it. I mean I was in the office, and I generally saw that the book got out before the first of the year to different people that were on the list. Whether I was in a supervisory capacity or just what my actual official duties were, we saw that the books got out.

Q. You saw the books got out? A. Yes.

Q. Were you familiar with the original of that booklet? A. Yes, of the book in general.

Q. Of the book in general? A. Yes.

Q. Now, turning to Exhibits 77, 78——

The Court: In other words, you are not talking about this particular one?

The Witness: No.

The Court: Just the general issue of those books?

The Witness: Yes.

Q. (By Mr. Mead): Referring to Exhibits 77, 78 and 79, referring to the cover which is reproduced on each of those exhibits, could you state by what company that book was printed? [1938]

A. Same company, American Bonding.

Q. American Bonding Company? A. Yes.

Q. Now, did you during those years circulate similar books? A. Yes.

Q. And when I say "similar," were they the exact book put out by the American Bonding Company?

A. Yes, just the blank — I mean just the book with the inside not filled in, naturally.

Q. And then would the only change be in the

(Testimony of Morton Pinch.)

printing of the agent whose name appears on that book?

A. Yes, that would be about the only change in comparison with our books. Sometimes companies themselves send out the book and the agents don't have their names printed. Other than that, the books are identical.

Q. Can you identify each one of those books as being of the American Bonding Company?

A. Yes.

Mr. Mead: Now, will you hand the witness, please, Exhibit 500, Defendant's Exhibit 500?

Q. (By Mr. Mead): Will you examine that book, sir? A. Yes.

Q. What is that book?

A. That is the same book, the only difference being is that the initials "F. D." are impressed [1939] on the outside cover of the book meaning Fidelity and Deposit. Outside of that, to my knowledge and opinion, and I might say unquestionably, it is the same book with the different initials on the outside.

Q. And that is the only difference between the books?

A. Yes. It's owned by the same company.

Q. I was going to ask you what is the connection between the Fidelity and Deposit Company of Maryland and the American Bonding Company.

A. Well, the Fidelity and Deposit is the parent company, and the American Bonding Company is a subsidiary, wholly owned subsidiary.

(Testimony of Morton Pinch.)

Q. Now, sir, what is the color of all of the pages in those original volumes, and by that I mean the original exhibit or the original document that was reproduced in Exhibits 76, 77, 78 and 79? What would be the color of the pages as they were put out? I don't mean the photostatic copy, but the color of the page.

A. They would be the same as this exhibit, this one that says Fidelity and Deposit. I guess Exhibit 500 would be the same color.

Q. The same color, and what is the color of the pages in that book?

A. White as best I can see.

Q. Are you color blind? [1940]

A. No, I say it's white.

Q. And have you put out continually since 1949 similar books right up to the present time?

A. Yes.

Q. And what has the color been in pages of those books put out?

A. Been white as far as I know.

Mr. Mead: Thank you, you may inquire. One more thing.

Q. (By Mr. Mead): I might ask, have you searched, Mr. Pinch, to try and find the exact books that you put out for '42?

A. Well, we have made a thorough search, but it's very difficult to get anybody to come up with books that are this old. I talked to attorneys and doctors and people that we have circulated books to during the years, but they had served no particu-

(Testimony of Morton Pinch.)

lar purpose, they all tell me even from a legal standpoint, and it seems practically after the year is through, they discard them. That is about it.

Q. You haven't been able to find the original?

A. We are still working on it, and we have one gal checking to see.

Mr. Mead: That is all. [1941]

Cross Examination

Q. (By Mr. Obenour): You say you have been looking for the old books?

A. For old editions of the books. I just didn't know what.

Q. Where is that?

A. I don't know. I was asked to see if we could get any old editions.

Q. You were asked to see if you could find some old editions of the book? A. Yes.

Q. And you were told that everybody, all the attorneys and everybody destroyed them?

A. Well, I talked to a number of attorneys and they said it was only an appointment book as far as they are concerned, and at the end of the year —one was keeping them for 20 years, and he threw them all out, and as far as they are concerned, at the end of the year they generally discard them.

Q. So unless there was something of considerable importance in there, an attorney would have destroyed that after the end of each year?

A. Well, I am not an attorney, but that is what I am told.

(Testimony of Morton Pinch.)

Q. So that no one would be apt to have kept a '42 book until 1950? [1942]

A. Ordinarily not.

Mr. Obenour: That is all.

The Court: That is all. You may leave whenever you wish.

(Witness excused.)

DOROTHY FORMAN

called as a witness on behalf of the Defendant Forman, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Dorothy Forman, F-o-r-m-a-n.

Direct Examination

Q. (By Mr. Mead): Mrs. Forman, are you the wife of Bill Forman, the Defendant in this case?

A. Yes, I am.

Q. How long have you been married, Mrs. Forman? A. Twenty-two years.

Q. Are you acquainted with Army Seijas?

A. Yes, I am.

Q. Have you talked to Army Seijas on the telephone on various occasions? [1943]

A. Not recently.

Q. Well, I mean various times in the past, have you talked with him on the telephone? A. Yes.

Q. Are you acquainted with his voice?

(Testimony of Dorothy Forman.)

A. Yes.

Q. I will ask you, Mrs. Forman, whether or not you received a call from Army Seijas in July of last year while you were in California?

A. Yes, I did.

Q. Where were you at that time, Mrs. Forman, in what city? A. In the City of Los Angeles.

Q. And will you please state the substance of Mr. Seijas' telephone call to you on that occasion?

A. Mr. Seijas called and wanted to speak to Mr. Forman, but he wasn't home, and so he told me to tell Mr. Forman to come to—wanted to see him in the next day or two. He said, "Have him come up here right away." He said that Mr. Forman should come up in the next day or two. He repeated it several times. He said, "Tell Bill if he knows what's good for him to come right up here."

Q. Did Mr. Seijas ever tell you there were—on that occasion or at any time there were some records or some information that had come out during the course of his trial which he wanted Mr. Forman to see? [1944]

A. No, he didn't say anything like that.

Mr. Mead: You may inquire.

Cross Examination

Q. (By Mr. Obenour): Did he say any reason why he should come up?

A. He didn't say any reason. He just said to have him come up.

Mr. Obenour: That is all.

The Court: That is all, Mrs. Forman, you are excused and may leave whenever you wish.

(Witness excused.)

Mr. Mead: Mr. McCusker does not answer, your Honor.

The Court: You can check and investigate to see if it is wilful failure.

Mr. Mead: He was here yesterday, and we have only three other witnesses. Mr. McCusker would be rather a lengthy witness and I would appreciate it if we could take a recess.

The Court: My recollection from the previous trial is that Mr. McCusker is a cripple.

Mr. Mead: Mr. McCusker was here in response to the subpoena and waiting here yesterday afternoon. [1945]

The Court: If there is any indication of wilfull failure to obey, call it to my attention, if you do not understand that it was just some mischance of some kind or another.

We will take the morning recess at this time.

(Thereupon, a short recess was taken.)

The Court: Mr. McCusker is not here?

Mr. Mead: Mr. McCusker has still been delayed so we are going ahead with other proof.

MIKE BAROVIC

called as a witness on behalf of the defendant Forman, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Mike Barovic, B-a-r-o-v-i-c.

(Testimony of Mike Barovic.)

Direct Examination

Q. (By Mr. Mead): Mr. Barovic, where do you live?

A. I live at 118 West Main, Puyallup, Washington.

Q. And how long have you been a resident of this community, sir?

A. Well, I have lived in Puyallup since 1920. It would be about 35 years.

Q. And what is the nature of the business in which you [1946] have been engaged?

A. Operating motion picture theatres in Tacoma, Puyallup, Fife, Sumner, and over here at the Parkland outside the city limits of Tacoma.

Q. Are you engaged in any other enterprises or types of business?

A. Yes. I own part of the Northstar Fisheries Salmon Business and also part of the Pacific Queen Fisheries which is also a salmon business, and then I am also engaged quite heavily in real estate enterprises. I am the landlord for J. C. Penny Company, Ford Motor Company and various other real estate properties that I am renting out.

Q. So you are engaged in real estate investments and salmon fishing industries and in the theatre industry? A. Yes.

Q. Are you acquainted, Mr. Barovic, with Bill Forman? A. Yes, sir, I am.

Q. How long have you known him?

A. Oh, I would say approximately twenty to twenty-five years.

(Testimony of Mike Barovic.)

Q. What has been your relationship with Mr. Forman? Have you had any business dealings with him?

A. Yes, sir, I have. About eight years ago I started to build a drive-in theatre, and I didn't know too much [1947] about the drive-in while I know enough about the conventional theatres. Then I asked Mr. Forman if he would join me and become my partner, and Mr. Forman did, he and I joined. We own Fife Drive-in Theatre just one-half mile outside the city limits of Tacoma.

Q. For the last eight years you have been a partner in the Fife with Mr. Forman? A. Yes.

Q. Do you know Mr. Forman's reputation as a law abiding citizen in this community, sir?

A. As far as I know, Mr. Forman is the nicest man that I have ever dealt with.

The Court: That is not responsive to the question, and the answer must be stricken.

Q. (By Mr. Mead): You do know his reputation? A. Yes.

Q. What is his reputation?

A. Well, as I said, as far as myself is concerned, Mr. Forman——

Mr. Obenour: Objection.

The Court: Excuse me, Mr. Barovic, the answer is not responsive.

Q. (By Mr. Mead): Mr. Barovic, we know how you feel, but what is his reputation in the community? A. Good. [1948]

Q. His reputation in the community is good?

(Testimony of Mike Barovic.)

A. Very good.

Q. Do you know what his reputation in the community for honest dealings, sir?

A. I said it is very fine.

Mr. Mead: Thank you, sir. You may inquire.

Mr. Obenour: No questions.

The Court: You are excused, Mr. Barovic.

(Witness excused.)

The Court: Call another witness, please.

CHESTER NILSSON

called as a witness on behalf of the Defendant Forman, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: My name is Chester Nilsson, N-i-l-s-s-o-n.

Direct Examination

Q. (By Mr. Mead): Mr. Nilsson, where do you live, sir? A. In Tacoma.

Q. And what is the nature of your business, sir, or occupation? [1949]

A. I am in the theatre business here.

Q. Do you have any profession other than the theatre business that you are engaged in?

A. I used to practice law, but I don't any more.

Q. You used to practice law?

A. Yes, sir. I am a member of the bar here in the State of Washington.

(Testimony of Chester Nilsson.)

Q. You are a member of the bar here in the State of Washington? A. Yes, sir.

Q. And how long have you been a member of the Washington State Bar, sir? A. Since 1926.

Q. And how many years have you been engaged in the theatre business? A. Since 1948.

Q. Are you acquainted with Mr. William Forman? A. Yes, sir.

Q. What has been your association with Mr. Forman?

A. He and I are in partnership in the operation of some drive-in theatres in Tacoma.

Q. Do you know Mr. Forman's reputation in this community as a law abiding citizen, sir?

A. Yes, sir.

Q. What is that reputation? [1950]

A. It's excellent.

Q. Do you know Mr. Forman's reputation in this community for honest dealings, sir?

A. Yes, sir.

Q. What is his reputation? A. Very good.

Mr. Mead: Thank you, Mr. Nilsson. You may inquire.

Cross Examination

Q. (By Mr. Obenour) Where does Mr. Forman live, Mr. Nilsson? A. He lives in Seattle.

Q. Doe he have any other homes?

A. Not to my knowledge. He has always lived in Seattle.

Q. Do you know of a home he maintains in Hollywood, California?

(Testimony of Chester Nilsson.)

A. Well, I know he has some business interests down there which require him to stay there.

Q. Do you know that he has a home in Hollywood?

A. No, not to my knowledge. I don't know whether he lives in a home or apartment or where. I know he comes back and forth quite often.

Q. How many theatres does Mr. Forman own, Mr. Nilsson? A. How many does he own?

Q. Yes, sir.

A. I really don't know, to tell you the truth. I mean it would be a guess if I would mention the number.

Q. What is your best recollection?

A. Well, I wouldn't like to state because when you say how many theatres does he own, I know he has lots of partners. Now, whether or not he would own a theatre in that situation, I don't know.

Q. All right. How many does he have an interest in? A. Oh, probably 30 or 35 maybe.

Q. Could it be as high as 55?

A. I wouldn't know. I mean these numbers are merely a guess as far as my knowledge is concerned in the matter.

Q. Do you know that he has an interest in Texas? A. No, I don't.

Q. Arizona? A. No, I don't.

Q. California? A. Yes.

Q. Hawaii?

A. I think he had some connection with a theatre that was built over there.

(Testimony of Chester Nilsson.)

Q. He has theatres in Hawaii, doesn't he, Mr. Nillson?

A. I don't know if it is one theatre or theatres. I don't have any knowledge with reference to that.

Q. Mexico? A. No.

Q. Southwest at all?

A. I never heard of him having an interest there.

Q. If he has interest in theatres in Texas, Arizona or the Southwest, you don't have any knowledge of that? A. None at all, none at all.

Q. An interest in these other theatres required him to be out of this community for considerable periods of time, doesn't it, Mr. Nilsson?

A. I imagine so.

Q. It is a fact that he maintains his home in California, and his family attends school there, don't they?

A. I think his boy and his daughter attend school down there. They go to the university.

Q. Yes, sir, and actually he is in this community only at such times as he might come up to transact business with either you or Mr. Barovic?

A. Well, I wouldn't say that exactly. When he is here, naturally we transact whatever business we have to because that would be our only opportunity.

Q. Isn't that the reason for his coming up here?

A. Well, I would imagine so, to take care of his business interests up here.

Q. And during this time in the last eight years he has [1953] been associated with you, your only contact with Mr. Forman has been on the occasions

(Testimony of Chester Nilsson.)

when he has come up to transact business with you?

A. Or when I have been down there.

Q. And on the occasions when you would be down there, you would not then know what his reputation would be up here in Tacoma?

A. Oh, definitely.

Q. Up in Tacoma? A. Yes, sir.

Mr. Obenour: That is all.

Redirect Examination

Q. (By Mr. Mead): Mr. Nilsson, Mr. Obenour inquired into the matter of Mr. Forman's children, and they are going to school. Are you acquainted with Mr. Forman's children, sir? A. Yes, I am.

Q. How many children does he have?

A. Two, a daughter and a son.

Q. And I think he inquired about the matter of their schooling. Do you know whether they live in Seattle and went to high school and grade school in Seattle? A. Yes, they did.

Q. And the school now that he is inquiring about is [1954] college, is that right, sir?

A. Yes, that is right.

Q. And both of the children are away at college now?

A. His son goes to Stanford, and I think his daughter went to U. S. C.

Q. Did Mrs. Forman and the children live in Seattle right up to the time that the children went away to school?

A. They did and even thereafter.

Mr. Mead: Thank you, sir.

Mr. Obenour: No further questions.

The Court: That is all, Mr. Nilsson. You are excused and may leave whenever you wish.

(Witness excused.)

HENRY SCHAEFER

called as a witness on behalf of the Defendant Forman, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Henry Schaefer, S-c-h-a-e-f-e-r.

Direct Examination

Q. (By Mr. Mead): Mr. Schaefer, where do you live, please? A. Seattle. [1955]

Q. What is the nature of your business?

A. I am financial officer of a number of corporations, principally the Doric Company.

Q. And what is the nature of that business, sir?

A. We own and operate hotels and office buildings.

Q. And prior to that line of work, what do you do, sir?

A. I was in the banking business for almost 20 years.

Q. And for the 20 years that you were in the banking business, Mr. Schaefer, what bank were you associated with?

A. Seattle Trust and Savings Bank.

Q. What was your capacity with that organization?

(Testimony of Henry Schaefer.)

A. For 15 years I was vice president and manager of the branch office.

Q. And was that in the City of Seattle, Sir?

A. In Seattle.

Q. What branch office did you manage?

A. Fourth and Union branch.

Q. Prior to that time, had you been in Tacoma?

A. I lived in Tacoma four years from 1929 to 1933.

Q. And what was your business or association in the City of Tacoma, sir?

A. I managed the office of the investment firm, Elbarge and Winslow, a Seattle firm.

Q. That was during the time you were in Tacoma? A. That is right. [1956]

Q. Are you acquainted with Mr. Bill Forman?

A. Yes, sir.

Q. How long have you known him, sir?

A. Since 1945.

Q. What has been your association with him during that period of time?

A. Well, from 1945 to 1952 he did banking business with me, and in 1951 I entered into a business relationship with him in the purchase of the Midway Theatre.

Q. Have you been since 1951 associated with Mr. Forman in connection with the Midway Theatre? A. I have.

Q. And you are at the present time?

A. That is right.

Q. Are you acquainted, Mr. Schaefer, with Mr.

(Testimony of Henry Schaefer.)

Forman's reputation in this community and in the City of Seattle for honest dealing? A. I am.

Q. What is that reputation?

A. My business relationship and my knowledge of his affairs has been of the highest order.

The Court: That is not responsive. The answer is stricken.

Q. (By Mr. Mead): What is his reputation for honest dealings? [1957] A. It is good.

Q. Are you acquainted with Mr. Forman's reputation in these communities as a law abiding citizen, sir? A. I am.

Q. What is that reputation? A. Very good.

Mr. Mead: You may inquire.

Cross Examination

Q. (By Mr. Obenour): From 1945 to 1952, Mr. Schaefer, I think you said you were doing banking business with him? A. Yes.

Q. And that is the Fourth and Union branch?

A. Seattle Trust and Savings.

Q. Seattle Trust and Savings? A. Yes.

Q. And the business during that period involved several loans made by your institution to Mr. Forman? A. Yes.

Q. Was that for the acquisition of certain drive-in theatres? A. I didn't hear the question.

Q. The loans were for the purpose of the acquisition of drive-in theatres? [1958]

A. I believe that that may have been the case in some instances.

(Testimony of Henry Schaefer.)

Q. And what were the others?

A. Personal loans.

Q. For what purpose?

A. I can't recall exactly. The use of the funds would not always be made known to us. His credit was practically unlimited.

Q. Yes, sir, and what was his business at that time when you first knew him?

A. Theatre business.

Q. And did you also know about his pinball business?

A. I knew nothing of the pinball business.

Q. In 1945? A. No.

Mr. Obenour: That is all.

Mr. Mead: That is all.

The Court: That is all, Mr. Schaefer. Thank you. You are excused.

(Witness excused.)

Mr. Mead: I am advised that Mr. McCusker is here, your Honor.

The Court: Mr. Obenour, I believe there is some matter that you want to take up with the Court before the testimony of Mr. McCusker. [1959]

Mr. Obenour: Yes, sir.

The Court: That evidence probably will take an hour or longer.

Mr. Mead: Yes, I imagine that will take that time.

The Court: Ladies and Gentlemen, we now understand that the evidence in the case for all con-

cerned will be concluded very shortly following the lunch period.

Mr. Obenour: I think there was a misunderstanding about the matter—it would simply be a matter of a motion and would be extensive——

The Court: I think that we might just as well do it this way.

I don't like to keep you people sitting around when you haven't anything to do, although I imagine you find it pleasant enough, but still in all, there may be other things you would rather do.

In keeping with what I told you when you were impaneled here as jurors, I try to look out for your convenience as best I can within what I have to do consistent with our duties here, your duties and mine. I think that I am going [1960] to excuse you now until 1:30 because there will only be a short session for this afternoon, the evidence being concluded, and in order that you may make your plans, I am sure that you have personal matters that you are concerned with.

The program will be that in the morning I am going to ask you if you will be on hand earlier than usual; namely, at 9 o'clock. Is there any of you that would be very badly inconvenienced to be here at 9? I am going to ask you to come back in the morning at 9 o'clock.

Keep in mind it will be necessary for you to remain in deliberation until you have arrived at a verdict and so keep that in mind in any plans you might otherwise have had for tomorrow.

I am going to release you for the noon recess to reconvene at 1:30.

May I again call your attention to the admonition that I have so frequently given you against discussing the case with anyone or hearing or seeing anything about the case except here in the courtroom where we can all see and hear it together.

You may leave now if you wish.

(Whereupon, the Jury withdrew from the courtroom.) [1961]

The Court: Now, is there a matter to be called to the Court's attention?

Mr. Obenour: It was this, your Honor, that I anticipated testimony of Mr. McCusker, and when the question was brought to the attention of the Court concerning a recess when Mr. McCusker did not appear, I had suggested that while it wasn't anticipatory, it might facilitate proceedings if the Government were heard on an objection to testimony of McCusker on what we believe would be attempt to impeach on a collateral matter. Mr. Billinghurst would present such argument in that matter now in the idea of facilitating proceedings.

The Court: Do you object to our hearing——

Mr. Mead: I never heard of such a procedure, your Honor, to object to the testimony of a witness before it is offered.

The Court: I have. In fact, you yourself did it in this case a couple of times, at least, once that I recall with respect to Albert Forman and with respect to Endersby and Meyers, and called my attention to the fact that some harm might come from

their testimony or even their being produced in the Court, so I don't think your [1962] statement of not having heard of it. At least, you didn't interpret that in the same character as this.

Regardless of that, if there is any probability of improper evidence being presented which might be harmful, the mere offer of it I would certainly not preclude either one from presenting such a matter, and I will do so now. If either of you have anything to present, I will hear it.

Mr. Obenour: It was not urged as harmful but as simply expediting the proceedings during the request for continuance.

The Court: In view of the fact that we have lots of time until this afternoon——

Mr. Mead: I have no objection to it being taken up now, your Honor. I have no objection to that. I merely meant that Counsel may be anticipating testimony that——

The Court: In view of the fact that we have ample time unless Counsel for the Government want to make some statement or raise some matter, I am going to adjourn.

Mr. Mead: We certainly have no objection to bringing up anything they wish to at this time.

The Court: Go ahead.

Mr. Billinghurst: Mr. Obenour pointed out this is anticipatory and may not be well taken, but I think the Court should be, to save time and to avoid prejudice on the part of the Jury, consider it.

If we are correct in our assumption that among other things that the Defense may go into it with

Mr. McCusker will be the matter of the lawsuit which he has brought against Army Seijas and also the business relations between McCusker and Army Seijas involving this interest in eastern Washington principally subsequent to 1945 and other business interests, which, in our opinion are not material to the issue before the Court, and, which, furthermore, were matters which were brought out entirely on cross-examination, if I remeinbered the record carefully, and I have tried to search it carefully.

The Court: Let's find out from Mr. Mead if there is any problem presented.

Mr. Mead: Well, I don't——

The Court: Does there seem to be a problem presented?

Mr. Mead: I don't quite understand [1964] Counsel's point.

The Court: The point is, as I understand it, that he is concerned with whether you propose to interrogate McCusker concerning certain transactions between McCusker and Seijas relating to some venture in Eastern Washington *of* elsewhere thus far in no manner covered in the evidence in this case excepting, according to Mr. Billinghurst, on cross examination. That is the substance of his point.

Mr. Mead: Of course, I don't understand that, your Honor, because it is not my understanding that we are limited in our direct case to what was covered in the Government's case. This is not a matter of that kind. We are entitled in our direct case to

make any showing which has any material bearing or relevancy to the problem involved here, your Honor.

The Court: The only point that I understand they contend for is they wish to assert the rule against impeachment on collateral issues. That is what I understand that is suggested, and, of course, that is a well settled and established rule. Whether it is applicable in this contention or not is another matter, but [1965] I certainly will fully consider that rule and applicability here if and when the occasion arises.

Mr. Mead: I am well aware of that rule, your Honor, and this witness' testimony will not be offered for the sole purpose of impeachment of Mr. Seijas on a collateral matter but will be offered in connection with a material fact involved in this case.

The Court: That is all I can do about it for now. You have in mind the rule against impeach on collateral issues, and, I take it, you will exercise your judgment and integrity as counsel not to offer something that violates that rule as far as we understand. We are all mistaken from time to time including not only the Court but other more exalted, so I don't anticipate that you are going to be mistaken, but all that we can do for the moment, as I see it, is to have in mind that the Government does make that contention concerning certain testimony of McCusker, and undoubtedly you will have the rule in mind, and I will rule on any further matters as they arise and develop if they do, in fact, develop. [1966]

Mr. Mead: I have that rule in mind, your Honor, but that is not my idea of the law with respect to impeachment on a collateral issue, that we would be barred from inquiring of this witness on problems that might be in conflict with Seijas' testimony merely because of the rule.

The Court: In mere fact that certain testimony might also be impeaching does not, of course, exclude it or render it inadmissible. I have that phase or phases of the rule in mind as well.

Mr. Mead: Thank you, your Honor.

The Court: If you gentlemen after a few minutes would like to repair to my chambers, I would be glad to advise you as it is my duty under the rule concerning the charge.

(Whereupon, the noon recess was taken.)

After Recess

The Court: The Jury are present. You may proceed.

Mr. Mead: Call Mr. McCusker.

MATT W. McCUSKER

called as a witness on behalf of the Defendant Forman, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Matt W. McCusker, M-c-C-u-s-k-e-r.

Direct Examination

Q. (By Mr. Mead): Mr. McCusker, where do you live, please? A. Seattle.

(Testimony of Matt W. McCusker.)

Q. And what is the nature of your present business or occupation? A. Insurance broker.

Q. Are you acquainted with Army Seijas?

A. Yes, sir.

Q. Are you acquainted with Bill Forman?

A. Yes, sir.

Q. Are you acquainted with Henry Morin?

A. Yes, sir. [1968]

Q. What is your relationship with Mr. Morin?

A. Mr. Morin is my brother-in-law.

Q. Mr. Morin is your brother-in-law?

A. That is correct.

Q. Did you have occasion, Mr. McCusker, to introduce Mr. Morin to Mr. Seijas in the year 1946?

A. Well, I believe it was somewhere it that neighborhood.

Q. What was the occasion?

A. Well, at that time I believe Mr. Morin was talking to Mr. Seijas about going into the pinball business.

Q. And had Mr. Morin been in some other type of business? A. Yes, sir.

Q. And did you introduce Mr. Morin to Mr. Seijas? A. Yes, that is correct.

Q. Did you have occasion to sit in on the conferences between Mr. Morin and Mr. Seijas with regard to the purchase of an interest in this pinball business by Mr. Morin?

A. On some of it, yes, sir.

Q. Was that at the inception of the negotiations, at the beginning of them? A. Yes, sir.

(Testimony of Matt W. McCusker.)

Q. With whom did Mr. Morin negotiate for the purchase of this pinball machine business?

A. As far as I know, with Mr. Seijas. [1969]

Q. And approximately how many meetings did you sit in with Mr. Morin in connection with these negotiations?

A. It's hard to say. The talk about this business went on for a period of time, maybe two or three weeks. I don't recall how many meetings we may have had in that two or three-week period.

Q. Could you give us an estimate of how many times you sat in on the negotiations between Mr. Morin, your brother-in-law and Mr. Seijas?

A. Oh, I would say at least a half dozen times.

Q. Did Mr. Forman participate in any of those negotiations? A. Not to my recollection.

Q. Now, Mr. McCusker, you appear by subpoena, do you, sir? A. That is correct.

Q. And that was a subpoena served on you by the Defendant, Bill Forman?

A. That is correct.

Q. Did you have occasion to appear at the trial of Mr. Seijas last year in this court?

A. Yes, sir.

Q. Were you subpoenaed by either the Government or Mr. Seijas in that matter?

A. By the Government.

Q. Were you subpoenaed by the Government in connection with [1970] this trial? A. No, sir.

Q. Now, Mr. McCusker, during the years 1942 to 1945, what business were you engaged in?

(Testimony of Matt W. McCusker.)

A. Well, they were many and varied businesses at that time.

Q. Specifically, were you interested in any taverns at that time? A. Yes, sir.

Q. Were you interested in any taverns located in the City of Bremerton, Washington, in the County of Kitsap, Washington? A. Yes, sir.

Q. With whom were you associated in those ventures? A. Army Seijas.

Q. What taverns in Kitsap County were you connected with Army Seijas during that period of time?

A. City of Bremerton within Kitsap County?

Q. Yes, sir.

A. Blue moon was the first one.

Q. Do you recall, Mr. McCusker, when the Blue Moon Tavern was purchased?

A. Somewhere in the neighborhood of — latter part of 1943 or early part of 1944.

Q. And by whom was the Blue Moon Tavern purchased at that time? [1971]

A. By Army Seijas and myself.

Q. Were you partners in that venture?

A. That is right.

Q. What was the amount of the investment, sir, approximately? A. Approximately $30,000.

Q. Had each of you contributed half of the investment? A. That is correct.

Q. What other tavern were you interested in in Kitsap County with Mr. Seijas?

A. We had Pop's Inn and Seven Seas.

(Testimony of Matt W. McCusker.)

Q. When were you interested in Pop's Inn? When was that purchased?

A. That was purchased about six to eight months after the Blue Moon.

Q. So that would be in——

A. About 1944 approximately.

Q. Approximately? A. Yes.

Q. And what was the purchase price of that tavern?

A. It was in the neighborhood of $17,000.

Q. And were you equal partners in that venture or did you have a lesser interest than Mr. Seijas?

A. No, I was on that on a third basis. Henry and Louie Seijas were in on that as far as licenses were concerned, [1972] but as far as I was concerned, it was Army and myself.

Q. And the other tavern, I think you mentioned, was the Seven Seas? A. Seven Seas.

Q. Where was that located?

A. Located about a half block, I imagine, from Pop's Inn. I don't recall the street number at the present time, but it was right close to Pop's Inn.

Q. Who were the partners in that enterprise?

A. Again, that was Henry and Louis Seijas and myself, but actually it was Army and myself.

Q. And what was the purchase price of that tavern? A. That was about $12,000.

Q. And did you have an equal interest with Seijas in that?

A. No, I had a third interest in that also.

Q. Now, during that period of time that you

(Testimony of Matt W. McCusker.)

participated in those operations, did you in the operations of the taverns that you have mentioned during the time you owned them with Mr. Seijas?

A. I am sorry, I didn't get your question?

Q. Did you participate in connection with the operation of those ventures? A. Yes, sir.

Q. Do you recall, sir, when Pop's Inn was sold?

A. Sometime in '45, I believe. [1973]

Q. Do you recall what the sale price was?

A. About $20,000.

Q. Do you recall when the Seven Seas was sold?

A. That was sold about 1946, I believe.

Q. And do you know what the sale price of that venture was?

A. Well, that was sold twice, and I don't recall the details of it, but I think somewhere in the neighborhood of $12,000.

Q. And when was the Blue Moon sold?

A. That was sold about 1945 also.

Q. And do you know what the price of that was?

A. Somewhere in the neighborhood of twenty-five or thirty thousand dollars. I think it was $25,000 and then probably an extra $5,000 for the stock.

Q. By the stock, do you mean the merchandise inventory, do you, sir? A. Yes, sir.

Q. During the entire time that you were an owner in those three taverns, Mr. Seijas was a partner in those ventures? A. That is correct.

Q. What was the practice with regard to the installation of pinball machines in those three taverns —were there pinballs installed there?

(Testimony of Matt W. McCusker.)

A. There were pinball machines already installed in the [1974] taverns when we took over, and they usually belonged to somebody that had the pinball route.

Q. What is the practice with regard to making collections by the operator in those respective taverns during the time you were connected with it?

A. Well, they usually had a service man come around, usually about once a week, and he would take the money out of the machines and go over to a booth or go into the back office and count the money, and at that time whenever he took the money out of the machines, usually I — the manager or myself would sit down with him. Occasionally he may have taken some money out of the machines when there wasn't anybody that could be available to sit down and count with him.

Q. Was it usually the practice that either you or the manager would sit down with the collector when these proceeds were taken from the machines?

A. Well, that was the usual procedure.

Q. Now, Mr. McCusker, during that period of time was there any hold out of any of the proceeds of those machines to your knowledge?

A. None to my knowledge.

Q. Was there any occasion to your knowledge that greater amounts of money were collected from those machines than were reported upon the receipts delivered to the [1975] owner or the manager?

A. Well, it could have been possible, but I don't

(Testimony of Matt W. McCusker.)

see how. Actually, anybody that runs machines—that has machines in their place of business can determine pretty well down to a matter of $25 which should be in the machines per week regardless of whether you are there or not.

Q. Why is that?

A. You usually know the amount of nickels you buy and the nickels you have on hand at the start of the week, and you usually know what pay outs were made on the machine so that you can determine from that pretty well what should be in the machine, and if you are experienced at all in operating a place of business that has machines like that, you can determine pretty well down to about five or ten dollars which should be in that machine per week.

Q. But I think, notwithstanding that, you said it was the practice generally for either the manager or yourself to be present when the money was counted. A. That is correct.

Q. And when the money was being divided?

A. That is correct.

Q. Now, Mr. McCusker, there has been some reference to the company known as the Moses Lake Investment Company. [1976]

Mr. Billinghurst: I object to this line of questioning, your Honor, on the basis that it is immaterial and relates to a collateral matter brought up on cross-examination, and, therefore, the Defense is bound by the testimony.

(Testimony of Matt W. McCusker.)

The Court: You can't tell at this moment. Go ahead, put a question.

Q. (By Mr. Mead): What was the Moses Lake Investment Company?

A. That was a company that Army and I had in Moses Lake for the purpose of purchasing buildings and other properties.

Q. And when was that investment acquired, sir?

A. Somewhere in the neighborhood of 1947.

Q. In 1947? A. Yes.

&. Has that investment been liquidated?

A. Yes, sir.

Q. Do you know when it was liquidated?

A. Well, in 1948 or '49, I believe.

Q. What did that company consist of, and by that I mean, what properties did it own in a general way?

A. We owned a building and a lot, several lots, I think were three lots and a building over there.

Q. In Moses Lake? [1977]

A. That is correct.

Q. Now, what was the Moses Lake Development Company?

A. That was a company set up to buy another piece of property that consisted of land, hotel, restaurant and tavern.

Q. And when was that company set up?

A. That was set up about 1947.

Q. And do you recall what land and building and tavern was purchased by that company?

A. I would like to just go back a minute if I

(Testimony of Matt W. McCusker.)

may. I think that both of those companies were about somewhere in '46 rather than '47. I think it was a year earlier than what I have just stated.

Q. And what were the properties purchased by the Moses Lake Development Company?

A. Well, there was, I think, six pieces of land, six lots and a building that consisted of a hotel, restaurant and tavern.

Q. And do you recall what the purchase price of the land was, sir?

A. Of the whole investment do you mean?

Q. Yes, sir.

A. Somewhere in the neighborhood of $60,000.

Q. Did that include the tavern also?

A. That is correct. [1978]

Q. And what was the name of the tavern?

A. White Elephant.

Q. What was your ownership in that business?

A. Forty-nine per cent.

Q. And what was your investment in that enterprise?

A. Forty-nine per cent, whatever it was.

Q. Was that business or the assets of that business liquidated? A. Yes, sir.

Q. When were they liquidated?

A. Well, I believe in 1948 or '49.

Q. In 1948 or 1949? A. Yes, sir.

Q. Have you been able to secure access to the records of any of these businesses to refresh your memory with respect to the time of the investment and the details of the investment?

(Testimony of Matt W. McCusker.)

A. No, sir.

Q. Is that the reason that you are not able to give us exact data on the times?

A. This is as good reason as any. I haven't seen the books since we have had it.

Q. Now, when was that—when was the last time since you have seen the books or the records of any of these enterprises? [1979]

Mr. Billinghurst: I renew my objection.

The Court: We are going beyond what the subject calls for.

Q. (By Mr. Mead): Have you ever had an accounting from Mr. Seijas for the proceeds of the sale of the business known as the Seven Seas?

A. No, sir.

Q. Have you ever had an accounting from Mr. Seijas for the proceeds of the sale of the properties of the Moses Lake Development Company?

A. No, sir.

Mr. Billinghurst: I want to renew my objection to this question.

The Court: Overruled. I will permit that question. It was answered "No."

Q. (By Mr. Mead): You have not?

A. No.

Q. Have you ascertained and determined the amount of money which was in the account of the Moses Lake Development Company at Moses Lake?

Mr. Billinghurst: Objection renewed.

The Court: I think we are going beyond what

(Testimony of Matt W. McCusker.)

you may legitimately be shown in the view of the objection that was made.

Mr. Mead: I would like to make an offer of [1980] proof, your Honor.

The Court: I will give you an opportunity to do that.

Mr. Mead: At a later time?

The Court: Yes.

Q. (By Mr. Mead): Have you had occasion to sue Mr. Seijas for an accounting in connection with these enterprises?

Mr. Billinghurst: Same objection.

The Court: Overruled.

The Witness: Yes, sir.

Q. (By Mr. Mead): When was that proceedings filed?

The Court: I don't want to go into the details. You have got one lawsuit on your hands here.

Mr. Mead: Very well, your Honor.

That is all. You may inquire.

Cross Examination

Q. (By Mr. Billinghurst): Mr. McCusker, with reference to the Blue Moon Tavern, how long were you associated with Mr. Seijas in that endeavor?

A. Well, from the inception of purchasing until it was sold.

Q. And how long a time was that?

A. Well, I would say it could have been from '46. It might [1981] have been earlier than that, '46

(Testimony of Matt W. McCusker.)

until about 1950, I believe when the last time it was sold.

Q. And during that time you were the operator, were you not? A. No, sir.

Q. Of the tavern? A. No, sir.

Q. Who operated it?

A. Well, there were several managers over there.

Q. What part did you have to play with the business?

A. I had no part to play with the business except to go over and take a look at it now and then, see that the thing was running.

Q. And how about Pop's Inn, you were the manager of Pop's Inn, were you not?

A. No, sir.

Q. Who managed Pop's Inn?

A. Henry and Louie Seijas.

Q. And what did you have to do with the operation of that business?

A. Again just look at it and see that the thing was running.

Q. And the other tavern, the Seven Seas, did you manage that tavern? A. No, sir.

Q. Who managed that one? [1982]

A. Henry and Louis Seijas.

Q. And during the period with which you were associated with Mr. Seijas and his brothers in these three operations, you were not the active manager of the business, is that correct?

A. In which businesses are you talking about?

Q. Any one of the three of them.

(Testimony of Matt W. McCusker.)

A. Blue Moon, are you talking about — Pop's Inn, the Seven Seas and the White Elephant?

The Court: He is talking about the Blue Moon, Pop's Inn and the Seven Seas.

The Witness: No. The Blue Moon, I was running the Blue Moon.

Q. (By Mr. Billinghurst): Did Mr. Seijas take any part in the management, and I am talking about Army Seijas, of the Blue Moon?

A. Yes, sir.

Q. What did he have to do with it?

A. He had to do with the keeping of the records.

Q. Which records do you refer to?

A. Also—excuse me, let me finish that if I may. Also he was on retainer at the same time for any legal problems or legal matters that came up in relation to the various businesses that we were in.

Q. How about the operation of the tavern itself? [1983]

A. He was operating it as much as I was.

Q. Now, are you referring to the Blue Moon?

A. I am referring to all of them.

Q. You were the manager of the Blue Moon?

A. Well, I was supervisor of the Blue Moon.

Q. What did you do to supervise?

A. I came down and checked the stock, checked the tills and so on. We had a manager there. The manager was working there the same as we had managers in all other taverns. I watched the Blue Moon a little closer than I did any of the rest of them.

(Testimony of Matt W. McCusker.)

Q. Now, Mr. McCusker, I believe you stated that the price of the Blue Moon, that is the purchase price, was $30,000, and you had a half interest in that tavern, is that right?

A. That is correct.

Q. How was the purchase price apportioned between you and Mr. Seijas? Which portion of the $30,000 did you pay and which portion did he pay?

A. Well, I imagine 50-50.

Q. What funds did you use to make that purchase?

A. I had funds from other taverns that I owned, other businesses.

Q. And you put in $15,000, would that be correct?

A. No, I don't—I didn't say that, and I don't recall [1984] exactly how much I put in.

Q. You don't know how much you put in?

A. That is correct.

Q. Do you recall was the tavern purchased for cash, or was there a down payment or how was it paid?

A. A down payment and payments made from there on out.

Q. Do you recall the amount of the down payment?

A. I think in the neighborhood of $12,000.

Q. And how much of the $12,000 to the best of your recollection did you provide?

A. Half of it.

(Testimony of Matt W. McCusker.)

Q. Was that paid all at once or did you have to borrow some of the money?

A. It was paid all at once.

Q. Now, with respect to Pop's Inn, how was the financing or the purchase of Pop's Inn made?

A. Same way.

Q. Do you recall the down payment?

A. I believe about $10,000. I couldn't be sure on that.

Q. And how much of the $10,000 did you pay?

A. A third.

Q. Where did the funds come from?

A. Came from the sale of other businesses that I had.

Q. And you put approximately $3,000 into Pop's Inn, is that correct? [1985]

A. As far as I can recall.

Q. And how about the Seven Seas?

A. The Seven Seas was financed through the sale of Pop's Inn. We sold Pop's Inn and all put in shares from Pop's Inn.

Q. And how much was your share?

A. In the neighborhood of 35 hundred dollars.

Q. During the time that these taverns were operating, were you receiving any kind of a salary or compensation for acting as manager?

A. At the Blue Moon, I believe I was getting a salary. I am not sure.

Q. How much of a salary did you get?

A. I can't recall at the present time.

Mr. Billinghurst: I think that is all.

The Court: That is all, Mr. McCusker. Step down, please.

(Witness excused.)

Mr. Bischoff: May we have the witness retained?

The Court: Don't leave, Mr. McCusker.

Mr. Bischoff: Until you hear the offer of proof.

The Court: Yes, I have that in mind.

Mr. Mead: At this time I would like to offer [1986] in evidence Exhibits 500, 501, and 505. I believe those have not yet been offered.

The Court: Exhibit 501 has been admitted according to my record. That is the stipulation in the Seijas trial.

The Clerk: Yes, your Honor.

Mr. Mead: That is admitted?

The Court: My notes so show. Is there any objection to it?

Mr. Obenour: No, sir.

The Court: 501 has been admitted.

Mr. Mead: 500.

The Court: 500 has never been offered.

Mr. Mead: We are offering it now.

The Court: Is there any objection?

Mr. Obenour: 500 is the book. I fail to see the materiality.

The Court: Admitted.

(Thereupon, Defendant's Exhibit No. 500 for identification was received in evidence.)

Mr. Mead: Exhibit 505.

The Court: Is there any objection to 505? That is the Forman statement of September 7, 1951, identified by Oftedal.

Mr. Obenour: No, your Honor. [1987]

The Court: Admitted.

(Thereupon, Defendant's Exhibit No. 505 for identification was received in evidence.)

The Court: You are not offering Exhibit 504, I take it?

The Clerk: That exhibit was returned to the witness at your direction, your Honor.

The Court: Yes, with the agreement of counsel that it would not be required.

Mr. Mead: Yes, your Honor.

The Court: All of the exhibits referred to are admitted.

Mr. Mead: Subject to that and subject to the offer of proof which we desire to make, the defendant rests.

The Court: Very well. We will take a short recess. I think I am going to release you for the day in a few minutes, but for now, will you just stay for a few minutes until we get another matter settled.

(Thereupon, the Jury withdrew from the courtroom.)

Mr. Mead: I am wondering, your Honor, if I could make a statement with regard to the relevancy of the——

The Court: The particular question and the [1988] only one to which objection is sustained, was the matter of where the funds were, or words to that effect.

Mr. Mead: How much was in the bank account of the Moses Lake Development Company.

The Court: You didn't indicate at what time, but you can supply that information now.

Mr. Mead: I think the question was, "How much is in the bank account?". You recall that the witness Seijas testified that with respect to the Moses Lake Development Company matter that he had not made an accounting to Mr. McCusker. Now, the purpose of this evidence, your Honor, is to show that in 1948 and '9 Mr. Seijas had substantial amounts of cash on hand, the proceeds of other investments that he had not accounted to his associates for, which included the Seven Seas restaurant or tavern, and which included the substantial investment in the Moses Lake Development Company.

Now, it is material to the defendant's case to be able to demonstrate that this money was on hand in cash. Mr. Seijas says that this money is in the bank account of the Moses Lake Development Company and in a strongbox or locked up at home in cash.

Now, if it be a fact that there is in the account of the Moses Lake Development Company retained for an accounting with Mr. McCusker a substantial amount of cash, that would, of course, mitigate against the contention of the defendant that he had substantial cash on hand from other sources at these times when he says that he used the pinball receipts from these earlier years, and it is our purpose to show, and this witness will show, that there is no money in the account in the account at Moses Lake as Mr. Seijas testified, and, therefore, we are entitled to the deduction from that that all of these proceeds from these various different enterprises

were available to Mr. Seijas in the years 1948 and 1948 which have not been disclosed or brought out in this case, your Honor, and that is the purpose of our showing. It is not impeachment on a collateral issue.

The Court: I haven't the slightest inclination to restrict you. Even in a case of doubt, I will resolve in your favor. I think that is a good rule to follow in this kind of case. My only concern is that I do not want to get involved in the details and the extended ramifications of the [1990] litigation between Seijas and the witness McCusker, particularly when the government made no inquiry into that matter at all. The inquiry was made solely of Seijas on cross-examination, as I recall.

Mr. Mead: I think that is true, your Honor, although the government on their case, as I recall it, did go into the matter of the Moses Lake Development Company and those investments.

However, it is our position that whether the government went in to them or not, that it would be perfectly proper for the defendant in his case in chief to show that Seijas had substantial amounts of cash available to him during the period that he says he used the withholding from his pinballs.

The Court: As I say, I resolve questions of this kind, not only in this case but generally when I am in doubt, in favor of the defendant. I think they should be resolved that way as a general proposition, and accordingly, I think I will permit you to let the witness say whatever he knows about that subject.

Bring the Jury in. There is nothing else? You have rested except for that one matter?

Mr. Mead: That one thing, your Honor. [1991]

The Court: All right. Then, of course, desired further cross-examination on that one subject may be conducted. Bring the witness in and let him get on his way so that we can proceed promptly.

(Thereupon, the Jury resumed the box.)

MATT W. McCUSKER

resumed the stand and testiefied further as follows:

Redirect Examination

Q. (By Mr. Mead): Mr. McCusker, do you know how much money is in the Moses Lake Development Company account in the bank at Moses Lake at the present time? A. Yes, sir.

Q. How much? A. None.

Q. Has that been true for some period of time, sir?

A. According to the bank officials, yes.

Mr. Mead: That is all, your Honor.

The Court: Anything further from this witness?

Mr. Billinghurst: No, your Honor.

The Court: That is all, Mr. McCusker. Now you are excused and you may leave whenever you wish.

(Witness excused.) [1992]

The Court: Ladies and Gentlemen, we have concluded a little bit earlier than expected.

I would like you to return ready for duty at 9

o'clock tomorrow morning and we will proceed then, to hear arguments of counsel in the morning session, and immediately following lunch the Court will instruct you, give you the charge as to the law, and then the case will be committed to you for your consideration.

Mr. Mead: Pardon me, your Honor, I don't mean to interrupt, but I don't believe the record indicates yet that the Government has rested. I don't recall that they indicated that.

Mr. Obenour: That is correct, your Honor. We would rest, though.

The Court: Very well. Before we part again, I must now again caution, and I hope this will very nearly be for the last time because I know you have become very familiar with this admonition and probably somewhat irritated with it. I hope not. However, it is very important that you should not under any circumstances hear or see anything about this case, or consider or discuss it with anyone even in the remotest way until it is finally committed to you. At that time you can [1993] discuss it as long or as short a time as you think the case warrants.

Good evening, then, and we will see you tomorrow morning at 9 o'clock.

(Thereupon, the Jury withdrew from the courtroom.)

The Court: The record will show, and I think that counsel will agree, that the Court has advised the counsel on the requests to charge as required by the rule?

Mr. Mead: That is correct, your Honor, and I

apologize to your Honor for interrupting but that occurred to me they had not rested.

The Court: There is no apology required at all. I might say this for your further information, that with respect of your request 27,—Mr. Bischoff, do you have 27 in mind?

Mr. Bischoff: Yes, sir.

The Court: On further reflection after a conference this morning and examining that more carefully, I concluded that the last summary where you suggest I summarize 1, 2, 3, I think that that is not properly phrased, and I have made what seemed to me a slight change that improves it. If you have your copy there and you want to come in to chambers, I will tell you how it was [1934] changed. Would you like to do that?

Mr. Bischoff: I want to make a formal motion at this time and we won't have to return.

The Court: I think that would be desirable to do so.

Mr. Bischoff: At this time the defendant Forman renews each and every of the motions that were made at the close of the government's case, to declare a mistrial and to discharge the jury and to strike portions of the indictment and portions of the evidence, and to withdraw the issues under Paragraphs A, B, and D from the Jury on the grounds which were then stated.

The Court: Let the record show that all of the items referred to in the written motion that you filed at the end of the government's case may be deemed re-asserted at this time.

Mr. Bischoff: I would like to have that done.

The Court: Is that agreeable to you?

Mr. Bischoff: Yes. And at this time the defendant Forman moves for a judgment of acquittal on the grounds that the Court is without jurisdiction of the offenses charged in the indictment, and that the offenses charged in the indictment are barred by the statute of limitations, and that [1995] the government has failed to establish the offense or offenses charged in Count XV of the indictment by evidence sufficient for submission to the Jury, in that evidence is insufficient to establish the guilt of the defendant Forman beyond a reasonable doubt, and that the evidence in this being circumstantial, is at least as consistent with the innocence of the Defendant Forman as it is with the guilt and would not warrant a finding of guilty beyond a reasonable doubt.

The Court: Each and all of the motions are denied, and exception allowed.

Mr. Obenour: If your Honor please, the government would be appropriate to except to the proposed instruction that is indicated to the degree of the determination, that the Paragraphs A and B would have been outlawed by the statute of limitations, and it would be the government's position that the evidence—that the records have, within the three years prior to 1953, or thereafter, been destroyed or otherwise made unavailable and would be a further act by one of the conspirators to conceal the mis-entries or incorrectness of the records, and as such, would be a continuation of the conspiracy

to violate the [1996] offenses set forth in Paragraphs A and B, and which matter should be put to the consideration of the Jury and should not be precluded by an instruction of the Court by reason of the evidence that has been introduced, that the fact is as late as '53, or thereafter, the records were made unavailable for inspection.

The Court: Exception will be noted. However, I think you have misunderstood what I hurriedly and briefly gave you in the conference as to the charge on that phase of the case.

If you want to come in now when I inform Mr. Bischoff of the modification in that instruction, I will be glad to advise you further.

Recess subject to call.

(Whereupon, the court recessed to reconvene the following morning, August 15, 1956, at 9 o'clock a.m.) [1997]

(Whereupon, on the 15th day of August, 1956, at the hour of 9:30 a.m. the following further proceedings were had, to wit:)

The Court: Good morning, Ladies and Gentlemen, and counsel.

As you know, Ladies and Gentlemen, the evidence in the case has been concluded now and the next phase in the trial will be the argument of counsel. You will hear from the counsel for the government in opening, then the defense argument, and then the government in closing and reply.

Are you ready to proceed?

Mr. Obenour: Yes, your Honor.

The Court: Very well, proceed.

Mr. Billinghurst: If it please the Court, Mr. Forman, Mr. Bischoff, Mr. Mead, Mr. Obenour, and Ladies and Gentlemen of the Jury, during the past two weeks you have heard the testimony of a number of witnesses and you have seen the entry into the record of the case of the United States vs. William Forman of some 150 documents.

During that two week period you might say that the case has belonged to the witnesses because it is their testimony and their evidence which constitutes the background and facts against which you must test the guilt or innocense of the defendant in this case, and soon the case will belong to you for that purpose. But in the meantime, as the Court has pointed out, counsel for the United States and for the defense will argue to you by recalling to you as best we can recollect them, the various facts which we believe support our particular points of view concerning the meaning of the charge and whether or not Mr. Forman is guilty of the crime as he has been charged.

I believe that the Court will instruct you that the arguments of counsel have no quality or value as evidence and nothing we say or do or argue to you can alter the record as it stands, in any way, and that puts a burden on you to listen to it as attentively and carefully and even critically, but fairly, as you can, because the issue here is not between counsel for the defense and counsel for the government. It is between the United States and Mr. Forman.

If during the course of arguments one of us

should bring to your attention what we allege to be a fact, and if that fact varies from your recollection of the evidence, after your careful consideration, or if we draw a conclusion from some [1999] fact relating it to the meaning of the evidence with respect to the charge, and that conclusion does not conform to your opinion concerning the meaning of that fact, then you should be bound by your recollection and your conclusions, and not those of the lawyers.

At the outset of the trial some two weeks ago, I recall that you were generally acquainted with the nature of the case and you were made acquainted with the details of the indictment as it pertains to Mr. Forman. Basically the charge upon which he is being tried is conspiracy, and the charge contains the elements that the defendant Forman and Mr. Army Seijas conspired to fraudulently and wilfully evade the payment of income taxes on incomes of Mr. and Mrs. Army Seijas and others, during the years 1942, '43, '44, and '45, and that subsequent to that time, many overt acts, that is, acts which were calculated to accomplish the purpose of that conspiracy, have been committed by both Mr. Forman and his partner, Mr. Seijas.

Now, later on today you will be instructed by the Court concerning the essence of the charge as is going to be presented to you, and for that reason I want to discuss with you at this time the technical document, Count XV. I read, "That during the years 1941 to 1945, inclusive, Armador A. Seijas, also known as Army A. Seijas, and William R.

Forman, in partnership with themselves and in some instances with others, operated pinball machines and other coin-operated gaming and amusement devices in the Western District of Washington, and particularly, in Kitsap County, Washington, under an arrangement whereby these coin-operated devices were maintained by the partnership in taverns and other locations and the funds taken from those machines by the collectors were divided on a percentage basis between the partnership and owners of such locations. At various times various portions of this business were conducted by said partners, Armador A. Seijas, also known as Army A. Seijas, and William R. Forman, under the following styles: Bremerton Amusement Company, United Amusement Company, American Amusement Company, and United Amusement Company of Bremerton.

That beginning on or about Febriary 1, 1942, and continuously thereafter until about April 15, 1953, in the Western District of Washington, and particularly in the City of Seattle, Washington, said Armador A. Seijas, also know as Army A. Seijas, and [2001] William R. Forman did wilfully and unlawfully combine, conspire, confederate, and agree together, and with each other, and with other persons to the grand jurors unknown, to defraud the United States and to commit offenses agains the United States, more specifically, to wit:

A. To violate Section 54 of the Internal Revenue Code, 26 U.S.C, Section 54, and the rules and regulations promulgated thereunder (particularly Section 29. 54-1 of Regulations 11 promulgated by

the Commissioner of Internal Revenue) by wilfully and knowingly keeping and causing to be kept for and on behalf of the partnerships named above records for the years 1942 to 1945, inclusive, which did not accurately reflect the true receipts and income of the aforementioned partnerships.

B. To violate Section 1001 of the New Criminal Code, 18 U.S.C., Section 1001, and Section 3809 by knowingly and wilfully filing and causing to be filed with the Collector of Internal Revenue for the Collection District of Washington, at Tacoma, Washington, numerous false and fraudulent information returns in the name of the aforementioned partnerships which greatly understated the receipts and income of said partnerships and understated the [2002] partners' distributive share of such income."

Those two elements of the indictment, Ladies and Gentlemen, will not be submitted to you as to the guilt or innocence of Mr. Forman with respect to the filing of false income tax returns back in those years, '42 to '45, nor with respect to maintaining false records of the partnerships business during those years.

They will be considered by you only if you find that such things were done and if you find that they in themselves support and are material to the next section of the indictment which is the crux of the matter and which is the only matter upon which you may base the guilt or innocence of the defendant. That reads:

"C. To violate Section 145(b) of the Internal Rev-

enue Code, 26 U.S.C., Section 145(b), by knowingly and wilfully attempting to defraud and evade a large portion of the income taxes owed by Armador A. Seijas and wife, Bettey L. Seijas, and others, to the United States for the years 1942 to 1945, inclusive, upon their share of the unreported income of the aforementioned partnerships.

D. To violate Section 1001 of the New Criminal Code, 18 U.S.C., Section 1001, and Section 145(b) of the [2003] Internal Revenue Code, 26 U.S.C, Section 145(b), by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and wife, Betty L. Seijas, for the years 1942 to 1945." Then the indictment goes on to set forth numerous overt acts which we will discuss later.

Also, at the outset of the trial, Ladies and Gentlemen, and in his opening statement, Mr. Obenour very briefly outlined for you the evidence as we anticipated it would be entered in this record which would prove the charges which now you must consider: namely, the allegations that Mr. Seijas and Mr. Forman, his partner, conspired to evade the income taxes due on Mr. Seijas and others, income from '42 to '45, and that they conspired to

conceal the income from Federal agents and submitted false statements to them.

Mr. Obenour briefly pointed out that [2004] Mr. Forman and Mr. Seijas formed an association of some kind in the year of 1940, that prior to that time Mr. Seijas and been in a law practice and Mr. Forman had been the general manager of the Sterling Theatres Chain in Seattle, Washington, throughout the Northwest, that following the association in 1940, the partnership, just a general association at that time, sought to enter the theatre business and they made numerous efforts to obtain theatres and start operating, that instead of that, they first went into the pinball business in Bremerton, Washington, that they obtained a route licensed to operate in Kitsap County under the name of the United Amusement Company, that three licenses to operate in the City of Bremerton were obtained under various partnerships names, that the routes were put into operation following the routes going into operation the business was organized, the collections were made from the receipts or from the funds contained in the machines, by Mr. Meyers, Mr. Heberling and others, and that of the funds taken from the pinball machines for the items known as holdouts, in other words, income from the machines that was not reported to the partnership accountant that was carried on none of the partnership [2005] books which was not included in the basis of the information returns relating to the partnership business and which was not included on Mr. Seijas' income tax returns nor in the income tax returns

of anyone, basing their personal income tax returns on those partnership information returns.

He pointed out to you that this business operated in this manner throughout those four years 1942 to 1945, to the full knowledge of Mr. Forman, and in a very substantial part under his direction. And that following the year 1945, the association continued, and that after Mr. Seijas' income tax matters came under the scrutiny of the Internal Revenue and finally the intelligence unit of the Internal Revenue Bureau, and throughout the years from 1946 through early 1953, both Mr. Forman and his partner Seijas on numerous occasions made false statements, provided false records in various ways, concealed or attempted to conceal from the government the fact that this holdout income had been obtained during those years in a total amount of over $160,000; that in so doing both Mr. Forman and Mr. Seijas, in his opinion, were guilty of the crime of conspiracy as it is alleged in the last two sections of the indictment as I read them to you, [2006] Sections C and D.

On that day also, Mr. Mead addressed you concerning the defense theory of what had happened back in 1942-'45 subsequently. In his opening address to you he told you that Forman, the defendant in this case, was a young man 29 or 30 years of age who came under the influence of the more mature and elderly Mr. Seijas; that through the influence of Mr. Seijas he got into the pinball game—in the pinball business, which wasn't his field; that he wasn't very interested and didn't want to be in it;

that he and Seijas operated for some four years and Mr. Forman didn't know very much about what was going, apparently he couldn't keep up with Seijas; that in 1945, or at least in 1946, he broke the association and knew nothing about Mr. Seijas' income taxes, was completely unaware of what had gone on, and that after the Internal Revenue people became interested in Seijas' case, he tried to throw the blame on Mr. Forman in order to save his own hide, and shortly before Mr. Seijas' trial, and afterwards, he moved heaven and earth to get money from Mr. Forman, the implication being if he didn't come forth with money Mr. Seijas would further involve him somehow or other. That is the [2007] essence of the contest between two different points of view concerning the facts which you have seen presented in the testimony which you have heard.

Now, very briefly I want to cover some of the evidence. We can't possibly cover it all which I believe represents picking a good portion of the wheat from the chaff, and examining it with respect to the opening arguments of Mr. Obenour and Mr. Mead.

We first pick up the story back sometime prior to 1930. Apparently both Mr. Forman and his partner Mr. Seijas at that time were at the University of Washington where they met. Mr. Al Forman being the contemporary of Mr. Seijas.

From that time on Mr. Forman and Mr. Seijas for sometime went their own way. Seijas went into a law practice at the beginning of a depression and successfully established himself. Mr. Forman went

into the theatre business sometime during the middle Thirties in Seattle, became employed by Sterling Theatres, and with lightening like effect he became a theatre manager, and in a very short time was the general manager of the entire Sterling Theatre chain. [2008]

In 1940, for whatever reasons, he left the Sterling Theatre chain and wanted to get into the theatre business himself. He was without capital and met Mr. Seijas, and they discussed this problem with the result that Mr. Seijas invited Forman to come into his office and he provided him with office space. Both of them at that time, then, sought some manner or means of getting into the theatre business. According to the evidence, the pinball thing was a complete happenstance. They had gone to Port Angeles to examine some theatre deal, found they couldn't get in on it, and on the way back Mr. Forman noticed that there were no pinball operations in Bremerton. He mention the fact and wondered if it wouldn't be a fertile filed way of making money.

Apparently about the same time or a little later, he discussed this problem with Mr. Vito Cuttone, and he was encouraged to go ahead with the matter. To give you an idea of what Mr. Forman and Mr. Seijas did, they are endowed with aggressive intelligence and can see an opportunity as most of us can, but once having seen it, they are fully capable of putting it into effect.

It fell to Mr. Seijas, as it always did in [2009] these operations, to take care of the legal work. He approached the Prosecutor of Kitsap County who

told him that pinball games were illegal. Mr. Seijas immediately brought a test suit to test the legality of the pinballs, and brought a suit to restrain the Prosecutor from interfering with it. That was followed by the process of drafting ordinances and influencing the City of Bremerton to pass such ordinances, and Kitsap County, and to obtain the licenses in face of the fact that Bremerton licenses were supposed to go to local people, Forman and Seijas being strangers.

They were faced with the problem of no money and Mr. Forman arranged financing through the American Discount Company. In examining the records for 1942, they bought and paid for some $26,000 of pinball games, machines in 1942 alone.

They had to have someone operate this route and Mr. Forman came into the picture again with his friend, Jerry Meyers, a former employee, who became the collector.

There was the statement that Mr. Forman and Mr. Seijas ran into the Dock Concessions, which you will recall having been operated by Mr. Bliss, a friend of Mr. Seijas. Forman obtained [2010] Mr. Goldstein to run that after they got into a weird sort of a partnership where no one other than Forman knew that Seijas was a silent partner, and no one other than Esfeld knew his interest was that of his son.

The crux of the matter is that after the business got going, holdouts were made, as you will recall from Mr. Meyers' testimony, on the more lucrative locations on the routes. These holdouts were not re-

ported on the collection slips from which the partnership books were compiled and from which the partnership information tax returns were compiled, either by Mr. Renstrom for the four pinball companies or by Mr. Rockwell for the Dock Concessions.

During those years a record was kept, a private record, which was not shown to anyone until sometime in 1953, and by Mr. Seijas in these famous exhibits which you have seen so many times, and which also contained Mr. Forman's entries on some six separate occasion showing where specific holdout had been divided, the amount as set down, the division sign, the half share of Forman and the half share of Seijas, and him not trusting Mr. Forman, to test the split multiplying the half into the whole again. [2011]

That, Ladies and Gentlemen, is the essence of the purpose of this conspiracy to evade payment of income taxes for Mr. Forman and others, the others being for whom else may use the false information.

Mr. Mead: I beg your pardon, but I think counsel misquoted. He meant Mr. Seijas and others. He said Mr. Forman.

Mr. Billinghurst: I beg your pardon. Mr. Seijas and his wife and others, the others being whoever might prepare their personal income forms or cause them to be prepared on the basis of the false information returns, and you will recall Mrs. Endersby and Mr. Meyer who were Mr. Forman's accountants in Portland, Oregon, who prepared his returns for those years, stating that they did use those in-

formation returns, falsely reporting an under-earning of the pinball companies during the years.

In connection with these holdouts, the defense has attacked the validity of the diary records of Mr. Seijas and Mr. Forman, and who else may have made some entries. There is other handwriting in them.

If those exhibits were the only evidence concerning this particular transaction, it might be [2012] difficult to find that at sometime during 1942 Forman and Seijas decided to make these holdouts, that Forman and Seijas instructed Mr. Meyers to make them, but you will also recall the testimony of Mr. Heberling who came into a partnership in this pinball operation who was the collector in two places where he, and he alone, was trusted by the operators of the Palace and Knett's, and Mr. Rylander who was also the operator of the Palace and who also shared in these holdouts. Both testified, Mr. Heberling to the effect he did make the holdouts, they weren't reported, but the funds were turned over to Forman and his partner Seijas, and Mr. Rylander to the effect that he was aware and told of the holdouts that he received his share of the holdouts, and the testimony of both of them, that unlike the partnership with which we are concerned, they paid their taxes on those holdouts.

Mr. Heberling after worrying considerably and asking the advice of his counselor and his accountant as to what he should do, finally reported them as income from other sources.

In considering this matter, Ladies and Gentlemen,

we find that throughout the operation each man played a part consistent with his ability and training and [2013] his background.

Mr. Seijas was also the front man. He went before the City Council in Bremerton and dealt with the Prosecutor. Mr. Forman was the businessman, the opportunist, and the man who foresaw the possibilities in operating pinball games. He provided the financing and he provided the personnel. He consulted with an expert in this business, Mr. Vito Cuttone, before he went into it, then he dealt with the operations end of the thing.

Mr. Forman was the man who perhaps at times in concert with Mr. Seijas, gave instructions to the collectors as to the holdouts. He was always there.

From all of these facts there can only be one answer as to whether or not a conspiracy took place. Certainly it did back in 1942. The object of the conspiracy was fully effected. Some $165,000 was divided by Mr. Forman and Mr. Seijas in which they paid no income taxes during that period of time, and in doing so they became civilly liable to the United States for whatever taxes were due at the time, and they remained civilly liable until such taxes are paid.

Now, it was said that Mr. Forman removed himself from this situation in 1945. It wasn't admitted [2014] that Mr. Forman had any knowledge of all of this thing, but whatever happened he came out of it in 1945.

Apparently the crux of the matter is the sale of the United Amusement Company and a part from

Mr. Morin who bought a 49 per cent interest in it. This matter first became of interest when Mr. Seijas was trying to account for the amount of cash that he had on hand in 1946, '47, and '48.

You will recall that Mr. Seijas was tried and convicted of evading his income taxes during those years. While the investigation was going on, anything that would legitimately contribute to the net worth of Mr. Seijas during that time, other than unpaid income, would be very much to his advantage. He told us, as he recounted on the stand, the agents investigating the case, that $15,000 of the money he had then he borrowed from Mr. Forman. Mr. Forman had sold his interest in the United Amusement Company for $30,000 and immediately Mr. Forman loaned Mr. Seijas half of it, $15,000. Both Mr. Forman and Mr. Seijas were questioned about this matter on various times and they kept insisting that it was a loan, and Mr. Forman was interviewed by Mr. O'Leary as late as March 26, 1952, at which [2015] time he stated that he had loaned Mr. Seijas $15,000, that he didn't know when or how it was repaid, and had no records of it, that he didn't recall it had been paid.

He wrote Mr. Oftedal and Mr. O'Leary a letter on April 24, 1952, in which he again reiterated the information he had given on the prior occasion, and on March 11 of 1953, a year later, the agents still not being satisfied with this, he finally submitted a formal statement in which he again stated this sum was a loan.

Well, it was at that time to Mr. Seijas' advantage

to try to convince everybody that that was a loan. That would help him to the extent of $15,000. However, during the course of the trial certain things happened. For the first time, the checkbook and the bank accounts concerning this transaction came to the attention of the government and it was found that after the sale to Mr. Morin, Army Seijas on various occasions wrote checks as drawings on a partnership, presumably, to Mr. Forman, payable to him, which amounted to exactly half of the drawings of Mr. Seijas from this various partnership with Mr. Morin.

He also paid one half of the capital gains tax [2016] which was due the government at that time on the profit from the sale, and, finally, you will find in the record, I think it is about the only number of an exhibit I recall, Exhibit No. 117, I believe in the middle of April, April 9 or 11, or some such date, in 1946, Mr. Seijas and Mr. Forman executed a written agreement in which it was stated and agreed that the 51 per cent interest in the United Amusement Company not owned by Mr. Forman was to be owned share-and-share-alike by William R. Forman and his partner, Army Seijas.

At this time it would be somewhat of an advantage to the defense if this thing was alone. Actually, it establishes the fact that Mr. Forman made no break whatsoever with Mr. Seijas during those years. Afterwards, you can recall that the testimony of what happened between the two of them.

Mr. Forman made no attempt to break away from Mr. Seijas in any way, shape, or form. On the con-

trary, they were mutually involved in a number of theatre operations which I don't intend to go into in detail.

I will draw your attention to the fact that as late as 1948 and 1949 Mr. Forman sought out Mr. Seijas and wanted his help. He was involved in a [2017] theatre deal in California and he needed $100,000. His partner, as he always had before, came through for Mr. Forman. He produced that $100,000. Forman knew he had it. There wouldn't have been any point in asking for it if he didn't know he had it, and actually it was by the fact, that of disclosure, that he had that amount of money.

When that loan was put of record, it didn't check with his purported income, and in connection with that, according to Mr. Seijas, he was afraid it might happen. He apparently asked Mr. Forman to indemnify him for any tax loss that he might suffer as a result of the disclosure of his assets through the making of the loan.

When this organization needed a competent lawyer, someone who could help them raise additional funds, it was Mr. Army Seijas who went back to Washington, D. C. and successfully negotiated a loan on behalf of Mr. Forman and other people interested in the enterprise, a very substantial loan.

Now, very briefly to cover the matter of continuation of the conspiracy, which I believe you will be instructed to consider in connection with guilt or innocence, is the conspiracy to evade payment of taxes from 1942 to 1945. Those taxes remain [2018] due until paid.

The conspiracy, then, in its very nature is a sort of a continuing thing. It couldn't avail a man to evade his taxes in 1945 and something happens in 1947 that causes him to pay them.

I submit to you, Ladies and Gentlemen, that there isn't one shred of evidence in this record anywhere indicating that this conspiracy was ended, which occurred obviously back in 1942, ended at any time until Mr. Seijas in 1953 made his disclosure of the diaries and told the United States Government and its representatives that he had received his share of $165,000 in unreported income in 1942.

Everything that Seijas and Forman did with respect to the investigation by the United States through its Department of Internal Revenue, every act was calculated, not each one to protect himself, but to protect each other as illustrated by this misrepresentation of the Morin sale and partnership interest as a loan.

Some of these overt acts consisted in concealing from Revenue Agents who were auditing their personal income taxes at various times throughout 1944 through 1948, the fact that there was any such income by providing them with false information returns of the [2019] partnerships for their use in checking out the personal income tax returns of both Mr. Forman and Mr. Seijas. You will recall in that connection the testimony of Mr. Carlson, Mr. Clodfelter, and Mr. Riedel, all of whom were agents at that time. I believe that period is correctly stated as being between 1945 and 1948. This record of overt acts goes on through the period of 1953 when

Mr. Seijas disclosed the existence of his private records.

As I pointed out to you, on March 26, 1952, April 24, 1952, and March 11, 1953, Mr. Forman stated about the partnership interest being a loan to O'Leary and Oftedal, and later on in May 29 of 1953 he was questioned by Mr. O'Leary and Mr. Oftedal about these diaries after they had been disclosed, his reaction to the situation was simply, "Well, am I going to have to pay penalties?" and nothing else.

We submit to you, Ladies and Gentlemen, that the record in this case has established conspiracy as alleged to have occurred in 1942, and that the conspiracy continued. Nothing was done by either Mr. Forman or Mr. Seijas to withdraw from it until 1953, and Mr. Forman was fully aware of it, and that a man of his business ability, his intelligence, couldn't possibly have been anything but informed [2020] of it, but that he himself was perhaps the organizer and the opportunist who foresaw this thing. That can be drawn from the fact that he was the executive, Mr. Seijas was the actionman.

With these considerations, Ladies and Gentlemen, will close our argument for rebuttal of Mr. Mead.

Mr. Mead: If the Court please, the defendant Forman submits the matter without argument.

The Court: That being the case, the argument is closed.

We will take a short recess and then proceed with the instructions.

(Thereupon, a recess was taken.) [2021]

The Court: We now come to the final phase of the trial prior to your own consideration of the case and the finding of your verdict.

As I have told you before at the time of your qualifications for jurors in this court and again at the beginning of this particular trial, in the trial of cases where a jury participates in the trial, under our system of administering justice, the jury are concerned with the finding of facts. That is the sole function of the jury and in that field the jury are paramount and the final word.

On the other hand, it is the responsibility and duty of the Judge to determine what the law applicable to the case is and to state it to the jury, as clearly and understandably as the subject will permit, and it is the duty of the jury to follow the law as the court states it, irrespective of any personal opinion of the jurors as to the wisdom or unwisdom of the law. I have no doubt that you have that keenly in mind and will follow that instruction.

Under the Federal Law, the Judge may, if he sees fit and thinks is appropriate, make comment about the facts to the jury, summarize them and give his opinion concerning the weight to be attached to evidence, and in some cases I do that when in my judgment it is required. However, even if the Judge gives the jury his views as to the weight of the evidence or the evidence to be considered, and so on, the jury [2022] is not bound to follow the views of the Judge. The jury may consider such views but in the last analysis, it must be the judgment and con-

science of the jurors that controls in the finding of fact.

In this particular case, I have determined to make no comment. I do that because I believe you ladies and gentlemen are every bit as well able as I or anyone else to find and determine these facts. Accordingly, if it should have seemed to you that any time throughout the trial or in the giving of these instructions, that I have made any comment or expressed any view one way or another about any phase of the case, I ask you now to wholly disregard that and to follow your own judgment about what the facts are without any consideration whatever to what you might suppose I think about them, one way or the other.

In this court, as in all Federal Courts, the instructions to the jury, which is sometimes referred to as the charge to the jury, is given orally and only once. You will not be provided with any manuscript of transcript of these instructions. Therefore, it behooves me to state these instructions as intelligibly as I can to cover the matters that the instructions cover in a manner that you will understand, and on your part it becomes your obligation to listen attentively, closely to the instructions in order that you may have fully in mind what the law applicable to this matter is. [2023]

It is my duty to inform you of all phases of the law as it may apply to this particular case. Accordingly, the instructions will be, perhaps, more lengthy than you would desire. Nevertheless, I must do that, and in that connection I wish to call your

attention too, to the fact that the instructions are to be taken as a whole, no single instruction picked out and given attention without reference to the other instructions, because, obviously, in a case of this character, and generally speaking, it is impossible to state all the law about the matter in a short statement. Accordingly, all of the various things that I tell you with respect to the law are applicable to the case and must be considered by you as applicable, and each thing that I say in one place must be taken in the light of what is said in another.

I also want to call your attention to the fact that it is my duty and responsibility to tell you what the allegations and the charges of the indictment are. Now, it must be understood that in stating these charges and allegations to you, they are not stated as facts but merely as asserted facts, the existence or non-existence of which it will be your duty to determine from the evidence that has been presented to you here. The only thing that you have a right to consider in deciding this case is the evidence that you have heard here in the courtroom, whether oral or documentary, and the instructions of the court. Nothing else must be given [2024] any thought in arriving at your verdict.

The only charge of law violation that we are here to consider and that you may consider, is the charge made against the defendant Forman of conspiracy. I am going to elaborate more fully about other things, but keep always in mind that the only charge made against Mr. Forman in this case is that of conspiracy, nothing else. That is the only offense

as to which you may find him either guilty or not guilty in this case.

In my judgment, the basic fact questions for you to decide in this case are in general, three; first, whether the defendant William R. Forman within the period of time alleged in the indictment knowingly and wilfully entered into an agreement or understanding with one or more other persons to commit the offense against the United States of wilfully and knowingly attempting to evade income taxes as charged in the indictment.

Secondly, whether in pursuance of and following such an understanding or agreement, one or more of the overt acts charged in the indictment intended and tending toward furtherance and accomplishment of the agreement were in fact done by or at the instance of anyone or more of the parties to the agreement.

If you find an affirmative answer to the general questions one and two within all the limitations and qualifications that [2025] I will explain to you further, then you may find the defendant Forman a party to and a participant in a completed conspiracy. Now, if you so find, then you must determine the third general and basic question, whether the defendant Forman is subject to prosecution on account of conspiracy under the statute of limitations.

I am going to instruct you fully in detail on the law applicable to your determination of each of these basic facts. The evidence has ranged over many subjects and many details as to which you will be required to make findings of fact, but your

findings with respect thereto will only be important insofar as you find they may have a bearing on these basic questions that I have outlined.

Now, as you know, this is a criminal case in which the United States of America is the plaintiff and William R. Forman is the defendant. Count XV of the indictment, which you will take with you into the jury room for your use in your deliberations, charges the defendant Forman with a crime of conspiracy to commit an offense against the United States.

It is alleged in the indictment, and here now I am going to outline in summary the allegations of the indictment, I will call your attention to when I conclude that, so you will understand what I am referring to now, are the assertions of fact or the allegations of fact contained in the indictment. [2026]

It is alleged that during the years 1941 to 1945, inclusive, defendant Forman was a partner with Armador A. (or Army) Seijas and others in various business partnerships in Kitsap County, Washington, engaged in the business of maintaining and operating pinball machines and other coin-operated gaming and amusement devices. It is alleged that from about February 1, 1942, and continuously thereafter until about April 15, 1953, defendant Forman conspired with Seijas to defraud the United States and to commit the offense of attempted evasion of income tax as alleged in the indictment.

You will find in the indictment certain lettered paragraphs, capital letters A, B, C, and D, each of

these alleging a violation of various provisions of the laws of the United States. Since I do not wish to continually repeat these allegations in detail and thus over-lengthen the instructions, and inasmuch as you will have the indictment with you, I will not repeatedly give them in detail but refer to them, perhaps, generally, or A, B, C, and D, or briefly characterize them, but you will understand throughout that I am referring to those charges in those lettered paragraphs.

Paragraph A charges defendant Forman with conspiring to violate the Internal Revenue Code and regulations thereunder by wilfully and knowingly keeping or causing to be kept partnership books and records which did not accurately reflect partnership income for the years 1942 to 1945, inclusive. [2027]

Paragraph B charges defendant Forman with conspiring to violate Federal law by wilfully and knowingly filing and causing to be filed false partnership information returns with the Collector of Internal Revenue at Tacoma, Washington, which substantially understated the income of the partnerships and partners' distributive shares thereof.

Paragraph C charges defendant Forman with conspiring to violate the Internal Revenue Code by wilfully and knowingly attempting to evade a large portion of the income taxes owed by Armador A. Seijas and his wife and others to the United States for the years 1942 to 1945, inclusive.

Paragraph D charges defendant Forman with conspiring to violate Federal law by furnishing

false books and records to officers of the Treasury Department and by making false statements to such officers for the purpose of concealing the partners' unreported shares of the partnership income for the years 1942 to 1945, inclusive, and for the purpose of concealing the true income tax liability of Armador A. Seijas and his wife for those same years.

Count XV goes on to charge that in furtherance of the alleged conspiracy, and during its existence, one or more of the parties to the conspiracy committed one or more of the overt acts numbered 1 through 33, inclusive.

In substance, the overt acts charged in the indictment are as follows: [2028]

That defendant Forman and Seijas instructed certain collectors, accountants and bookkeepers not to record the full amounts of money collected out of the pinball machines and other gaming devices operated by the partnerships and to maintain records and books of account which understated such receipts, but that the unreported money was to be turned over to Seijas or the defendant Forman personally.

That Seijas and Forman actually received more than $150,000 in this manner which was not recorded or reported as income of the partners.

That Seijas kept a private diary from about February 11, 1942, to December 27, 1945, keeping an accurate account of the money delivered personally either to him or defendant Forman and not reported in the partnership books and records.

That the unreported money so collected and re-

ceived was divided periodically between Seijas and defendant Forman and such divisions were recorded in the aforementioned diary.

That during the years 1942 to 1945, inclusive, Seijas leased safety deposit boxes in various cities.

That Seijas and Forman caused partnership information returns to be prepared for the calendar years 1942 to 1945, inclusive, purporting to reflect true partnership income although they were well aware that because of the diversion of receipts previously described, the partnership books and records from which these returns were prepared substantially [2029] understated the true income of the partnerships.

It is further alleged that Seijas and Forman filed with the Collector of Internal Revenue in Tacoma, Washington, on or about March 15, of each year from 1943 through 1946, partnership information returns for the various business partnerships in which they were associated for the taxable years 1942 through 1945, which they well knew understated the true income of such partnerships by more than $150,000.

It is further alleged that on or about March 15 of each year from 1943 through 1946, Seijas filed with the Collector of Internal Revenue in Tacoma, Washington, income tax returns for himself and his wife for the calendar years 1942 to 1945, respectively, reporting only his distributive share of the profits of the income from the partnerships here involved as reflected in the partnership information returns, although he knew that during the

years in question he had received additional income of about $75,000 in the manner previously described.

It is alleged that on two occasions, in 1945 and in 1947, Seijas and defendant Forman, and on one occasion in December, 1948, Seijas alone, caused to be presented to an officer of the United States Treasury Department for use in his official verification of the partnership information returns above referred to, the regular books and records of those partnerships for the years 1942 through 1945, inclusive, which [2030] Seijas and defendant Forman knew under tated partnership income by approximately $150,000.

It is alleged that on two occasions, once about October 28, 1944, in Portland, Oregon, and once on about September 1, 1948, in Seattle, Washington, defendant Forman concealed from an officer and employee of the United States Treasury Department engaged in an official examination of his and his wife's personal income tax returns that during the years 1942 through 1945, inclusive, he had received income from the aforementioned partnerships with Seijas in addition to that shown on the partnership information returns filed by those partnerships.

It is alleged that Seijas on about September 1, 1944, and on about October 1, 1947, in Seattle, Washington, concealed from an officer and employee of the United States Treasury Department engaged in an official investigation of his and his wife's personal income tax returns that during the years 1942 to 1945, inclusive, he had received income from the

aforementioned partnerships with defendant Forman in addition to the amounts shown on the returns filed by said partnerships.

It is alleged that on about September 1, 1948, in Seattle, Washington, Seijas and defendant Forman, during an official re-examination of their respective personal income tax returns, concealed from an officer and employee of the United States [2031] Treasury Department the fact that they received income from the aforementioned partnerships in addition to the amount shown on the information returns filed by said partnerships.

It is further alleged that on about December 29, 1951, in Seattle, Washington, Seijas submitted to officers and employees of the United States Treasury Department a false statement of his assets and liabilities as of December 31, 1945, which statement concealed the fact that he had on hand on that date a large amount of currency representing his unreported receipts from the aforementioned partnerships.

It is further alleged that on January 11, 1952, in Seattle, Seijas stated to officers and employees of the United States Treasury Department engaged in an official investigation of his and his wife's income tax liability that he believed his income for the years 1942 to 1945, inclusive, had been correctly reported and that he had no knowledge concerning the source of the unexplained assets discovered in his possession, whereas in truth he well knew at that time that his income tax returns for the years in question understated his income by omitting pinball

receipts in the amount of about $75,000 which had been delivered to him personally and that such receipts were the source of his unexplained assets above referred to.

Now, the foregoing is merely a statement of the allegations [2032] of the indictment which is lengthy, and this is merely a summary of the allegations. Certain important limitations on your consideration of the charges in the indictment will be made later in these instructions, and I caution you now to look for that when we come to it. Count XV of the indictment will be available to you in the jury room so that you may examine and consider the exact and complete language of the allegations. The summary I have just made will be sufficient for present purposes.

Count XV of the indictment is brought under a section of the law that provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy * * *" each shall be guilty of the crime charged in Count XV.

A conspiracy is a partnership in crime, a combination of two or more persons to accomplish by concerted action in a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. In order to establish the crime of conspiracy it is necessary to show, first, that there was an agreement between two or more

persons to commit the particular offense or offenses against the United States as alleged in the indictment; and, second, that [2033] one or more of the parties to that agreement committed some overt act to effectuate its purpose. Although the offense is not complete without the commission of some overt act, it is not necessary that the illegal purpose of the conspiracy be accomplished. If the illegal purpose was accomplished, however, that fact may be considered along with all the other evidence in determining whether a conspiracy actually existed. The agreement may have any number of objects, some of which may be innocent, but if any one or more of the objects of the agreement is to commit an offense against the United States, the entire agreement becomes illegal. There need be no evidence of a written or of a formal oral agreement between the parties. It is sufficient to show that there was a common purpose or design by concerted action to violate the law; hence the jury may find the existence of a conspiracy agreement from the evidence of the conduct of the parties and the attendant circumstances. Evidence of this type if called circumstantial evidence, concerning which more detailed instructions will be given later in these instructions.

The essential elements of the offense in this particular case, both of which the government must prove beyond a reasonable doubt, are: first, that the defendant Forman did wilfully and knowingly, during the period from about February 1, 1942, until about April 15, 1953, enter into a conspiracy agreement with one or more other persons with the object of [2034] violating the law in one or more

of the particulars alleged in the indictment for the purpose of evading the income tax liability of Scijas, Mrs. Scijas, and others; and

Second, that thereafter in furtherance of the cofispiracy agreement, one or more of the co-conspirators committed at Tacoma within the Southern Division of this court, at least one of the overt acts for the purpose of evading the payment of income taxes.

Failure of proof beyond a reasonable doubt of either of these elements will require a verdict of acquittal.

The defendant has entered a plea of not guilty which places upon the government the burden of proving beyond a reasonable doubt every material allegation essential to conviction contained in the indictment.

You are instructed that the defendant is presumed to be innocent of the offense with which he is charged. That presumption attaches to and continues with him throughout all stages of the trial, and throughout all stages of your deliberations, and until it has been met and overcome by the evidence in the case beyond a reasonable doubt.

This presumption is a part of the law of the land to which the defendant is entitled, and, unless this presumption is overcome by the evidence in the case beyond a reasonable doubt as to every element of the case necessary for conviction, you must acquit the defendant. [2035]

The fact that the Grand Jury has heretofore indicted the defendant, charging him as has just been

indicated to you, is no evidence whatever of his guilt, and must not be so construed by you. The indictment is merely the formal instrumentality provided by the law for bringing a person to trial. The fact of guilt can in no way be presumed to arise because of the indictment. It must be proved by competent evidence beyond a reasonable doubt. Therefore, in determining your verdict in this case, you will give no consideration whatever to the fact that the defendant has heretofore been indicted by the Grand Jury.

With reference to the first element of the crime of conspiracy, namely, the formation of an agreement or understanding between two or more persons to commit an offense against the United States, the Government alleges that the defendant Forman conspired with others to violate one or more of the following statutes or regulation having the force of law: Section 54, Internal Revenue Code: "Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe."

Section 29.54-1 of the Regulations of the Commissioner: "Every person subject to the tax, except persons whose gross [2036] income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commis-

sioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income."

The indictment charges that the defendant Forman conspired to violate this section by wilfully and knowingly keeping and causing to be kept for and on behalf of the partnerships named in the indictment records for the years 1942 to 1945, inclusive, which did not accurately reflect the true receipts and income of the aforementioned partnerships.

B. Paragraph B. of the indictment is concerned with Section 1001 of the New Criminal Code which provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be guilty of an offense against the United States. [2037]

Section 3809 of the Internal Revenue Code, "Any person who wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and

upon conviction thereof * * *" shall be guilty of an offense against the United States.

The indictment charges in this paragraph B that the defendant Forman conspired to violate this section by knowingly and wilfully filing and causing to be filed with the Collector of Internal Revenue for the Collection District of Washington, at Tacoma, Washington, numerous false and fraudulent information returns in the name of the partnerships mentioned in the indictment, which greately understated the receipts and income of said partnerships and understated the partners' distributive share of such income.

Paragraph C of the indictment refers to Section 145(b) of the Internal Revenue Code of the United States, and is as follows:

"Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof * * *" shall be guilty of an offense against the United States.

The indictment charges that, in paragraph C, the defendant [2038] Forman conspired to violate this section by knowingly and wilfully attempting to defraud and evade a large portion of the income taxes owed by Armador A. Seijas and his wife, Betty L. Seijas, and others, to the United States for the years 1942 to 1945, inclusive, upon their share of the unreported income of the partnerships mentioned in the indictment.

Paragraph D of the indictment refers to Title 18, U.S.C.A., Section 1061, which provides:

"Whoever, in any matter within the jurisdiction

of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device, a material fact, or makes any false, fictitious of fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry," shall be guilty of an offense against the United States.

Section 145(b) of the Internal Revenue Code which I just read to you a moment ago, namely, "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof," shall be guilty of an offense against the United States.

The indictment charges in paragraph D that the defendant Forman conspired to violate the laws of the United States just referred to by furnishing officers and employees of the Treasury Department false books and records, and false [2039] financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive.

The burden is on the government in establishing the first element of the alleged conspiracy charged in this case to prove beyond a reasonable doubt that the defendant Forman entered into an agreement

or understanding with one or more other persons to commit one or more of the offenses charged in the indictment for the purpose of evading income taxes.

With reference to the second element of the crime of conspiracy, you are instructed that an overt act is any action taken or statement made by any member of a conspiracy agreement for the purpose of accomplishing one or more of the agreed objects of the conspiracy. The overt acts particularly charged in this case have been summarized for you and are to be found in the indictment which you will take with you into the juryroom and will not be reiterated at this time.

With respect of the second element of the alleged conspiracy in this case, the burden is on the government to prove beyond a reasonable doubt that during the time defendant Forman [2040] was a party to the conspiracy agreement alleged in the indictment; either the defendant Forman or any other member of the alleged conspiracy commited at Tacoma, within the Southern Division of this court; any one or more of the overt acts alleged in the indictment, and that such act was done with the intent and in furtherance of the object of evading the income tax liability of Seijas, Mrs. Seijas, and others.

When a person enters into an agreement to accomplish an illegal object and cooperates in its accomplishment, he becomes liable for all acts done in furtherance of this agreement whether such acts be done with or without his knowledge, or approval.

This refers only to acts and statements made by participants in the conspiracy in the course of its operation. Anything done by any party either before the conspiracy began or after it ended, will not be chargeable to anyone other than that party himself.

An act committed or statement made by any party to an alleged conspiracy, which act or statement is for the personal purposes of the party committing the act or making the statement and not in furtherance of the alleged conspiracy, is not, under the law, an overt act chargeable to other parties to the conspiracy.

An act committed or a statement made by any non-participant in the alleged conspiracy without the knowledge or [2041] direction of any member of the alleged conspiracy is not an overt act chargeable to the alleged conspirators, even though an incidental effect of such an act or statement was to advance a purpose of the alleged conspiracy.

You are instructed that the mere fact that the defendant Forman was associated in a business partnership with Armador A. Sojas during the years 1942 to 1945, inclusive, does not make them co-conspirators. Acts performed by partners in the ordinary course of their partnership business, which are not pursuant to a conspiracy as previously defined, do not constitute overt acts in furtherance of a conspiracy. The mere fact that one partner may attempt to evade or does evade his own income tax liability without the wilful and knowing participation of his co-partner, does not make the co-partner criminally liable as a conspirator.

The Government has charged the defendant Forman with conspiracy with Armador Seijas and others to violate federal law in various ways. However, there has been but one offense charged against defendant Forman, and that charge is of conspiracy to evade income taxes. It is of this offense of conspiracy, and this offense alone, that you must find that any of the violations of federal law actually were committed, you may consider such fact only in determining if such violations resulted from an agreement or conspiracy between the defendant Forman and Army Seijas to commit the violation referred to. [2042]

Similarly, there has been some evidence introduced from which it might be inferred that the defendant Forman evaded the tax due upon his share of the partnership income during the years 1942 to 1946. The defendant Forman is not charged with tax evasion of his own taxes, and, accordingly, you can consider such evidence only insofar as it may bear upon the charge against the defendant of conspiracy. The object of the alleged conspiracy is that of violation of Section 145(b) of Title 26, by evading the tax of Armador A. Seijas and his wife, Betty L. Seijas, and others for the years 1942 to 1945, inclusive, upon their share of the unreported income of the partnerships. If you find that there was unreported income from the amusement company partnerships during these years upon which there was tax due, from either or both of the partners, you may consider such fact in determining whether or not it resulted from an agreement be-

tween Armador Seijas and defendant Forman to evade such tax due upon the distributive share of such partnership income to each of them. An act by defendant Forman to evade the tax due upon his distributive share of such income, if such there was, could be considered by you in determining if it resulted from an agreement between the partners Forman and Seijas along with all other evidence in the case bearing on that matter.

The evidence in the case shows that the partnerships, of which Seijas and Forman were members, were engaged in operating [2043] what is commonly called pinball machines. You are instructed that during the years in question the operation of pinball machines was a lawful and legitimate business, licensed by the State of Washington and by the municipalities in which the business was conducted. You are not to draw any inference adverse to the defendants by reason of the fact that they were engaged in that business.

I am now going to give you a number of instructions concerned with the statute of limitations to which reference has been made during the trial and previously in these instructions. All of the instructions given you on this subject, as all of the instructions, as a whole must be considered in your determination of this question in this case.

Under the law, prosecution of criminal offenses must be commenced by return and filing of an indictment within limited periods of time prescribed by provisions of law generally referred to as the Statute of Limitations. Irrespective of guilt of

an offense, no person may be prosecuted for such offense unless the indictment is returned and filed within the period specified by the applicable statute of limitations. The statute of limitations requires prosecution for conspiracy, the sole offense charged against defendant Forman in this case, to be commenced by filing of indictment within specified periods from the date of the last overt act in furtherance of the conspiracy done by or at the instance of any party to [2044] the conspiracy during such time as the defendant is a party to the conspiracy.

Any overt acts not personally done by a defendant, occurring after a conspiracy has been finally terminated as to such defendant, or not in furtherance of particular objectives of the conspiracy agreed to or understood by a defendant, are not chargeable to such defendant and must not be considered in finding the date of the last overt act in furtherance of the conspiracy necessary for determining whether prosecution of such defendant is barred by the statute of limitations. Mere acts of concealment of a prior concluded conspiracy, which did not include a specific and distinct agreement to conceal, occurring subsequent to final termination of the conspiracy as to a particular defendant, do not constitute overt acts chargeable to such defendant and are not to be considered in applying the statute of limitations to prosecution of such defendant.

To determine whether certain alleged overt acts were committed in order to promote the object of the conspiracy, and the applicability of the statute

of limitations with respect thereto, you must first determine the duration of the conspiracy. Did it end at some particular time or was there also an agreement between Mr. Seijas and Mr. Forman to continue concealment after 1945 of their activities relating to the amusement company earnings during the years 1941 through [2045] 1945 for the purpose of evading the income tax liability of Seijas, Mrs. Seijas and others? The existence of such a continuing understanding or agreement may not be implied merely from the activities of Forman and Seijas during the period 1941 to 1945. Such a continuing agreement or understanding to conceal the conspiracy must be shown beyond a reasonable doubt from all the facts proved by the evidence presented for your consideration.

The indictment in the case now on trial was filed November 19, 1953. This is the fixed date from which computation of the applicable period for limitation of prosecution must be commenced; that is, November 19, 1953. Whether the period be three years or six years is dependant on the character of the offense or offenses found in fact to be objects of the alleged conspiracy as to defendant Forman.

Now, in this case, four different such offenses were alleged in the indictment by the paragraphs now referred to several times before as A, B, C and D. These were charged in the indictment as objectives of the conspiracy charged against Mr. Forman. Now, the first of those stated in paragraph A of the indictment in substance charges as an objective violation of federal law with respect to

keeping false books and records reflecting taxable income of the amusement companies referred to in the indictment.

The second, stated in paragraph B, charges as an objective [2046] violation of federal law with respect to filing false partnership information returns for Seijas and Forman and the amusement companies in which they were partners.

The third, stated in paragraph C, charges as an objective violation of federal law in attempting to defraud and evade income taxes owed by Seijas and wife for the years 1942 to 1945.

The fourth, stated in paragraph D, charges as an objective violation of federal law by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive.

A conspiracy to commit the alleged offenses referred to in A and B, that is, keeping false books and filing false partnership returns is subject to a three year period of limitation and prosecution on a charge of conspiracy to commit such offenses must be commenced by return and filing of an indictment within three years of the last overt act in furtherance of such conspiracy.

Now, these particular alleged offenses, that is, keeping [2047] false books and filing false partnership returns in and of themselves and standing alone, are fully completed and concluded as objectives of a conspiracy when the false entries in the books are made and the false partnership returns filed, and are not continuing in nature. Therefore, a prosecution for conspiracy to commit only such particular offenses, standing alone, would be barred if commenced more than three years from completion of the offenses. The prosecution in this case was not commenced within that time; therefore, if you find such particular offenses were the only objectives of the conspiracy understood or agreed to by defendant Forman, you must return a verdict of not guilty as to Forman. The offenses stated in A and B as alleged objectives of the conspiracy are wholly withdrawn from your consideration as objectives of the conspiracy charged. Accordingly, now you may only consider one question: did William R. Forman conspire with Armador A. Seijas to avide the taxes of Armador A. Seijas, Betty Seijas and others, and so violate Section 145(b) of the Internal Revenue Code?

However, the evidence introduced during the trial relating to the keeping of false books and the filing of false partnership returns may be considered by you in determining whether the offenses of attempted evasion of income tax was also an objective of the conspiracy understood and agreed to by defendant Forman; and whether such tax evasion offenses was [2048] in fact committed; and whether

the tax evasion offense was in fact a continuing object of conspiracy; and in determining the time when the conspiracy terminated as to defendant Forman with respect of such tax evasion offense.

A conspiracy to commit the alleged offense referred to in paragraph C of the indictment, namely, attempted evasion of income tax owing by Seijas and wife and others for 1942 to 1945, inclusive, and the offense in paragraph D of the indictment, namely, furnishing false books and making false statements to Treasury agents for the purpose of evading the tax liability of Seijas and wife, are subject to a six year period of limitation and prosecution of a charge of conspiracy to commit such offenses, if for the purpose of evading income tax liability, must be commenced by return and filing of an indictment within six years of the last overt act in furtherance of such conspiracy.

If you find that the defendant Seijas and Forman conspired to attempt to evade the tax liability of Seijas and his wife and others for the years 1942 to 1945, inclusive, you must find the defendant Forman not guilty unless you are convinced beyond a reasonable doubt that they also conspired to conceal the alleged conspiracy in order to prevent prosecution therefor and that such additional conspiracy was a continuing one. You cannot imply that there was a continuing conspiracy to conceal the offense from the fact that they may [2049] have conspired to attempt to evade the tax liability of Seijas and wife. That is to say, the mere fact that they may have conspired to evade the tax liability

of Seijas and his wife for the years in question, if it be a fact, does not warrant the conclusion that they also conspired to conceal the commission of the offense. You would have to be convinced beyond a reasonable doubt that they actually conspired to conceal the conspiracy and that they committed an overt act or acts in furtherance of such subsidiary conspiracy. As previously stated, the understanding or agreement for such conspiracy need not have been entered into by written or formal oral expression, but may be determined from a consideration of the conduct and statements of the parties and all of the evidence as shown by the evidence in the case.

If you find that the defendants only conspired to attempt to evade the tax liability of defendant Seijas and his wife and did not form the additional conspiracy to conceal the same, then I charge you that the conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax returns of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statute of limitations would run from that time, and if you so find, your verdict would have to be not guilty.

If you find that there was no subsidiary conspiracy to [2050] conceal as I have just outlined it to you, but acts of concealment were thereafter committed as an after-thought and were conceived after the filing of the returns in March, 1946, then, of course, your verdict must be for the defendant Forman.

Summarizing with respect to the statute of limitations, you must first find that Forman knowingly and wilfully conspired with Seijas to attempt to evade the tax liability of Seijas, Mrs. Seijas and others;

Second, that part of this conspiracy was to make continuing efforts to avoid detection and prosecution under the condition just referred to;

Third, that one or more of the alleged conspirators committed an overt act or acts within a period of six years prior to the filing of the indictment herein in furtherance of the conspiracy and during its continuance to accomplish the object of the conspiracy just referred to: namely, attempted evasion of tax liability of Seijas, Mrs. Seijas and others.

If you cannot answer all three of these questions in the affirmative, as shown by the evidence beyond a reasonable doubt, then you must return a verdict of not guilty.

If an income tax return as filed be false and the tax paid as a result of such false return be in fact substantially less than the true tax due, and such understatement of tax be [2051] made wilfully and knowingly, then a fraudulent evasion of the unpaid portion of the correct tax due occurs. Civil collection of income understated in a return and unpaid by reason of fraud is never barred by any statute of limitations.

Turning now to a new subject, there has been offered for your consideration in behalf of the defendant, evidence of good character and reputation. This is evidence proper to be received and

considered by the jury in connection with all of the other evidence in the case bearing upon the ultimate question for your determination as to the guilt or innocence of this defendant. It is the view of the law that a person who has enjoyed a good reputation or good character is less likely to engage in an unlawful enterprise than a person without such reputation. Evidence of good character may raise a reasonable doubt as to guilt when, except for such evidence of good character, the evidence might otherwise be convincing to the jury beyond a reasonable doubt.

While evidence of good character bears upon the likelihood of the defendant's committing the offense charged, you should not disregard evidence which seems to you convincing of guilt upon the theory that one who appeared heretofore to have had a good reputation and the good opinion of the community in which he lives, will never violate the law.

You are to consider this character evidence, together with and in the light of, all of the other evidence and [2052] circumstances of the case and to determine the weight to be given to it as being upon the ultimate question of the guilt of this defendant.

You are instructed that the fact that the defendant Seijas, who was a co-defendant in the case, has entered a plea of guilty as to Count XV is not to be considered by you as any evidence whatsoever in determining whether or not the defendant Forman is guilty. The defendant Forman has the right to have his guilt or innocence determined by the evi-

dence presented against him and not by what has happened with regard to the prosecution against the defendant Seijas. You are not to draw any inference adverse to the defendant Forman from the fact that defendant Seijas has pleaded guilty to Count XV of the indictment or from the fact that he was previously convicted on several counts charging him with tax evasion.

In this case you have heard evidence from witnesses who were involved in the very crime for which the defendant is not being tried. In considering the weight and value of such testimony you must determine whether or not these witnesses are what is termed in law as "accomplices." An accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent. Under the allegations of the indictment and the evidence, Seijas was an accomplice. An accomplice does not become incompetent [2053] as a witness because of participation in a particular crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by any other evidence. However, the jury should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict a defendant solely upon the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt.

The evidence admitted during the trial of a prior criminal conviction of a witness may be considered

by you only so far as it may affect in your judgment the credibility of the witness and the weight and value to be given to his testimony.

In this case certain expert testimony was admitted. When a witness is qualified as an expert in a particular field of skill or knowledge or learning and is allowed to express opinions upon subjects within that field, these opinions are for the aid and assistance of the jury but are not substituted for its judgment. The testimony of an expert witness insofar as it is based on his personal observations of particular facts and conditions is to be considered by you the same as that of any other witness, but the opinions of experts based on hypothetical assumptions of act or on the assumed correctness [2054] of other evidence in the case do not tend to prove the assumed facts or evidence upon which the opinions are based. The jury is not bound to find the facts to be in accord with the expert testimony, but such testimony should be considered by you in connection with all the other evidence in the case. The responsibility to decide all facts in issue rests upon the jury, and it is your duty to evaluate and appraise the testimony of expert witnesses who express opinions precisely as you would evaluate and appraise the testimony of any other witness. It is for you, in the light of all of the circumstances disclosed during the progress of the trial, to place that weight upon and give that credit to the testimony of each witness, whether expert or otherwise, which you conscientiously believe in the exercise of sound judgment and good sense it is fairly entitled *to received* at your hands.

The defendant Forman did not take the witness stand and testify. You are instructed that a defendant accused of a criminal offense does not have to take the stand and testify in his own behalf. He has the right to insist that the government in this case should establish the commission of the offense charged in the indictment by evidence that convinces you beyond a reasonable doubt, and the evidence adduced by the government must so convince you before you can find him guilty. You cannot draw any inference adverse [2055] to the defendant Forman by reason of the fact that he did not testify in his own behalf. A defendant in a criminal case does not have to disprove anything. The burden is always on the government to prove the accusation made by the indictment beyond a reasonable doubt.

Intent is an essential element of crime. It is psychologically impossible for you to enter into the mind of the defendant and determine the intent with which he spoke and acted. You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider all of the circumstances disclosed by the evidence in that connection.

In this case the government must prove beyond a reasonable doubt that the defendant Forman acted with a specific intent to commit the crime of conspiracy. That is to say, the government must prove beyond a reasonable doubt that the defendant Forman entered into the alleged conspiracy agreement with a specific intent of conspiring to accomplish the object of evading income tax liability as alleged in the indictment, and that thereafter one or more

of the alleged conspirators committed one or more of the overt acts charged in the indictment with the specific intent of carrying out the illegal object of the alleged conspiracy.

Specific intent means more than a mere general intent to do some particular thing. The intent required under [2056] the conspiracy statute here involved is not inherent in the commission of the act, but must be established beyond a reasonable doubt by evidence other than the commission of the act itself.

You are instructed that even if you find that Seijas was guilty of tax evasion for the tax years 1942 to 1945, you cannot find the defendant Forman guilty in this prosecution for conspiracy unless you are convinced beyond a reasonable doubt that Forman knew that Seijas intended to evade the tax liability of himself and his wife, and that the defendant Forman conspired with Seijas that he should do so. You cannot impute that knowledge to the defendant Forman. You must be convinced beyond a reasonable doubt that the defendant Forman actually knew of Seijas' intentions and conspired with him to accomplish that purpose.

The term "wilful," as I have used it in these instructions, means voluntary, self-determined and intentional. An act done wilfully is done in bad faith and with illegal motive or intent. Wilfulness is not to be presumed from the mere fact that an act was performed or a statement made. It like intent must be shown from other evidence. In determining whether an act was done wilfully, you

should consider all the facts and attendant circumstances as shown by the evidence which in your judgment bear on the matter.

As I have previously told you, your verdict must be based [2057] entirely upon the evidence presented and received during the course of the trial regardless of whether the evidence was given by witnesses called by the government or by the defendant either on direct or cross examination, and your must not discuss or consider anything but such evidence. The statements of attorneys in the case made during the trial and in their arguments are not evidence and should be disregarded by you unless they accord with your own recollections of what the evidence is.

Evidence is divided into two classes: first, direct evidence, and secondly, circumstantial evidence.

Direct evidence is that given by witnesses who testified directly from their personal observation and knowledge.

Circumstantial evidence means indirect proof, that is, the proof of certain facts and circumstances upon which the existence or non-existence of ultimate and final facts required to be proved or disproved may be logically inferred. Such evidence is not to be rejected or denied consideration by you merely because it is such, but it should be carefully scrutinized and considered. You should not indulge in speculation or guesswork, nor hastily or lightly draw inferences or conclusions, but you are permitted to, and should draw logical, reasonable and fair inferences from facts which themselves you find

have been established beyond a reasonable doubt. You must give such weight and effect to such inferences, [2058] whether in favor of guilt or of innocense, as you deem them fairly entitled to receive.

Circumstantial evidence may be as conclusive in its convincing power as direct evidence. When it is strong and satisfactory, the jury should so consider it neither enlarging nor belittling in its force. It should have its just and fair weight with you, and if, when taken as a whole and fairly and candidly weighed, it convinces the guarded judgment of guilt beyond a reasonable doubt, you should convict. If, in connection with all of the other evidence before you, both circumstantial and direct, you have no reasonable doubt as to the defendant's guilt, you should convict him. On the other hand, if you entertain a reasonable doubt, you should acquit him. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction but only requires that the jury should be satisfied beyond a reasonable doubt by the evidence of either the one character or the other or both.

The law requires that in order to convict on circumstantial evidence as to any material matter, all of the facts and circumstances from which elements of guilt are inferred must themselves be shown by evidence beyond a reasonable doubt; that these circumstances must all be consistent with one another; that they must all be consistent with the defendant's guilt, and that they must all be inconsistent with every [2059] other reasonable hypothesis except that of guilt.

The jury are the sole judges of the facts and of the credibility of the witnesses and of the weight and value to be given their testimony. Witnesses are presumed to speak the truth, but the presumption may be overcome as to any witness, or as to any part of the testimony given by a witness by the evidence in the case and the reasonable inferences to be drawn therefrom by the jury. In determining the credit you should give to a witness and the weight and value you should attach to his or her testimony, you may take into consideration the conduct and appearance of the witness on the stand; the interest of the witness, if any, in the result of the trial; the motive actuating the witness in testifying; the witness' relation to or feeling for or against the defendant; the probability or improbability of the witness' statements; the opportunity the witness had to observe or be informed as to the matters respecting in which such witness gives testimony; and the inclination of the witness to speak truthfully or otherwise as to the matters within the knowledge of the witness.

All of these matters being taken into account, with all other facts and circumstances given in evidence, it is your province to give to the testimony of each witness such value and weight as you deem proper.

Inconsistencies or discrepancies in the testimony of a [2060] witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or

hear it differently in the first place and remember it more or less accurately afterwards. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy or inconsistency, if such you find, consider whether it pertains to a matter of importance or unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood.

A witness may be discredited or impeached by contradictory evidence, or by evidence that at another time the witness has made statements inconsistent with the witness' present testimony.

If you believe that any witness has been impeached and discredited, it is your exclusive province to give the testimony of that witness and the various parts thereof such credibility, if any, you think it deserves.

If, upon the consideration of all the evidence, you conclude that any witness has wilfully sworn falsely as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony except insofar as it may be corroborated by other credible evidence in the case. [2061]

The burden of proving every fact material and necessary to a conviction by competent evidence beyond a reasonable doubt is on the government and does not at any time or under any circumstances shift from the government. It is not sufficient for the government to prove any material fact by guess, speculation or conjecture, or suspicion, or by a preponderance of the evidence, or only to the extent

that the evidence pertaining to such a fact is evenly balanced on uncertain, or is as consistent with innocence as with guilt.

Since the burden is upon the government to prove the accused guilty beyond a reasonable doubt of every essential element of the offense charged, the law does not impose upon the defendant the duty of producing any evidence, and the defendant has the right to rely upon the failure of the prosecution to establish such proof, if the jury finds such failure actually be found.

The expression "reasonable doubt," which I have used frequently in these instructions, means in law just what the words imply; namely, a doubt founded upon some good reason. It must not arise from a merciful disposition, or a kindly, sympathetic feeling, or a desire to avoid performing a disagreeable duty. If it arises, it must be either from the evidence produced or from the lack of evidence. It must not be a mere whim or a vague, conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial [2062] doubt such as would make an honest, sensible, and fairminded person hesitate to act in a serious and important matter wherein ascertainment of truth was conscientiously being sought.

You just use your common sense as men and women of experience possessing some knowledge of worldly affairs, and if, after examining carefully all the facts and circumstances shown by the evidence in the case, you can say and feel that you have a settled and abiding conviction of the guilt of the

defendant, then you are satisfied of his guilt beyond a reasonable doubt. If you do not have such conviction, then you must acquit the defendant.

The verdict must represent the considered individual judgment and conviction of each juror. In order to return a verdict it is necessary that each juror agree thereto. In other words, your verdict must be unanimous by all twelve.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with you fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous.

There is no fixed method of procedure for you to follow [2063] during your deliberations. However, you should proceed in such a way as to give every juror an equal chance with every other to express his or her views and in such a way as will tend to produce the most intelligent result possible.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror upon entering the jury room to announce an emphatic opinion on the case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved, and the juror may later hesitate to recede from an announced position even when shown it is incorrect. Your sole interest, ladies and gentlemen,

is to ascertain the truth from the evidence in the case. You will make a worthwhile contribution to the administration of justice when you agree upon and return a verdict based upon the evidence in the case and the law applicable thereto.

When you retire to your juryroom to deliberate, it will become your duty, first, to select one of your number as Foreman who will speak for the jury when called upon by the court to do so and who will sign your verdict when it has been agreed to.

A form a verdict has been prepared for you which reads:

"We, the jury impaneled in the above-entitled cause, find the defendant William R. Forman is" and there is a blank line "as charged in Count XV of the [2064] Indictment, herein dated at Tacoma, this blank day of August."

If you find the defendant guilty, you will fill in the word "guilty" on the blank space.

If you find him not guilty, you will fill in the words "not guilty."

Then you will date and have the Foreman sign the verdict and then return into court with your verdict.

In order that you may be full informed of the accusations upon which the defendant is being tried, you will have with you in the juryroom throughout your deliberations a copy of Count XV of the indictment. You will also have with you in the juryroom all of the exhibits that have been offered and received in evidence in the case.

Again, now, at the conclusion, I want to call your

attention to the fact that you must not single out or overemphasize any particular instruction of the court, but you must consider the instructions as a whole and applicable to the whole law of the case.

Now, finally, in conclusion, ladies and gentlemen, let me remind you that each of you have taken a solemn oath that you will well and truly try this case and a true verdict render upon the evidence as given in the trial and the instructions as to the law given you by the court. You have nothing whatever to do with the punishment to be inflicted in [2065] case of a violation of the law. The fact that punishment may follow a conviction cannot be considered by you, except insofar as, and only insofar, as it may tend to make you careful in the discharge of your duties.

Neither must you allow yourselves in the least to be moved by sympathy or influenced by prejudice. The question of guilt or innocence is a question of fact, not a question of sympathy or prejudice or what the punishment shall be. If, as a matter of fact, from the evidence, the defendant is guilty, no amount of sympathy will make the defendant innocent. If the defendant is innocent, no amount of bias or prejudice will make him guilty. Regardless of what the penalty may be, regardless of any feeling of sympathy or prejudice, the defendant is, upon the evidence and the evidence alone, either guilty or not guilty, and what the true verdict should be as shown by the evidence and under the law, becomes your responsibility now to answer and determine by your verdict.

Let the bailiffs be sworn.

(Thereupon, the bailiffs were sworn.)

It is now lunchtime. Ladies and gentlemen of the jury, I wish you to retire to the juryroom and remain there shortly, and then in a very short while we will have you go to lunch. Will you please go directly to the juryroom under the direction of the bailiffs?

(Thereupon, the jury withdrew from the courtroom.) [2066]

Mr. Bischoff: Your Honor, may we have a recess for five minutes for personal reasons?

The Court: Yes, I am glad to accommodate you for any reason, but keep in mind that we would like to get this matter attended to. I think it best in this case that if there should be any modifications of the instructions, they should be given forthwith and without an interval intervening.

Mr. Bischoff: Not to exceed five minutes.

The Court: Very well, we will recess for five minutes.

(Thereupon, a short recess was taken.)

The Court: Do you wish me to discharge the alternate juror? I had intended to do that after the exceptions were taken.

Mr. Mead: Whatever your pleasure is, your Honor.

The Court: You have no concern about it one way or the other.

Mr. Bischoff: May it please the Court, the defendant Forman wishes to note some exceptions.

The Court: Yes, sir.

Mr. Bischoff: The defendant excepts to the portion of the charge which includes the conspiracy to evade Forman's tax under allegations of the phrase "and others" in portions of the indictment.

The defendant excepts to the portion of the [2067] charge which applied the six year limitation statute of limitations to the charge in paragraph D of the indictment.

The defendant excepts to the portion of the charge which permits the jury to find an overt act committed within Tacoma, Washington.

The defendant excepts to the refusal of the court to charge that there can be no conspiracy if defendant Forman had no knowledge of Seijas' intention to evade his taxes and that of his wife, and of the acts Seijas performed to accomplish the evasion.

The defendant excepts to the instructions based on Section 3809 dealing with the filing of returns, on the ground that that section does not define the offense of filing false returns but only with the offense of making and subscribing to false returns, and, therefore, is not applicable to the case.

The defendant excepts to the portion of the charge that permits the jury to find that conspiracy continued beyond the date of the filing of the returns in March of 1947.

The defendant excepts to the refusal of the court to charge that the case involves conspiracy to evade the tax liability of the defendant Seijas and his wife only.

The defendant excepts to the portion of the

charge—excepts to the refusal of the court to charge that the indictment does not involve the charge of conspiracy to evade the tax of [2068] Forman and his wife.

The defendant excepts to refusal to charge that the case is limited to the evasion of income from the four partnerships, specifically named in the indictment, and that the indictment is limited to the evasion of the income for the years 1942 to 1945 only.

Defendant excepts to the portion of the charge in which the jurors were informed that they could consider the evidence introduced in support of the allegations in paragraphs A, B, and D, of the indictment in connection with the allegations contained in paragraph C, or for any purpose.

The defendant excepts to the portion of the charge relating to the allegations of and the elements of the offenses charged in paragraphs A, B, and D of the indictment on the grounds that it now appears they were barred by the statute of limitations and that the court had no jurisdiction of those offenses because it was not committed—an overt act in connection therewith was not committed in the South Division.

The defendant excepts to the portion of the charge in which the court limited the acts of concealment to the time after the conclusion of the conspiracy on the grounds that all acts of concealment may not be considered whether committed before or after the conspiracy in the absence of a

subsidiary conspiracy to conceal the offence of conspiracy and to prevent prosecution.

The defendant excepts to the portion of the charge relating to the civil liability in which the court charged that civil liability is never barred on the grounds they are not applicable to the case, and may be misconstrued by the jury.

The defendant excepts to the failure of the court to instruct affirmatively that if the circumstantial evidence is as consistent with innocence as with guilt, that the verdict must be for the defendant.

The Court: You have stated your exceptions. The case is committed to the jury. Ask them to return, and I will discharge the alternate.

Have you made arrangements to proceed shortly to lunch?

Mr. Grant: Yes.

The Court: Bring the entire jury in, please.

(Thereupon, the jury assembled in the courtroom.)

The Court: It is now my responsibility to relieve the alternate juror. Mr. Christensen, Mr. Christensen, you are now discharged from any further attention to this case.

(Thereupon, the alternate juror was discharged, and the jury withdrew to deliberate.)

Motion for New Trial and Court's Decision

(Whereupon, on the 7th day of September, 1956, at the hour of 1:15 o'clock p.m., the following further proceedings were had, to-wit:)

The Court: United States vs. Forman. Proceed.

Mr. Bischoff: This case is before the Court on a motion for arrest of judgment on the grounds that the indictment fails to state facts constituting an offense, and on the grounds that the Court is without jurisdiction.

The case is also before the Court on the motion for judgment of acquittal, or renewal of the motion for judgment of acquittal, I should say, and on the motion in the alternative for a new trial based on several grounds, among them newly discovered evidence.

We have served a memorandum, which I assume your Honor has read?

The Court: I have.

Mr. Bischoff: And it is not my purpose or intention to discuss all of the questions presented, but I want to devote a few minutes to stressing one aspect of the case which we believe to be decisive of the case, and if the court should overrule us, then Mr. Mead will present to your Honor the alternative motion for new trial. [2072]

The Court: All right.

Mr. Bischoff: The proposition that we wish to urge at this time, which we believe to be decisive in the case, is the question whether there is any competent evidence to establish any one or more of the overt acts alleged in Count XV of the indictment relating only to seven of the overt acts which are alleged to have been committed in the six year period prior to the filing of the indictment. My remarks will be devoted to those seven only.

The first of those overt acts is No. 24, and the

act is alleged to have been committed on December 1. It is alleged in summary that the defendant Seijas presented to the Revenue Agents books of the partnerships on the reexamination of the 1944 and 1945 partnership returns, which books understated the income.

With respect to that particular overt act, we submit, may it please the Court, that there is not a scintilla of a record of any evidence, of any interview of conversation between any Revenue Agent or anyone representing the government on December 1, 1948, or thereabouts. The only Revenue Agents or Treasury Department representatives [2073] that testified in the case were Carlson, Riedel, and Clodfelter, who testified to conversations in the early periods, and the witnesses O'Leary and Oftedal testified to conversations subsequent to 1950.

Now, none of the three former witnesses testified to any conversation or interviews on that date. Mr. Carlson's interview took place in 1947, not later than February 28, because on that day he made a report of his interview, and so it had to take place earlier than that, and the date involved in this overt act is December 1, 1948. That is the only interview he gave any testimony about.

Mr. Carlson testified to an interview in 1944 which took place in Portland with the bookkeeper of the theatre companies in looking after the theatre company books in Portland, and with Mr. Forman, and I should mention at this point that I made an error in my brief in stating the interview

was with Al Forman. It was with one that he thought was William Forman. I think I stated in my brief that he had the interview with Al Forman, but that is not important at this point. The important point is that the interview took place in 1944, [2074] the overt act relating to transactions or interviews in 1948.

Mr. Carlson—Mr. Clodfelter testified to two interviews, but the evidence is devoid of any dates as to the time when he had those interviews. In any event, the interview related to a very specific transaction. He examined or interviewed Mr. Forman, and I think Mr. Seijas, on some one or two occasions with respect to an agreement not to compete. That was the agreement that was made between the United Amusement—or Seijas and Forman and the purchaser of the county route, and it was with respect to the capital gain implications from that contract that the interview was held, and Mr. Clodfelter testified specifically that he made no inquiries regarding income from the pinball operations of the partnerships and was asked whether he made any inquiries, and he testified that he didn't, and that no statements were made of the character described in this particular overt act.

Now, of course, O'Leary and Oftedal testimony couldn't apply because that didn't take place until after 1950.

Now, we come to the next two overt acts which I will discuss together, No. 26 and 29. I will [2075] discuss them together because they are really dupli-

cates. They refer to the identical interviews with the same party and relating to the same manner except that in one years 1944 and 1945 is mentioned, and the other the year 1944 alone is mentioned. Otherwise they are alike.

Now, your Honor, I want to read the overt act 26, and it will apply to 29, and it says, "That on September 1, 1948, Forman concealed from an officer of the Treasury Department engaged," and I ask your Honor to notice this particularly, "in an official examination of his, Forman's and his wife's personal income tax returns for the years 1944 and 1945, and that during those years he received income from the above-mentioned partnerships with Scijas in addition to that shown on the information return filed by said partnerships."

Now, this interview in these two overt acts was an interview relating to the personal income tax liability of Forman and his wife. That is the subject matter of the investigation, and that was the official examination, and it is in connection with that subject matter that it is said that Forman concealed. There is no allegation as to what act was [2076] done which constituted concealment. As it stands, it is consistent only with silence or inaction, but nothing is said in these two overt acts as to what constituted the concealment.

Now, since the subject matter of this conversation was the investigation of Forman's income tax return, that of his wife, whatever transpired or was said at that time, or whatever was left unsaid at that time, could not possibly constitute an overt

act in furtherance of a conspiracy to conceal Seijas' income tax liability. The indictment centers around a conspiracy to evade Seijas' income tax liability. That was what——

The Court: Those words "and others."

Mr. Bischoff: I have not forgotten about them, and I submit, if it please the Court, that your Honor erroneously gives effect to those two words. When the defendant is named in the indictment, then the words "and others" relates to persons other than the defendant who are named. They can have no application to a defendant who is named and identified, and especially so when the whole body of the Count XV taken by its four corners centers the vice or the sin——

The Court: That would apply to Mrs. Forman, though, couldn't it, if taking that very narrow [2077] view of it, it could apply to Mrs. Forman?

Mr. Bischoff: It could not under the allegations of taking this indictment as a whole, that it was Seijas and his wife's income tax liability that was being evaded. That is the essence of the charging part of the indictment, and it is the essence of the overt act alleged in furtherance of the charge in the indictment.

Now, when we read the whole indictment, then the words "and others" cannot possibly have relation to Forman and his wife under the designation of "and others," and, moreover, taking the evidence in relation to the charge in the indictment, no evidence was developed to support that there

was any statement that would be in furtherance of a conspiracy to evade Forman's tax liability.

The Court: That is a reasonable inference, though, Mr. Bischoff. We are not limited in a conspiracy case to the direct evidence. You shouldn't argue a proposition so obviously invalid as that.

Mr. Bischoff: I am fully aware of the proposition that conspiracy may be spelled out from——

The Court: It almost always is.

Mr. Bischoff: And almost always is, your Honor. [2078] But the whole trial from beginning to end centered around the evasion of Seijas' tax liability for those particular years. It wasn't Forman's income tax liability that was made the subject of investigation by this indictment. Had it been so, Forman would have been charged in this indictment with tax evasion just the same as Seijas was in the former 14 counts, and had it been the intention to focus attention on the evasion of Forman's tax liability, the conspiracy count would have said "the defendants conspired to evade the income tax liability of Seijas and Forman."

The very fact that the government limited its allegations to the one specifically named precludes the idea that the words "and others" could have reference to Forman, and so since the subject matter of the investigation was Seijas' tax liability, whatever was said in connection with Forman's tax liability couldn't be an overt act in furtherance of the conspiracy to evade Seijas' liability.

The Court: In spite of the manifold motions attacking the indictment in this case, as I recall

now, you didn't make any motion to say who those "others" were, did you? [2079]

Mr. Bischoff: We never moved specifically to identify those, because as we read the indictment, the failure to charge specifically——

The Court: I am not criticizing, I am just trying to call attention to it. I can't recall there was any request.

Mr. Bischoff: I made no specific motion. As we read the indictment, it charged the fact that—it specifically charged the conspiracy to evade Seijas' and his wife's tax liability and omitted to include Forman's tax liability in the conspiracy, and was convincing to us that the issue in the trial would be Seijas' tax liability and not Forman's tax liability, and under that kind of pleading, it is unjust to make Forman's tax liability the subject matter of this indictment now.

Your Honor will recall that all the evidence as to the unreported income centered around Seijas' failure to report the income which he said he had accumulated by the end of 1945, and he used that as the explanation for his failure to report a greater amount of income for the years 1946 to 1948.

But aside from that, your Honor, the allegation of concealment alone without allegation of any affirmative act of conscious participation, an [2080] affirmative act of the kind that was described in the Grunewald case and others that we have cited, is not an allegation of an act of an affirmative act which must be an overt act. The very idea of

"overt" means something affirmatively done, deliberately done, and doesn't refer to silence which the word "concealment" alone with other allegations, implies.

Now, with respect to 31, 32 and 36, there is one answer that is inclusive of all three, to those aside from the specific answers to each of them independently, and I will speak of the contention with respect to all of the three collectively.

Overt act No. 31 alleged to have been committed on December 29, 1951, and in it is alleged that Seijas submitted a net worth statement or a statement which did not disclose certain information. Now, your Honor will recall that Seijas didn't submit that statement, in the true sense. What happened was, according to the testimony of the witness Oftedal, was that he started investigating the Seijas return, and perhaps some others, in the early part of 1951, I believe it was, and he spoke to Mr. Seijas about a net worth statement that seemed to show some tax deficiency. What, [2081] particular net worth statement and the amount of the deficiency wasn't identified.

He went along, had some conversations with Seijas until he went along to about the summer of the year, I think it was July, when he made a specific request that Seijas should submit a net worth statement, and Seijas then employed accountants to prepare such statement for him. As I recall, he first employed a Mr. Jacobsen who had made some efforts to prepare such a statement, and finally he employed Mr. Whittle who went to

work in the preparation of such a statement, and on December 29, Mr. Oftedal called at the office of Mr. Whittle and picked up the statement.

The testimony of Mr. Oftedal is also that there was no interview or conference with Mr. Seijas at that time at all concerning the statement. Seijas wasn't there at all at that time. There was an interview later which I will speak of in a moment, and that was in January of 1952, but on December 29 there was an interview relating to that statement. The statement itself, your Honor, I don't know whether your Honor read the letter that is appended to the net worth statement, in it [2082] Mr. Whittle takes particular pains to make it clear that the statement is not prepared as an accurate statement. He repeats in the letter at least twice, I think, that it is not accurate and it doesn't—other information would have to be resorted to to ascertain the accurate facts regarding the conditions that prevailed in the three years.

Now, that statement was prepared for the purpose of demonstrating the income tax return for the years 1946 to 1948. Those were the years that were under investigation. Both Mr. O'Leary and Mr. Oftedal testified to that, and the purpose of demonstrating the true facts for those years that the statement was prepared and submitted.

Mr. Seijas testified in this case that he didn't regard the statement as correct and told the agents that he took sharp issue with Mr. Whittle about the accuracy of that statement. He went so far as to charge, I don't know whether seriously or not,

or facetiously, that Mr. Whittle was working for the government.

At any rate, the delivery of that net worth statement was accompanied with sufficient information to make it impossible to draw the conclusion that it was to be regarded as an absolute representation of the facts. [2083]

The Court: It didn't include anything about the holdouts, did it?

Mr. Bischoff: It included information which showed on its face that there was $165,000 of excess income.

The Court: But it didn't include anything about the holdouts, did it?

Mr. Bischoff: He didn't say in so many words that it was hold out, but it was a disclosure at that time. It was not a misrepresentation that he had accurately reported his income for all of the years in question. It was a disclosure and an admission to the Internal Revenue agents that he had not correctly reported his income. The implication was from that statement that he had either understated his income for the years 1946 to '48 by $165,000, or that he had understated his income for the preceding years, '42 to '45 by that amount, the implication being that he must have had that money at the beginning of 1946.

In either case, the statement was an admission. It revealed that he was guilty of tax evasion, the evasion having taken place either in the latter period or in the former period, and the effect of [2084] that disclosure, may it please the Court,

was to put an end to any conspiracy, if any existed up to that time, because you cannot have a conspiracy after a disclosure is made of the offense when that statement was delivered. He in effect said, "I have been guilty of tax evasion," and having made a disclosure or an admission, that was immediately outside the scope of any conspiracy that might have existed, if any there be, because conspiracy does not include the binding of one alleged conspirators by the other with an admission, that under the Lutwak case in the Supreme Court of the United States, and the Krulewitch case, was an end of the conspiracy, and couldn't be an overt act in furtherance of the conspiracy.

The Supreme Court stated in the Lutwak case in this way where a disclosure was made, "This revealed and did not conceal." That is the language of the Supreme Court. In order to be an overt act it would have to have been concealed the offense and not disclose or admit the offense.

Now, then, having by that act, and the Supreme Court said in both of those cases that such an admission terminates the conspiracy, those acts couldn't be chargeable and couldn't be in [2085] furtherance of the conspiracy and can't be an overt act.

Now, then, having on December 29 made a statement or delivered a statement or submitted a statement and having on its face constituted a revelation of the commission of the offense of the tax evasion, what happened thereafter, or any statements that Seijas could have made thereafter in

subsequent interviews, and particularly with respect to the two subsequent interviews both of which are alleged to have been had on January 11, 1952, can no longer be overt acts in furtherance of a conspiracy because there was no longer a conspiracy, if ever there was one, from the moment he made the disclosure on December 29 when he delivered that statement admitting his tax evasion. That ended whatever conspiracy there was, and whatever he did subsequently could not be an overt act.

That takes up the three remaining overt acts, and we submit that upon that record there is no proof of the commission of any overt act to support the alleged conspiracy, if there was one.

We submit that, may it please the Court, and if your Honor desires to dispose of this question first, we will defer the argument. [2086]

The Court: I will just simply say this, Mr. Bischoff, it wouldn't be any comfort to you for me to extend my remarks, and I am certain it is not going to enlighten anyone else, and accordingly I think there is no need of my taking the matter under advisement or extensively extending or discussing the matter.

I simply don't agree with your view of the evidence or of the law, and, accordingly, the motion is denied on the grounds thus far argued.

Mr. Bischoff: Mr. Mead will present the motion for new trial.

Mr. Mead: If the Court please, with respect to the alternative motion for new trial on the

grounds of newly discovered evidence, we request, your Honor, the privilege of introducing oral testimony in that connection. While some affidavits have been filed in support of this motion, we have Mr. McDonald present in court, having subpoenaed him to appear here at this time for several reasons; one, that we thought possibly your Honor might wish to question the witness, and we would like to with your Honor's permission, have the opportunity of calling the witness because he is the one who has this information and had [2087] the information which we considered the basis of this motion.

The Court: Is that the only testimony you desire to produce, Mr. McDonald's?

Mr. Mead: That would be at this time unless the government intended, your Honor, to introduce some oral testimony.

The Court: I mean on your behalf that is all you suggest?

Mr. Mead: Yes, sir.

The Court: Mr. Mead, I am not disposed to grant that motion. It rests entirely, I believe, within the discretion of the trial judge. I think the point that you have to make about it can be just as well understood by what Mr. McDonald says in his affidavit as we could by extended oral testimony. If there was conceivably something about it that didn't appear in the affidavit, or something of that kind, I might consider it, but it is against our practice. Rarely, if ever, do we take oral testimony on a motion for new trial, and I have very

carefully examined the showing made here, and unless you wish to argue it further, I am not disposed to grant that motion.

Mr. Mead: Very well, your Honor. We would like the record to show that Mr. McDonald is [2088] present in court. He was subpoenaed here by the defendant and available for the purpose of taking testimony.

The Court: The record will show that.

Mr. Mead: Now, with respect to the merits of the motion, your Honor, the affidavit of Mr. McDonald shows, first, that he is one of the successors to the former insurance agency of the W. W. Connor Company located in the Dexter Horton Building in Seattle, Washington, and that he was an employee of this company during the years of 1942 through 1945, and thereafter up to the time, I think that the company was terminated.

You will recall that upon the trial of this case one of the important material issues involved was the four photostatic copies of daybooks or diaries as they were designated upon the trial, produced by Mr. Seijas at the time he made a disclosure to Mr. Patten in April, I believe, of 1953, Mr. Patten to Mr. Paine, those original books which where then at that time produced were lost or destroyed and were not thereafter available.

The government took photostatic copies of those books several days after that interview, and these photostatic copies, as your Honor will recall, were produced in evidence at the time of the trial. [2089]

It was our position, your Honor, and we stated

it clearly in the opening argument to the Jury, that those daybooks were manufactured evidence, that they were fraudulent, and they were prepared for the sole purpose of convincing the government that Mr. Seijas had no income tax liability for the years '46, '7, and '8, and which were then under investigation, and were created by him for that purpose.

The government produced the witness, Mr. Seijas, who identified those photostatic copies of diaries, who stated that they were records kept, they were photostatic copies of original records kept by him in the ordinary course of what might be termed his business, that those were records which showed so-called holdouts, and they were used by the government to substantiate Mr. Seijas' testimony.

The government went to the point of producing an expert witness from the Postal Service who testified to the effect that he had examined those exhibits, that he had handwriting specimens taken from various individuals, he examined other handwriting specimens, and he testified in his opinion those records were genuine photostatic copies of genuine records made over the period of the four years involved, '42, '43, '44, and '45. He testified that it was with respect to Mr. Seijas' handwriting which appeared in most of them, and the three earlier books and throughout the fourth one for the year '45 as to his reasons for concluding that. He stated that there were various differences in pressures in lettering, and so forth.

On cross examination he admitted that those same characteristics would have occurred had the exhibits been prepared over a period of a week or three weeks, for example. All he could say was that they were not prepared at one sitting.

Now, about a week or two before the trial, maybe a little before that, we had had an opportunity to call at the United States District Attorney's, and the photostatic copies of these daybooks were exhibited. They were generally inspected for the reasons that the United States Attorney agreed to furnish us with photostatic copies of these daybooks.

As a result of that agreement these photostatic copies of daybooks were obtained by Mr. O'Hearn of our local counsel about a week before the trial, and those photostatic copies did not show the name of the office issuing these books. They didn't show [2091] it because the name was obliterated by a piece of paper that had been placed over the front of the book upon which the exhibit numbers in the Seijas case had been entered, and I don't think that that was intentional but was merely an accidental situation that occurred, but it obliterated the name of the agency issuing these books.

Upon the trial when the books were produced, we had a chance to examine them closely over a period and saw, of course, that name. We ran down the name of W. W. Connor and found out it was not listed in the telephone books in Seattle, that the company was out of business, and after considerable inquiry we learned that Mr. McDonald

had been affiliated with that company and was connected with it during the years that were involved.

The affidavit discloses that Mr. John McKee, a public accountant, certified public accountant from Chehalis, who assisted us during the course of the trial in doing some late work, contacted Mr. McDonald. Mr. McDonald advised Mr. McKee on the telephone that he was acquainted with Mr. Seijas and that Mr. Seijas was on the mailing list of the W. W. Connor Company for this period of time, that he did not know of any of these original [2092] daybooks that were available at that time, there being some issue, your Honor recalled, as to the color of the pages of these books that had been testified to by the government agents, and that he didn't think any of them were available.

Mr. McKee explained to him the reasons why we were anxious to find the originals of these daybooks if any existed, and Mr. McDonald advised him that he was leaving on his vacation immediately, that his family were waiting in the automobile, and that terminated the conversation, and Mr. McDonald, of course, was not available to us because he was then in Seattle and we were in Tacoma.

After the trial Mr. McDonald realized the significance of these daybooks or diaries as they were so-called, and Mr. McDonald felt that this evidence perhaps was material; that it should have been disclosed at the time we made this contact with him, and he called upon his attorney, Mr.

Philip Lycette, and an attorney in Seattle. All these facts are disclosed, of course, by the affidavit of Mr. Lycette, Mr. McDonald, and the various parties that were connected with the transaction. This contact, I believe, was on the 17th of August.

Mr. Lycette advised Mr. McDonald that he felt [2093] that this information was material and that it should have been disclosed, and the thing that he should do was to now disclose it to one of Mr. Forman's attorneys, and thereupon Mr. Lycette placed a telephone call to me and introduced Mr. McDonald to me over the telephone, and Mr. McDonald then for the first time disclosed to us this information which came to our knowledge on the 17th of August.

We then took the various affidavits from Mr. Lycette and Mr. McDonald in support of these facts which I have outlined to your Honor, and it could not help but be said that this was a very material fact, these facts which Mr. McDonald could have testified to were very material and could not have helped but to have had a very important bearing upon the outcome of the case.

I recognize that the granting of a new trial on the grounds of newly discovered evidence is entirely a matter within the sound discretion of the court and that in order to exercise such discretion the court should be convinced of various facts; first, that the evidence was newly discovered. I think that the affidavits that we have introduced in evidence by reputable parties, Mr. Lycette and Mr. McDonald, clearly demonstrate that, [2094]

and demonstrate that it came to our attention on the 17th of August, after the course of the trial, and that due diligence was exercised to obtain the evidence before the trial. I think we had no basis of determining these facts. Even the government failed to make an investigation, as your Honor will recall.

You will recall the testimony of Mr. O'Leary, one of the agents who handled the investigation of these matters, and Mr. O'Leary stated upon cross examination that he had not contacted the insurance agencies who had issued these diaries, whose names appeared on it. He had not contacted them, you will recall, or made any investigation to determine from those agencies the facts with respect to the issuance of these diaries.

Your Honor should be satisfied that the evidence is not merely cumulative or merely impeaching. This evidence could not be cumulative because there was no evidence that we had available on the subject of the validity of those diaries, and, therefore, it could not be cumulative because there was no evidence available to us.

The evidence might be impeaching because it might impeach the testimony of Mr. Seijas who [2095] testified that these diaries, the entries were made in the ordinary course of business and were entered within a day or two in these books over the four years they were made, but it should not be rejected on the grounds that it was only impeaching because it is both material and impeaching.

Now, that the evidence is of such a character that it would probably result in an acquittal of the defendant is something that is very difficult, I recognize, for anyone to determine.

Your Honor will recall that the Jury went out about noontime and they returned with a verdict, I think about 9 o'clock in the evening, outside of the time that they spent for lunch and for dinner they were out nine hours. No argument was made, no final argument, and yet the Jury was out nine hours.

Now, I think, your Honor, that a matter that was as important during the course of the trial as these diaries, that assumed such importance, had we been able to demonstrate clearly to the satisfaction of that Jury that Mr. Seijas in 1953 or 1952, ten years after these diaries were published, had called on Mr. McDonald or contacted Mr. McDonald and had asked Mr. McDonald to furnish him with original and unused copies of these old [2096] diaries, and that Mr. McDonald was able to furnish him with unused copies of these old diaries for two or three of the years that were involved, and that Mr. Seijas had stated to Mr. McDonald that this was a very important matter to him at that time, and that it was not just an idle request that he get these diaries and get possession of unused copies of these diaries, that the significance and impact of that, your Honor, could not have helped but to have had an important bearing upon the consideration of the Jury and could not have helped but to demonstrate conclusively that these

diaries were, as we contended in the opening statement and throughout the trial, your Honor, manufactured evidence, and I feel that it would be unjust to impose a sentence on a man who was convicted on evidence, substantial evidence, your Honor, which it now appears was manufactured evidence, and was fraudulent, and that it would be a fraud on the court to sustain a conviction based upon that type of evidence, and that, I submit, your Honor, that our defendant Forman in this case is entitled to at least a new trial on the basis of this newly discovered evidence. Thank you, your Honor.

Mr. Obenour: If it please the Court, I will [2097] restrict myself to the answer pertaining to the new evidence, if I assume that is the basis.

The Court: I have ruled on the other phase of the case.

Mr. Obenour: Referring to the affidavits, the government also introduced two affidavits, one from myself and one from Mr. McDonald.

The Court: I have read that.

Mr. Obenour: Five conditions under which a new trial might be given for newly discovered evidence were set forth in the brief of the defendant; one, that it be newly discovered. Apparently that would be so from the affidavits of all parties concerned. Second, it was due diligence; third, it is not cumulative or impeaching; fourth, that it be material; fifth, that it probably result in a different verdict or a verdict of acquittal.

Assuming that the first is correct, restricting

myself to the remaining four of the five requirements, the second would be, then, due diligence. In the brief it is simply stated it is clearly established that the counsel and the defendant exercised due diligence with no further reference to it.

If the Court please, there was no proof at all [2098] in any of the affidavits that the defendant or his representatives, and as appears on the record, a very eminent firm here in Tacoma, two different attorneys in Portland, an accountant, a CPA hired from the State, accountants in Portland, representatives appearing before this court, and for this defendant had been as great and as able as they appeared in any case in which I have represented the government in similar type of cases.

Yet there has been no proof at any stage of the trial or in the affidavits that the defendant or any of his representatives had done one single thing to attempt to trace these diaries or their source, or their falsity, or their existence, at any time prior to the 13th day of August, some two weeks after the start of the case, and in fact, the start of the third week, and the day before the government rested, was the first day that there is any proof shown that they did anything to attempt to attack the veracity or the authenticity of those diaries.

The Court: I must say that I have had that very much in mind. I cannot help but say that there is not one word in this record, or a showing made to me, to indicate that there has been any [2099] diligence about running down these diaries at all. These diaries were revealed in April of 1953, more

than three years prior to the trial, shortly following which, according to the evidence, it came to Mr. Forman's attention and I think Mr. Mead as well, shortly following, but in any case Mr. Mead attended the trial of the Seijas case, and he was here when those diaries were admitted in evidence. They were here of public record for months open to the inspection of anyone who cared to inspect them.

There is no showing that anything was done or any attempt made to trace them and find out where they came from, or anything else. There certainly was no evidence of it during the trial.

It seems to me that there is certainly no showing of due diligence with respect of inquiring into the background of those diaries at all. Go ahead.

Mr. Obenour: If the Court please, in that regard, and calling attention to the affidavit of counsel for the government, I don't know, I attempted to examine the exhibits that are again in the custody of the Clerk and I attempted to examine them with Mrs. Freeney this morning, I believe it was, to [2100] determine where the original tags were on the exhibit.

The Court: I am not very much concerned about that detail, Mr. Obenour, because after all, these diaries were here in evidence for months and available to anybody to inspect, and it seems to me that the most elemental precaution in a matter of that consequence would have required a very careful and extended and minute examination of them, particularly if one were going to charge another person with having manufactured them. Charges of that

kind ought not be made simply shotgun and from the hip. If that kind of charge is going to be made, it seems to me that it calls for a very, very careful, minute examination of the evidence pertaining to it. There is no indication that that was done, ever.

Mr. Obenour: I would also call attention, if the Court please, that the book for 1942, Exhibit 76, shows to have been given with the compliments of Lipman and Esfeld. It is the same Esfeld who testified for the government at which time there was no inquiry when Mr. Esfeld testified on this stand, and at that time the books had been in evidence for some week or ten days, there was no question put on [2101] cross examination as to his knowledge of them, or is there any showing that Mr. Esfeld was questioned about his knowledge about the diary for 1942 even though he was at that time in 1942, in addition to, apparently, the insurance broker, he was also a partner of Mr. Forman and Mr. Seijas in what was known as Dock Concessions, although he may not have known of his partnership with Mr. Seijas as the evidence subsequently bore out.

In that regard, also, the books were shown to Mr. Mead in the office of the United States Attorney so that Mr. Mead and Mr. Bischoff had an opportunity on July 24 to examine those same books that were in evidence, at which time government agents answered all questions, explained all entries as best they could and as they understood them to be, to Mr. Mead and Mr. Bischoff, and no inquiry was made other than as to the books other than as to

the color, and the government had caused an expert examination to be made of their contents, and they were told at that time no examination had been made, which in fact it had not, and it was not until the trial progressed into the first week after the opening statement of counsel and the cross examination that developed of Mr. Seijas, that we became aware [2102] — the government became aware that the authenticity of the books was to be challenged, at which time, according to the affidavits submitted, Mr. James Conway, an expert of questioned documents, was contacted on Thursday, August 2, the Thursday of the first week, and he appeared on Monday of the following week and testified on the following Wednesday. His testimony was given, as the Court will recall, and I would differ somewhat in my recollection of counsel's representation of Mr. Conway's testimony. He said he believed it highly improbable that the diaries could be manufactured or fictionized because in his opinion while they could have been done over a sustained period of a week, and accordingly he could not establish the date, he did not think they could be fictionized because of the various reasons he set forth.

The Court: However, he did admit it as a possibility but he gave a very strong opinion to the contrary.

Mr. Obenour: Now, in addition to that, I would point out that in the opening statement of Mr. Mead——

The Court: Opening statement to the Jury?

Mr. Obenour: Opening statement to the Jury,

Mr. Mead stated that these diaries, and the [2103] explanation given to the government was an attempt by Mr. Seijas to explain or exculpate himself from prosecution for the periods of 1946 to 1949 by an explanation of prior acquired wealth.

He said, however, and that was referring now to these same diaries and to this explanation given to Mr. Patten, that his first statement was that he was sorry he had to make an attack upon another attorney, and he stated that this was manufactured to excuse himself, but then he went further and said that Seijas had serious problems and that he involved Forman to save himself, but since trial and shortly before Seijas attempted to force or blackmail Forman to get money to pay his taxes, and he said that Forman was not willing to pay the money, and accordingly Seijas simply now plead guilty to the charge in order to involve Forman because Forman wouldn't pay the blackmail.

He went on at length, what does this mean and what does the diary have to do with it? He was referring to something subsequent, something that hadn't been done because at the time of the trial this was three years later, three years after the diaries, and if the accusation of the attempt to involve Mr. Forman because he failed to pay blackmail [2104] certainly couldn't have anything to do with the diaries because it is three years later.

The government knew about the diaries, and nothing additional pertaining to the diaries could in any way further involve Mr. Forman for his failure to

pay money under whatever guise you might care to call it.

I might point out that there was no proof given by the defendant to substantiate this charge. Furthermore, there was no proof given by the defense to attack the authenticity of the diaries. The only evidence given by the defense to substantiate the statements made here today under which these diaries were manufactured, and so stated in the opening statement, and in the opening statement at the trial itself, was in the questioning in the cross-examination of Seijas and of the agents, Mr. Conway, Mr. Oftedal, and Mr. O'Leary.

Now, there is still no evidence attacking the authenticity of these books. Mr. McDonald's affidavit simply states that he has examined the photostatic copy of a book which had been issued by his company and marked Exhibit 167 which, incidentally, is the exhibit number attached to the original diary in the first trial. [2165]

Mr. McDonald examined that diary and found it to be one issued by him. He subsequently has recalled that Mr. Seijas in 1952 or 1953 called upon him to furnish diaries.

Now, we are involved with a question of four diaries. 1942 was issued by Esfeld and Company. It could not in any way be connected with the statement of McDonald, and that the defendant themselves called their representative who was the person who supposedly issued these diaries and not Esfeld who was here, but Mr. Pinch, or whatever his name was, but he was called by the defendant,

who said and maintained, that I recall that he contacted attorneys and they didn't keep old books, and he was unable to find any.

Then we come to the three others, '43, '44, and '45, which were issued by the Connor Company, and Mr. McDonald states he looked and found two diaries within this period, and if you will examine the distinction between the affidavits issued by the government and by the defendant, you will find that the affidavit by the defendant would attempt to establish that the three diaries were the three years of '43 to '45, when in fact he states in the affidavit by the government that only two were within [2106] this period and the third was for a subsequent period.

In any event, there remains two out of the four diaries that remain unchallenged, if you can call the affidavit of McDonald a challenge. He doesn't say at any time "This is the book" he gave Seijas. He says it was one issued by them and that they gave them to Seijas and Forman in the normal course of events at the time they stated.

The photostats had been identified as authentic by the agents, Oftedal, who stated the contents were old by appearance of the scotch tape, and by Conway who said, in his opinion they were aged. There is no evidence that attacks the authenticity of these books today.

Now, in that regard I would call the Court's attention to the books themselves the circumstances and under which they were given: first, Mr. Seijas was attempting to account for some $150,000 short-

age. All he had to do was produce these books and say he got the entire amount and he went home, and the total amount of $170,000 completely explained his shortage. There is no reason to involve his partner, no reason to involve anybody else. If he was going to falsify the books he could simply say he got it [2107] all and there wouldn't be any entries by Forman as there were, or by his collector, Meyers, or by some other party that Conway couldn't identify. He could have falsified these documents to show the $170,000 and that would have been it, there would have been a complete explanation, but instead, four books were produced which contained entries in 1942 which were covered up, ten entries in 1943 which were covered up, 22 entries in 1943 that were covered up, and 38 entries in 1945 that were covered up.

In addition, there were some 45 tapes fixed to the exhibit for 1945 in the period after May 1, 1945; that in this eight month's period after 1945, which could not be affected whenever the diaries were some 40 or 50 tapes that were put on by scotch tape which Oftedal said aged by color. They could not be affected whether the diaries had been obtained at any period of time.

There were the tapes that showed the information, and during the same period of time there were some 35 additional entries that were not covered and some 30 entries that were covered.

The Court: At best, if these were manufactured and required the most consummate skill to have [2108] manufactured them, and anyone having the

consume skill enough and the time and effort enough certainly when he manufactured them would have made a full and complete defense for himself instead of only one crutch.

It is hard for me to believe that Mr. Seijas with his ability, and if he had the ability to go to all the lengths to manufacture these diaries, would have been so stupid as to come out with an answer that didn't do him any good.

Mr. Obenour: I might also point out, your Honor, regarding the question of not being cumulative or impeachment, I submit at most it would impeachment as to Mr. Seijas and result in an acquittal, and we submit that this is not a material issue in itself. It is merely corroborative of the testimony of four witnesses, starting with Seijas who testified as to the complete transactions, the complete dealings with Mr. Forman, and that the Court should instruct and occasionally accept the testimony of conferences with care, and if it stood alone, then I think possibly the diaries would have greater importance, but, you have in addition, Mr. Heberling, who was an associate and in no way a friend of Seijas, and if anything, he [2109] testified he was associated with Forman during this period of time. He testified that he held out money under agreement with Forman and Seijas and gave the money to Forman and got part back which he then reported on his income tax return under miscellaneous income.

This would certainly stand by itself apart from the diaries *or* Seijas that there were holdouts by

Seijas and Forman which went to Forman as well as Seijas.

Similarly, Meyers testified that he was the collector under the instructions of Forman and collected and held out money which he gave to Forman, or if Forman wasn't there, to Seijas. Mr. Forman hired Mr. Meyers, and any charge that the friends of Mr. Seijas came to his rescue to save himself prosecution by the government would only refer back to the fact that Mr. Forman engaged Mr. Meyers, not Mr. Seijas.

Mr. Rylander, who was an employee of nobody stated that the first month that the pinballs were in operation Forman and Seijas and Seijas' brother, over a period of time collected the money from pinballs and that he, Rylander, went to the back room with Seijas and Forman where they split the money [2110] that was held out. That has nothing to do with the diaries and would stand alone as testimony that money was held out under a conspiracy to evade taxes, and as such, we submit, your Honor, that it would be nothing more than impeaching. It would not be sufficient to result in any other verdict for the Jury when you consider the entire circumstances under which the diaries were produced and their contents.

They are substantiated by the government expert who saw the originals, by the testimony of the persons who participated in the holdouts, and the only single thing that the diaries showed by themselves is to fix a certain amount of money as being the amount held out in the respective years. As

such that fact would not be material and the charge—and as such there would be no basis of any material evidence that would be sufficient to result in a verdict contrary to that rendered in this trial.

Mr. Mead: May I have just a moment or two to respond?

The Court: Yes.

Mr. Mead: First, I would like to correct the impression which seems to be in effect that I was present during the Seijas trial. [211]

The Court: Weren't you here part of the time?

Mr. Mead: I think that I was here a day or two.

The Court: I thought that is when I first met you.

Mr. Mead: That is correct, your Honor, but I was here only a day or two during the course of that trial when some of the witnesses who were employed by my client were called, and I did not attend the Seijas trial. I was not here when the diaries referred to were introduced in evidence, nor did I examine them during that period of time.

The Court: You must have known they were in evidence.

Mr. Mead: I certainly did know they were introduced in evidence.

The Court: That is all that is important.

Mr. Mead: I know that. In the first instance, counsel has referred to his surprise that we were going to challenge the authenticity of these diaries during the course of the Forman trial and stated, I think, that it was after Mr. Seijas had been cross examined?

You will recall, and I think it is in Mr. Obenour's affidavit, that we disclosed in our opening [2112] argument to the Jury we were going to question them.

The Court: The point Mr. Obenour made was that prior to your opening statement there was no intimation that you were going to challenge the authenticity.

Mr. Mead: The burden of proof is upon the government, and the defendant only takes the position that the opening statement, or sometimes even the opening statement is reserved until a later time.

The Court: There is no criticism of anyone involved.

Mr. Mead: I merely meant to answer that statement, your Honor.

The Court: Yes.

Mr. Mead: With regard to the situation that we are dealing with, first, the information that has been developed by Mr. McDonald's affidavit stands unchallenged. There is no affidavit from Mr. Seijas that it is not a fact. There is no denial anywhere in the record that it is not a fact.

The Court: Well, of course, there is Seijas' testimony in this case and in the other case that they were true and authentic documents.

Mr. Mead: Oh, yes, your Honor, and other testimony on the part of Seijas who admitted that [2113] he previously testified falsely.

The Court: Whatever weight you want to give it, the fact still remains that Seijas testified twice in this court before me that the originals of these

documents that were photostated were true and authentic and made at the time. There is no need of having him make another affidavit to the same effect, is there, Mr. Mead?

Mr. Mead: That was not my point, your Honor. My point was not that there is no denial on the part of Seijas that these were not true. My point is that Mr. McDonald's statement as to the fact that he got these new and unused copies ten years after they were issued, and that he got them under these circumstances remains undenied. That is the point now.

Now, it is our point, your Honor, that these documents that were introduced during the course of the trial, that the government has some responsibility for the evidence that they produced, and for the determination of the authenticity of that evidence, and they made no investigation at all. Mr. O'Leary testified along that line.

Now, if these documents were made at the time that Mr. Seijas says they were made, why then would [2114] he go to Mr. McDonald, we have this fact undenied, then years later to get these copies—original copies of diaries? Why would he do that?

I cannot conceive, your Honor, of a situation where a jury is present with those facts would not conclude that there was a good reason for that, and that the reason was that he needed those original diaries to manufacture this evidence.

Now, your Honor, there is no showing in this case nor is it a fact that we had not contacted Mr. McDonald. We did contact Mr. McDonald during

the period of time we would have learned these facts. On the contrary, Mr. McDonald——

The Court: That was right during the trial, Mr. Mead.

Mr. Mead: Whether we contacted him during the trial or two weeks before, his reaction would not necessarily have been any different than it was. He did not disclose this to us and didn't think it was important, and he didn't disclose it to us. Now, we had Mr. McDonald here——

The Court: It strikes me as odd the circumstances of the disclosure when he did, because you know he did say that he was interested in it because he knew Seijas. [2115]

Now, during the Seijas trial a year before, the Seattle papers were filled, and if I am not mistaken, there were pictures of this trial over here. It was very strange that Mr. McDonald didn't learn at that time about the fact that these diaries were important, and not until the later time after the trial of this case was concluded. I am not suggesting there is anything wrongful about it, but I am just saying that Mr. McDonald would have a lot to answer for in explaining those circumstances.

Mr. Mead: Mr. McDonald might have a lot to answer for, and Mr. McDonald is here here in the courtroom, ready and willing to answer any of these questions your Honor might put to him or that the government might put to him, and this leaves us in a position where we start with the fact that these exhibits were obviously fraudulent.

Now, a point has been made as to the hip pocket

attack, or hip pocket charges, and I feel, your Honor, I should comment on that.

Your Honor is not only a Judge, but you have had a lot of experience in trial of cases, and you know there is an important difference in what you know and what you expect to prove and what you are [2116] able to prove, sometimes, from the evidence that is available to you. I knew that these documents, and I felt it all the time and I know it now and I knew it then, were manufactured. They had to be manufactured.

Now, counsel said that these documents were disclosed in 1953 and there were threats of blackmail and what did Mr. Seijas hold over Mr. Forman's head. These already have been disclosed. That was brought out, your Honor, before the Jury. We didn't know what was held over Mr. Forman's head, but I told the Jury that there was some document that Mr. Seijas threatened him with and could be construed several ways, and it wasn't these diaries. They had already been disclosed. That document was the document that was produced by Mr. Seijas on the witness stand. I think he said his brother brought it to him. He didn't have it two days before the trial or before it was produced here, which purported to show that Mr. Forman was still interested in this business, you recall, that was sold out to Morini. Still interested after that period of time.

That document he had not disclosed or told us or told anybody about, but he came up with it when

he felt it could serve his purpose to do so. That [2117] was the document.

Now, I didn't know what the document was. I haven't the slightest idea but that was the document that I knew there was something, and that apparently was it.

Now, your Honor, as I say, the government in the Holland case, the Court decided that was a net worth case, you will recall it it is the duty of the government to investigate leads too.

There is nothing here that if we had contacted, no fact in evidence here or has it been shown, that had we contacted Mr. McDonald the result would have been different too. We contacted him during the course of the trial. It was late in the trial, yes, but it was hard to run him down. We finally located him.

Now, Mr. McDonald is here to explain if your Honor has some idea in mind as to why he didn't come up with the disclosure a year in advance. All I know about it is what Mr. McDonald has told me, and Mr. McDonald made the disclosure to Mr. Philip Lycette, a lawyer who I am not acquainted with, who I understand is a very competent and a well recognized lawyer in the City of Seattle, and made this disclosure to Mr. Lycette, and Mr. Lycette put him in [2118] touch with us as set forth in Mr. Lycette's affidavit.

Now, your Honor, the conviction in this case resulted from all of the evidence. Your Honor knows of the importance of the so-called diaries. The newspapers were full of it, expert witnesses were called

with respect to them, and it assumed great proportion with the Jury. It was one of the things that substantiated Mr. Seijas, and I don't see how anyone could say that at this stage of the procedure with these facts of Mr. McDonald's affidavit being unchallenged, that those diaries were not fictitious and fraudulent.

Now, Mr. Seijas on the stand very glibly——

The Court: How do you account for the fact that if Mr. Seijas would go to all the trouble and the difficulty, admittedly you are going to have a very difficult job if these diaries were manufactured, with four or five different handwritings involved, all those taped slips would have to be made up, all of that would be a real fancy job of manufacturing an exhibit. You would have to agree to that?

Mr. Mead: I would love the opportunity, your Honor, to——

The Court: How do you account for the [2119] fact that with his ability, and you must admit that he has some, Mr. Seijas I am referring to, some understanding of the problem that he was involved in, that he would go to all that elaborate business of preparing something that wouldn't solve his problem? Whereas, if he had manufactured it and had claimed the whole amount as being his and left his friend Forman out, saved him any possible embarrassment, and I must say on the face of the record I am satisfied Seijas never let Forman down at any time along the line until his own neck was in the noose, where he could have eliminated Forman from the picture so as not to put him in jeop-

ardy and claim the whole amount of the holdouts as his own, and would have an absolute, bulletproof defense on the net worth theory?

Now, how do you account for the fact of those two seemingly contradictory things?

Mr. Mead: He would not have had a complete defense on the net worth theory, your Honor, on the facts because you will recall that the gap—the problem he was faced with in 1953 was an unexplained increased in net worth over this period in excess of $200,000. That is the government's position.

The Court: If he had twice as much assets [2120] to account for, he would have been in a much better position answering that charge.

Mr. Mead: Well, you could argue it that way, your Honor. You are asking me why Mr. Seijas would do certain things that he did. I couldn't answer that question because I can't conceive of why he would do things he did. For example, testifying on the witness stand and actually introducing documents which were false and fraudulent and which he knew were false and fraudulent at that time. Why would he do that? Why would he testify during the course of his trial to many things that were false and many things that were fraudulent, it is impossible for me to answer, your Honor, why he would do that. I don't know why he would do that.

So whether there is a reason why he would do what he has done and what has been demonstrated he has done, and what your Honor has been at a loss to understand, I can't explain it either, your Honor.

The Court: Well, I am, of course, not in any

position to defend on way or another, but it is an incomprehensible thing to me that one who would display the genius, the evil genius, sufficient to manufacture an elaborate thing of this kind running over years of entries, involving several [2121] different handwritings, and involving tapes and figures all of which had to tie in with one another, the man who had the ability to do that and at the same time go to all that trouble and yet not provide himself with a defense, is kind of foolish.

Mr. Mead: I never argued, your Honor, that Mr. Seijas was lacking in a great deal of ability, and don't forget that he had many years of law practice dealing with these matters.

Now, what was he faced with when these were manufactured, because I am going to assume they were manufactured because Mr. McDonald's facts clearly demonstrate that, and why would he go to all this trouble to make up all these things?

First, he knew that criminal prosecution for him for the years 1946, '7, '8, and '9, were recommended. He knew, your Honor, that the fat was in the fire. He knew he had to come up with a defense of some kind, and so he concocted these books. He went to Mr. McDonald and got some of them there. Whether he had some of the others, or where he got them, I don't know. But at least we know he got these from Mr. McDonald, and he manufactured the stories, fabricated the stories of his brother's income, sources of income from his brother, [2122] and he manufactured the stories of sources of income of his father bringing money from the Old

Country. He manufactured stories of income that his father had got, none of which the government witnesses testified they bought, but they bought this because it was cleverly prepared. It was cleaverly worked out. It wasn't done at one sitting. It took him weeks to do it. There is no question that it did, your Honor. But the stakes were high, and at the time he prepared these documents in 1953 or the latter part of 1952, he didn't know that he was going to be shy quite as much money as he ultimately was shy, and he had these other explanations as to the difference.

Why would he cover up certain entries in some of these books in the later years? Why would they be covered up? It is all part of a plan to lend credence to the idea that they were genuine, your Honor, and it was a clever plan. Certainly no one would believe, your Honor, that a man of Mr. Seijas intelligence in the years 1952 or 1953 would go to contact Mr. McDonald and obtain from Mr. McDonald originals of these so-called diaries, or fresh ones, let us say, with no entries in them, for no purpose at all. He had a purpose, and his purpose [2123] was obvious.

Now, your Honor, it seems to me well demonstrated that this is just a little more fraud. These books are fraudulent, and the government had a responsibility to investigate them too, and there is no showing that had we made inquiry of Mr. McDonald that we would have found out anything more than what we did find out when we did contact him, and that Mr. McDonald is here in court,

and if any of these questions remained unanswered in your Honor's mind, he is here to testify.

One thing is certain, they are fraudulent. The fraud is not denied. Mr. Seijas is here even in this courtroom, and the record should show that, and no affidavit contrary to Mr. McDonald's affidavit has been introduced in evidence, and we submit, your Honor, that this evidence was material. A great point was made of it. It is fraudulent evidence. It was manufactured evidence, and that it would be wrong, your Honor, to let a conviction stand on this type of evidence.

Thank you, sir.

The Court: In my judgment, there is an utter lack of due diligence on the part of the defense with respect of the purported newly discovered evidence.

The reason that I inquired about it was against the possibility that perhaps somehow or other the idea of there being some question about the diaries didn't occur to counsel, but it now appears that the opening statement was made deliberately and intentionally. The opening statement was made, and I recall it very vividly, that it would be contended that these documents were fraudulent. How in the face of that can there appear to be any due diligence when there is no showing whatever that anything was done to run down or authenticate these diaries?

I think the testimony is merely in a certain sense, merely cumulative, but assuming the argument of Mr. Mead we will say at least that it is impeaching, and merely so, and in my judgment, for whatever it is worth, there is not the slightest chance that the

admission of the testimony of McDonald would result in an acquittal verdict on a retrial, let alone that is probably would.

Now, I say those things because as far as the matter of applying the rules is concerned, that is an end of it, but I have not considered that an end of it because notwithstanding the fact that there is not a showing of due diligence, and I am [2125] satisfied due diligence was not exercised prior to the trial.

Notwithstanding, in my judgment, merely impeaching in character the offered, newly discovered evidence, and notwithstanding that I am wholly satisfied there would be no different result on a retrial of this case, if in fact the diaries were fraudulent and I thought they were, and I thought that this purported newly discovered evidence showed that they were, in the exercise of the discretion that vests in me, I would grant a new trial notwithstanding, in spite of the fact that the rules applicable thereto are not met.

In other words, I don't want any man convicted in this court by reason of fraudulent evidence on any important and major phase of the case. That is why I have listened to the argument here to hear what you have to say about it, and consider it very fully.

In my judgment there is not a scintilla of evidence to indicate fraud in these diaries, let alone any substantial evidence to indicate it, and in my opinion there is nothing shown in the showing now offered, nor was there any showing made at the

trial. I was astounded at the lack of any [2126] evidence to support the assertions made in the opening statement. I thought certainly that there would be some kind of evidence brought forward to support the assertions that Seijas in effect was blackmailing Forman and that the diaries were fraudulent. I heard none, not the slightest, excepting on cross-examination occasionally was an effort made in that manner to bring it out. That is a perfectly proper way to do it. I don't mean to criticize you for that, if that is the best you had. You have to use the best that is available.

However, in my mind there is not the remotest doubt about the authenticity of these diaries. I do not think they are fraudulent, and I do not think this offered testimony of Mr. McDonald, even if we accept it at full face value that Seijas in 1952 or 1953, it is not very closely identified, why Mr. McDonald would remember it after all this time and without anything to jog his memory at all excepting only circumstances, he says, because of his acquaintance with Seijas, when a full year before this time the papers were full of those diaries and made a great deal more to do the first time we heard about them in the Seijas trial than we did in the succeeding trial. There is a possibility [2127] that through some mischance he didn't hear about it. If he didn't hear about them, he must have been the only person in King County that didn't. It drew a great deal of attention at that time, but there is still the possibility, so there is no need of digressing any further on it.

Gentlemen, I do not have the slightest doubt in my mind that the motion must be denied, and that will be the order of the court.

Proceed with the matter of sentence.

Mr. Obenour: If the record would show that counsel for the defendants, both Mr. Seijas and Mr. Sager, and Mr. Forman and Mr. Mead, are before the court.

The Court: I have a very extensive pre-sentence report in the Forman case, and, of course, I previously reviewed the Seijas matter.

I would be pleased to hear from you Mr. Mead or Mr. Forman, or both of you, if you wish, prior to imposition of sentence.

Mr. Mead: Yes, your Honor, I would like to make some observations.

I apprehend your Honor has a pre-sentence investigation report which will probably verify what I have to say, and not knowing quite what the report shows, [2128] I don't know quite where to commence.

The Court: I will tell you what it shows. It shows, in substance, that in the latter years, by latter years I mean the last six or eight years, Mr. Forman has been very highly regarded by his business associates. He is reported to be a good family man, exceptionally devoted to his family.

A good many people associated with him in various business enterprises, and business associates, speak highly of him and speak well of their experiences with him.

Now, in substance that is what it shows. It doesn't

show anything about what he was doing in 1942 to 1945 except that which I have heard from the evidence.

Mr. Mead: All I can comment on is what I have personal knowledge of with respect of Mr. Forman.

I have known him some 15 years or more, have acted as attorney for his family and for Mr. Forman during that period of time with the exception of the years from 1942 to 1945 when I was gone in the service.

I became acquainted with him when he first went into the theatre business with his own account, I believe late in the year of 1940, and during [2129] that period of time I have had occasion to have close contact with him, of his associates, partners and various associates that he has had in these theatre ventures. They have been quite numerous. They have been in the State of Oregon, the State of Washington, and the State of California.

I still have to meet a former associate or a present associate of Mr. Forman in any business enterprise who has had anything derogatory to say about the treatment that Mr. Forman gave him or the treatment that he received from Mr. Forman as a partner or as an associate.

His dealings have been up and above-board and have been thoroughly honest, and I think that that is borne out by what your Honor stated with respect to the theatre enterprises which, of course, are all the enterprises that I have any personal knowledge of. I had no connection with the pinball ventures in which Mr. Seijas was engaged with Mr. Forman

and know nothing of course, about that other than what I have learned through the investigation of this case and what I myself have heard from the witness stand.

Mr. Forman has a family and has been married something over 21 years, and he has lived [2130] most of his adult life in the City of Seattle where he now maintains a home and has maintained a home.

He has a son and a daughter who are attending college.

During the period of 1942 through 1955 Mr. Forman has paid personal income taxes to the United States of approximately $735,000. Currently and for the last year or so, he is paying on personal earnings approximately $10,000 a month in Federal income taxes.

He has been diligent, I think, in his reporting of income, and so far as I know from his operations, what he did when he was associated with Mr. Seijas your Honor knows as much as I do about it because I have learned about that from the witness stand.

Mr. Forman has a reputation, an excellent reputation for fair dealings and honest dealings. During the course of the investigations of this case I don't think that he lied to any agent and didn't misrepresent anything. He made no false statements, to my knowledge, that I know of. He has conducted himself, to my knowledge, as well as anyone could be expected to under the circumstances.

I think that he is a useful citizen, and, your Honor, to impose a severe sentence upon him [2131]

discovered evidence and additional grounds set forth therein.

Dated: October 16, 1956.

/s/ S. J. BISCHOFF
Of Counsel for Appellant.

[Endorsed]: Filed October 17, 1956. Paul P. O'Brien, Clerk.

would be an unfortunate thing. It would destroy his usefulness as a citizen rather than to teach him a lesson. I think he has learned his lesson and this has been a very expensive one for him.

He is a useful citizen in which, I think the government has an important stake not only financially but otherwise because he is a leader in his business in the theatre profession. He has been a credit to that profession and to that business.

I think your Honor could well consider a possibility of probation in connection with Mr. Forman.

If there is any question your Honor has to ask, why I will be very happy to answer, about his associations or anything connected with him.

The Court: Unless Mr. Forman wants to add anything himself, I am ready.

Mr. Forman: Well, all I wish to say, your Honor, is that I am very sorry, very full of remorse about this whole matter, and I appreciate all the courtesies.

The Court: Do you wish to be heard.

Mr. Obenour: No, your Honor.

The Court: Well, I keep repeating, because to some of you, at least; it is new, the imposition [2132] of criminal sentence is far and away the most difficult and disagreeable task of a judge, by far.

We are called upon to do what only divine judgment could properly do in every instance. Nevertheless, we are placed here to exercise such judgment and discretion and conscience as we have been given for the performance of the task.

A great many considerations have got to be given

attention in fixing a sentence. I shan't touch upon them all.

As far as the particular offense is concerned, while Mr. Forman is charged here and judged guilty of any a single count, the offense essentially is every bit as reprehensible as that of which Mr. Seijas was previously convicted. On this count the maximum penalty authorized by law for this offense is five years and $10,000, or both.

On the other hand, we have got to give some thought to the fact that only a single count is involved and not several as was the case in Mr. Seijas' case and some of the other cases. Mr. Forman's own tax evaded during these years 1942 to 1945 was in excess of $50,000, not counting the Seijas tax evaded in the same amount, a major exasion by any standards. I am not talking about income, I [2133] am talking about tax. That was in the years of 1942 to 1945 when a lot of American boys by the hundreds and thousands were giving their lives in the defense of the country, and Mr. Forman and Mr. Seijas were reaping this kind of harvest. In Mr. Forman's case they were no younger than he, and some of them a good deal older. I am not criticizing him for not being in the service. The report here shows that he had an injury and couldn't be in, but I am pointing out that during the very period when Americans by the thousands were laying down their lives, other Americans were at home reaping this kind of harvest, and in this instance, this money was largely reaped off sailors and servicemen and Marines, boys over in the Brem-

erton area home for a little while and away from the battlefronts.

It is pretty hard to imagine the offense for which less can be said than an offense of this kind. Mr. Forman has never made any effort up to the present time, as far as I know, to disclose anything about this situation, to assist or cooperate in the investigation either in himself or of Seijas, or, in fact, to make amends in any way for his wrongdoing at that time.

It appears to me there has not been the [2134] slightest effort on his part. I have always supposed that one of the best ways to judge whether one was truly sorry was whether or not he did something to make amends, whatever his conduct was.

I haven't seen anything on Mr. Forman's part excepting his statement that he is sorry for what he did.

Even at the trial the principal element of his defense, for which, of course, I don't criticize you, Mr. Mead, but I recall very vividly that at the opening statement you said that it was going to appear that Forman had sold out to Morin and from that moment on he never had any further connection with this thing in any manner, shape, or form. That was shown to be a sham and a fraud. So that Mr. Forman defended the case primarily on a sham and a fraud.

He doesn't give any evidence of having the proper attitude towards the observance of law, in my judgment.

Weighing all of these factors and many others,

and I might say I have given a great deal of thought to the sentence in this case, not merely on account of Forman as an individual, but I keep a record of every criminal sentence I have made, and every time I prepare to impose another sentence, I look back and, [2135] figuratively speaking, look in the eyes of every other man who has been here before, so that at least as far as I am concerned, there will be some consistency in the sentences that I impose.

I have done that in this case and I have reached a conclusion of what the sentence must be.

Mr. Forman, please rise.

(Thereupon, the defendant Forman complied.)

It is the judgment and sentence of the court that William Richard Forman upon his conviction thereof by jury verdict, is adjudged guilty of the offense stated in Count XV of the indictment herein and that accordingly he be committed into the custody of the Attorney General of the United States or his authorized representative, for imprisonment in such penal institution as the Attorney General may from time to time designate, for a period of three years and that he be fined the sum of $10,000.

That is the judgment of the Court.

Now, Mr. Seijas. Yes, Mr. Sager, do you wish to be heard before imposition of sentence?

Mr. Sager: Briefly, your Honor. I think in the trial of this count it did not disclose anything of substance that was not disclosed in the prior trial.

The evidence in support of the conspiracy, while I didn't hear it, it is my impression it was substan-

tially the same evidence as before, your Honor, in the trial of Mr. Seijas alone, and I am assuming from the fact of the sentence that your Honor then imposed upon Mr. Seijas that you took the whole, overall situation into consideration at that time. What was disclosed here, I think has not made it better or worse.

It seems to me that the sentence then imposed was at least substantial, and I think that any sentence imposed now on this Count XV should not add either time or fine to that previously imposed as a result of the trial. I think that the government would not oppose my attitude in that respect.

The Court: Well, Mr. Sager, I feel a great deal as you do about it. The sentence previously imposed was a substantial sentence, and I have not had any cause to feel that it was wrong, no matter how you may feel about it. I feel that it was right. A member of our own profession upon whom we placed a very special heavy burden of observing the law, let us down. There was a great deal of harm done.

On the other hand, I cannot find it in my [2137] conscience or heart to feel that an added sentence would be justified or justifiable in this instance.

Accordingly, I am going to fix sentence and make it concurrent with the existing sentence so there will be no additional extension of the sentence.

It will be the judgment and sentence of the Court that the defendant Armador A. Seijas upon his plea of guilty thereto is adjudged guilty of the offense stated in Count XV of the indictment herein and that accordingly he be committed into the custody

of the Attorney General of the United States or his authorized representative, for imprisonment in such penal institution as the Attorney General may from time to time designate, for a period of one year, this sentence to run concurrently with the existing sentence now being served.

That is the judgment of the Court.

(Thereupon, at 3.20 o'clock p.m. the Court adjourned subject to call.)

[Endorsed]: Filed September 17, 1956.

[Endorsed]: No. 15324. United States Court of Appeals for the Ninth Circuit. William R. Forman, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: October 9, 1956.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 15324

WILLIAM R. FORMAN Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Appellant above named intends to rely upon the following points:

(1) That the Court below was without jurisdiction.

(2) Count XV fails to state an offense.

(3) That the offense charged in Court XV is barred by the statute of limitations.

(4) That Count XV is duplicitous.

(5) The Court below erred in refusing to strike from Count XV the allegations contained in paragraphs A, B and D.

(6) The Court erred in ordering the return of Count XV to the Southern Division for trial.

(7) The Court below erred in denying defendant's motion to dismiss Count XV for want of jurisdiction.

(8) The Court erred in overruling defendant's

objections to the introduction of the evidence and for motion for judgment of acquittal on the ground that the Court was without jurisdiction.

(9) The Court erred in denying defendant's motion to quash the subpoena served on Al Forman and in permitting the witnesses Meyer, Al Forman and Endersby to testify with respect to books, records and documents which were the private papers and in the possession of the defendant Forman and in denying defendant's motion for mistrial on the ground of the admission of said evidence in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

(10) The Court below erred in denying defendant's motion for judgment of acquittal made at the opening of the case, at the close of the Government's case, at the close of the entire case, and renewed after the filing of the verdict on the ground that the evidence was insufficient to establish the commission of the offense charged in Count XV of the indictment beyond a reasonable doubt.

(11) The Court below erred in overruling defendant's objections to the introduction of evidence (oral and documentary).

(12) The Court below erred in the instructions to the Jury.

(13) The Court below erred in refusing to give instructions requested by the defendant.

(14) The Court below erred in denying defendant's motion for a new trial on the ground of newly

VOLUME V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 43

WILLIAM R. FORMAN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1959

CERTIORARI GRANTED MAY 4, 1959

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavits Referred to and Made a Part of Renewal of Motion for Judgment of Acquittal, and in the Alternative, Motion for a New Trial 1,883

Affidavit of Lycette, John Philip, Filed August 29, 1956 1,887

Affidavit of McDonald, Robert, Filed August 29, 1956 1,883

Affidavit of McDonald, Robert, Filed September 7, 1956 1,897

Affidavit of McGee, John W., Filed August 29, 1956 1,894

Affidavit of Mead, George W., Filed August 29, 1956 1,889

Affidavit of Obenour, John S., Filed September 7, 1956 1,899

Certificate of Clerk to Supplemental Record on Appeal 1,919

Motion for Correction of Designation of Record 1,916

Order for Transmittal of Supplemental Record 1,918

Proceedings in U.S.C.A. for the Ninth Circuit	[illegible]	[illegible]
Minute entry of argument and submission (omitted in printing)	1922	1923
Minute entry of order directing filing of opinion and filing and recording of judgment (omitted in printing)	1923	1923
Opinion, Pope, J.	1924	1923
Judgment	1935	1935
Minute entry of order directing filing of opinion on petition for rehearing	1936	1936
Per curiam opinion on appellee's petition for rehearing, October 27, 1958	1937	1936
Minute entry of order directing filing of opinion on petition for rehearing	1940	1938
Per curiam opinion on appellant's petition for rehearing, February 26, 1959	1941	1939
Clerk's certificate (omitted in printing)	1944	1940
Plaintiff's Exhibits:		
No. 2—U. S. Individual Income Tax Return for Calendar Year 1945 for Army A. Seijas (Betty L.)	1945	1941
No. 31—U. S. Individual Income Tax Return for Calendar Year 1945 for William R. Forman	1950	1946
No. 41—Report of Examining Officer (Internal Revenue Agent) on William R. Forman containing Statement of Total Tax Liability, Preliminary Statement, Item Adjustments, Computation of Income Tax—Individual for Calendar Years 1944 and 1945, Schedule No. 3 for Calendar Year 1945 (Excerpts from)	1955	1951
No. 42—Letter from Internal Revenue Agent to Army A. Seijas re deficiency in tax return for 1945, Reexamination Report, Statement of Total Tax Liability, Preliminary Statement, Schedule Nos. 2 & 3 for Calendar Year 1945 (Excerpts from)	1964	1960
No. 43—Letter from Internal Revenue Agent to Army A. Seijas re deficiency tax return for 1944 & 1945, Statement of Total Tax Liability, Preliminary Statement, Schedule Nos. 2, 3, 4, 5, 6 for Calendar Years 1944 & 1945 (Excerpts from)	1970	1966
No. 74—Letter from Whittle & Whittle, C.P.A. to Army A. Seijas, dated December 28, 1951 with Comparative Net Worth Statement for the years, 1941 through 1949 and Statement Setting Forth Determination of Cash Used and Remaining from Net Income and Increase in Net Worth for the years 1942 through 1948	1980	1976

Plaintiff's Exhibits:—Continued
No. 139-A—Testimony of Mr. Army Seijas taken January 11, 1952 ..... 1994 1990
No. 139—Supplemental testimony of Mr. Army Seijas taken January 28, 1952 ..... 2008 2007
No. 143—Testimony of William R. Forman taken March 11, 1953 ..... 2016 2017
Order allowing certiorari 2021 2023

AFFIDAVITS REFERRED TO AND MADE A PART OF RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL, AND IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL

United States District Court, Western District, of Washington, Southern Division

No. 16275

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARMADOR A. SEIJAS, Also Known as ARMY A. SEIJAS, and WILLIAM R. FORMAN,

Defendants.

AFFIDAVIT OF ROBERT McDONALD

State of Washington,
County of King—ss.

I, Robert McDonald, being first duly sworn, depose and say:

That I reside at 1217 21st Street North, Seattle, Washington. I am an insurance broker with offices in the Dexter Horton Building, Seattle, Washington; that during the years 1942 to 1945, inclusive, I was associated with the firm of W. W. Conner Co., Insurance Agents, 783 Dexter Horton Building.

Seattle, Washington; that this company as insurance agents wrote business with American Bonding Company of Baltimore and that during those years our office issued day books to customers and potential customers obtained through American Bonding Company; that these day books were bound with wire and were approximately eight (8) inches by five (5) inches in size; that I have examined a photostatic copy of one of these day books put out by our office for the year 1943 and marked Exhibit 167 in Case No. 16275 in the United States District Court at Tacoma, Washington.

I am personally acquainted with Army Seijas, a Seattle attorney, who formerly maintained his offices in the Smith Tower Building, Seattle, Washington; that some time during the latter part of 1952 or the early part of 1953, Mr. Seijas contacted me and asked me to search through my files and records and see if I could find copies of day books published for any of the years 1942 through 1945, stating that these books were important to him; that I searched our records and was able to find only two or three books which were unused for that period of time which books I gave to Mr. Seijas;

That during the course of the recent trial in Tacoma, Washington, of United States against William R. Forman, I was contacted on the telephone by a man who identified himself as John McGee and who stated that he was working for Mr. George Mead, one of Mr. William Forman's attorneys; that he requested information as to

whether or not I was formerly associated with W. W. Conner Co., Dexter Horton Building, General Insurance Agents during 1942 to 1945; I advised him that I was associated with this firm; that he then inquired as to whether or not I would be able to search the records for the purpose of obtaining copies of day books issued by W. W. Conner Co. during the years 1942 through 1945; that I explained to him that I was one of the successors of W. W. Conner Co. and still maintained offices in the Dexter Horton Building, but that I did not believe that any of the original copies of the old day books issued for those years were available;

That Mr. McGee explained to me the reasons why he wished to obtain copies of these day books, stating that photostatic copies of day books for those years had been produced during the course of the trial then in progress; that at the time Mr. McGee contacted me, I was departing on my vacation and my family were waiting in our automobile for me to meet them; that I did not understand and realize the significance of this request for information concerning these day books; that, however, I have since read articles in the newspapers about the day books allegedly kept by Mr. Seijas during this period of time and realizing the importance of the fact that Mr. Seijas obtained from me in 1952 or 1953 originals of day books issued in 1943 to 1945, I concluded I should discuss the matter with my attorney;

That, accordingly, on August 17, 1956, in the morning of said day, I called at the office of my attorney, Phillip Lycette, Seattle, Washington, and advised Mr. Lycette with respect to the foregoing; that Mr. Lycette told me that he believed this was material information and that I should disclose the circumstances to Mr. Mead; that thereupon, Mr. Lycette placed a telephone call to George Mead, Public Service Building, Portland, Oregon, at about 10:30 a.m., o'clock on August 17, 1956, and I gave the foregoing information with respect to Mr. Seijas' request and my delivery of original editions of day books for these earlier years issued by W. W. Conner Co. to Mr. Seijas;

That I further say that I do not know Mr. William R. Forman nor do I know Mr. George W. Mead or any individual connected with Mr. Forman to my knowledge; that I now maintain offices in the Dexter Horton Building and with an associate I am a successor to the former general insurance agency of W. W. Conner Co.

/s/ ROBERT McDONALD.

Subscribed and sworn to before me this 28th day of August, 1956.

[Seal] /s/ JOHN McGARRY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of copy acknowledged.

[Endorsed]: Filed August 29, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN PHILLIP LYCETTE

State of Washington,
County of King—ss.

I, John Philip Lycette, being first duly sworn on oath, deposes and says:

That I reside at 1253 Parkside Drive, Seattle, Washington, and that I am an attorney-at-law with offices at 800 Hoge Building, Seattle, Washington, and I am associated with the firm of Lycette, Diamond & Sylvester; that I am personally acquainted with Robert McDonald, a general insurance agent, with offices at 783 Dexter Horton Building, Seattle, Washington, and that Mr. Robert McDonald has been a client of mine for approximately twenty-five years; that on August 17, 1956, the morning of said day, Mr. McDonald called my office at the Hoge Building and advised me that during the course of the trial at Tacoma, Washington, during the month of August, 1956, in the case of U. S. vs. William R. Forman, et al., that he had been contacted on the telephone by an individual who identified himself as representing one of the attorneys for Mr. Forman who had inquired with respect to certain day books and diaries, photostatic copies of which have been introduced upon the trial. Mr. McDonald advised me that at that time, he was leaving immediately on his vacation and that he did not

realize the significance of the inquiry, but that subsequently, he read newspaper accounts concerning the diaries introduced at the trial and realized that he had had material information concerning such diaries which he, in good conscience, thought he should disclose. He requested my advice concerning what he should do in respect to the matter and I advised him that it was my opinion he should contact the attorneys for Forman and disclose material facts he had concerning the diaries, whereupon on the 17th day of August, 1956, at approximately 10.30 a.m., I placed a call to Mr. George Mead, Public Service Building, Portland, Oregon, and contacting Mr. Mead, I identified myself and introduced Mr. McDonald to Mr. Mead over the telephone, whereupon, Mr. McDonald related to Mr. Mead substantially the facts set forth in Mr. McDonald's Affidavit dated August 28, 1956, the contents of which I have read and which Affidavit was made in connection with the case of United States, Plaintiff, vs. Armador A. Seijas, et al., Defendants, Cause No. 16275.

I further state that I am not acquainted with William R. Forman or any associate or friend of his to my knowledge, and that I have met George Mead on August 28, 1956, for the first time and have not been previously acquainted with him or any associate to my knowledge.

/s/ JOHN P. LYCETTE.

Subscribed and Sworn to before me this 28th day of August, 1956.

[Seal] /s/ BERYLE RYAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of copy acknowledged.

[Endorsed]: Filed August 29, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE W. MEAD

State of Oregon,
County of Multnomah—ss.

I, George W. Mead, being first duly sworn, depose and say:

That I am an attorney at law with offices at 1211 Public Service Building, Portland, Oregon; that I was one of the attorneys for the Defendant, William R. Forman, in the above-captioned case of United States of America, Plaintiff, vs. William R. Forman, et al., Defendants, No. 16275; that I participated in the trial of said case in the United States District Court for the Western District of Washington, Southern Division, before the Honorable George H. Boldt, a judge of the above-entitled court;

That during the course of said trial, there was introduced in evidence by the Government photo-

static copies of diaries for the years, 1942 to 1945, inclusive, presumably kept by the Defendant, Armador A. Seijas, sometimes known as Army A. Seijas, during the period 1942 through 1945, which said diaries had notations therein allegedly representing unreported income of the said Armador A. Seijas during the years 1942 through 1945, inclusive; that said diaries were photostatic copies of original day books printed and published by American Bonding Company and issued through various insurance agencies and brokers representing American Bonding Company or placing insurance with this company.

That the photostatic copy of the day book or diary for the year 1942 had reproduced upon the cover thereof the name of Lipman & Esfeld, Insurance Agents, Smith Tower, Seattle, Washington; that the cover of the photostatic copies of day books or diaries for the years 1943 through 1945, inclusive showed upon the cover that the same were distributed by W. W. Connor Co., Insurance Brokers, 783 Dexter Horton Building, Seattle, Washington;

That approximately one week prior to the date of the trial by arrangement with the United States Attorney's office at Tacoma, we had obtained photostatic copies of reproductions of the photostats of said instruments introduced in a former trial wherein Armador A. Seijas was defendant. These reproductions did not show the name of W. W. Connor Co. for the later years. When the name of

the company became apparent during the course of the trial which had produced or issued such diaries, I ascertained that W. W. Connor was deceased and through a representative of the American Bonding Company with offices in the Dexter Horton Building, learned that a William Culliton and Robert McDonald were successors to the former insurance business of W. W. Connor Co. I instructed John McGee, a certified public accountant, to contact Mr. McDonald or Mr. Culliton to determine whether or not any of the original editions were available of said day books, also to determine whether or not if either Mr. Culliton or Mr. McDonald knew Mr. Seijas and whether he was on the regular mailing list for the period of 1942 through 1945 and if so, did he get more than one issue of the original day books per year.

Mr. McGee contacted Mr. Robert McDonald at Elliot 2212, Seattle, Washington, and advised me that McDonald told him that he had worked for the W. W. Connor Co. office for many years and that he and Mr. William Culliton were the successors to this insurance agency. Mr. McGee advised me that McDonald had told him that he did not have any of the old issues available and could not locate any. Mr. McDonald stated that he was personally acquainted with Army Seijas and that Army Seijas was on their regular mailing list for customers who received such day books during the years 1943 through 1945 and also that it was possible that Seijas had received more than one of such day books of each of the years 1943 through 1945.

Mr. McGee likewise reported that Mr. McDonald was leaving immediately on a vacation and would not be available for some time. It was, therefore, impossible for us to have any further contact with Mr. McDonald during the course of the trial which was concluded on Wednesday, August 15, 1956.

The authenticity of the day books introduced in evidence during the course of this trial presumably kept during the years 1942 through 1945 by Army Seijas with entries therein of monies allegedly unreported for pin ball business conducted by the defendant, William R. Forman, and Army Seijas during the years 1942 through 1945 was an important issue. The Defendant, William Forman, contended that such day books were manufactured evidence prepared by the Defendant Seijas for the purpose of explaining apparent unreported income during the calendar years 1946 through 1949. During the course of the trial of the Defendant, Forman, the Government produced witnesses who testified with respect to authenticity of such day books. One witness, an employee of the United States Postal Service, Mr. Conway, who qualified as an expert on questioned documents, stated that in his opinion entries in the exhibits had been made over a period of time, presumably four years. He admitted on cross-examination, however, that these exhibits could have been prepared over a period of several weeks.

On August 17, 1956, at approximately 10:30 a.m. o'clock, I received a call from Seattle, Washington,

from a man who identified himself as Phillip Lycette, an attorney in the Hoge Building, Seattle, Washington. Mr. Lycette stated that he was attorney for Robert McDonald and that Mr. McDonald was then in his office and had information which he had withheld from me during the course of the Forman trial and which he now wished to disclose. Thereupon, Mr. McDonald came on the telephone and talked with me stating that he had been contacted during the course of the Forman trial by a man working for me who had inquired with respect to the day books issued by the W. W. Connor Co. during the years 1942 through 1945. He stated that while he had advised us that he knew Army Seijas and that he did not have any of the old issues of the day books circulated by this office during that period, that he had failed to advise us, not realizing the significance, of the fact that Army Seijas had contacted him approximately three years ago during the late part of 1952 or the early part of 1953 and had requested that he search his records to obtain 1942 through 1945 issues of the day books published by American Bonding Company and circulated to customers during those years by the W. W. Connor Co office. Mr. McDonald then advised me that he had searched his records and had found one or two copies of these original issues which were unused and which he had then delivered to Army Seijas. Mr. Lycette stated that he was leaving on his vacation that day, August 17, 1956, but that Mr. McDonald would be glad to talk to

me further about the matter and would sign an affidavit to the above facts with respect to his personal acquaintance with Army Seijas and the fact that he had delivered to Seijas original issues of day books issued by the W. W. Connor Co. during the years 1943 to 1945 to Mr. Seijas late in the year 1952 or the early part of 1953.

/s/ GEORGE W. MEAD.

Subscribed and sworn to before me this 21st day of August, 1956.

[Seal] /s/ MARY McHENRY,
Notary Public for Oregon.

My Commission Expires February 9, 1957.

Service of copy acknowledged.

[Endorsed]: Filed August 29, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN W. McGEE

State of Washington,
County of Lewis—ss.

I, John W. McGee, being first duly sworn, depose and say:

That I am a certified public accountant and a member of the firm of McGee & Holland with offices in Chehalis, Washington;

That during the course of the trial of the United States of America vs. William R. Forman, et al., No. 16275, in the United States District Court at Tacoma, Washington, I was employed by George Mead, one of the attorneys for William R. Forman, to make calculations and to contact witnesses and that I was personally present during most of said trial at Tacoma, Washington;

That during the course of the trial, Mr. Mead requested that I contact Mr. Robert McDonald, an insurance agent with offices in the Dexter Horton Building at Seattle, Washington. I was advised by Mr. Mead that Mr. McDonald had been associated with the firm of W. W. Connor Co., insurance agents, 783 Dexter Horton Building, Seattle, Washington, during the years 1942 through 1945 and that the originals of certain photostatic copies of day books introduced during the course of the trial by the Government and identified by Army Seijas as records kept by him during the years 1942 through 1945 were issued by W. W. Connor Co. during said period.

I personally contacted Mr. Robert McDonald on the telephone and requested that he search his records to determine whether or not any of these day books issued for the years 1942 through 1945 were available. Mr. McDonald advised me that he was one of the successors to the former insurance agency of W. W. Connor Co., that he presently had offices in the Dexter Horton Building at Seattle and that he did not believe that any of such original

copies of said day books were available. He stated that the day books were published by the American Bonding Company and issued by the office of W. W. Connor Co. during that period of time to customers and potential customers. I explained to Mr. McDonald that photostatic copies of certain day books for this period had been introduced at the trial which Mr. Seijas claimed had been kept by him during this period and that we desired to obtain duplicate copies of the originals of such day books. Mr. McDonald advised me that he did not believe that any originals of such books were available and that he was leaving immediately on his vacation. Mr. McDonald did not disclose to me in this telephone conversation that he had given originals of such day books issued by W. W. Connor Co. during the years 1942 to 1945 to Mr. Seijas at any later date or that Mr. Seijas had made a request for earlier editions of such day books nor did I have any reason to believe from my conversation with Mr. McDonald that Mr. Seijas had obtained editions of such day books for any of the years 1942 through 1945 at a later time.

I was unable to contact Mr. McDonald again for the reason that he advised me that he was leaving immediately on his vacation and my telephone call to him was from Tacoma to Seattle where I had been able to contact Mr. McDonald at his office, Elliot 2212, on August 13, 1956.

/s/ JOHN W. McGEE.

Subscribed and sworn to before me this 22nd day of August, 1955.

/s/ A. A. HULL,
Notary Public in and for the State of Washington,
Residing at Chehalis.

Service of copy acknowledged.

[Endorsed]: Filed August 29, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT McDONALD

State of Washington,
County of King—ss.

I, Robert McDonald, being first duly sworn, depose and say:

That on August 28, 1956, I executed an affidavit in connection with the above-noted case for George W. Mead, Attorney for William R. Forman and that this affidavit is supplemental thereto.

Army Seijas was a client of the W. W. Conner Company and as such he was on the regular mailing list to receive one or more day books for each year 1942 to 1946; that I recollect the date Mr. Seijas telephoned me and requested old day books for the years 1942 to 1945, inclusive, by the fact that in April, 1952, we moved into a new home, and that on or about that date Mr. Seijas made his request.

After locating three old day books, I delivered them to Mr. Seijas at his office in the Smith Tower, Seattle; that two of these day books were for the years either 1943 and 1944, or 1944 and 1945 or 1943 and 1945, i.e., two separate years for the three-year period 1943 to 1945 and that one was for a year subsequent to 1945.

I went on vacation on August 13, 1956, and returned home the night of August 16, 1956. On the day I left on vacation, I received a telephone call from a Henry Schaefer, who identified himself as being with the Doric Corporation. Mr. Schaefer requested information concerning any old day books I might have of the W. W. Conner Company for the 1940's. Shortly after Mr. Schaefer's call I received Mr. John McGee's call with a similar request.

This statement is true and correct to the best of my knowledge and belief.

/s/ ROBERT McDONALD.

Subscribed and sworn to before me this 4th day of September, 1956.

/s/ ALBERT G. KEENEY,
Special Agent, Internal
Revenue Service.

[Endorsed]: Filed September 7, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN S. OBENOUR

United States of America,
Western District of Washington,
Southern Division—ss.

I, John S. Obenour, being first duly sworn, depose and say:

That I am a duly appointed Assistant United States Attorney serving in the Western District of Washington, and while serving in said capacity did represent the United States in the case of United States against Armador A. Seijas, also known as Army A. Seijas, and William R. Forman, Cause No. 16275, in all proceedings, including the preparation and trial of both defendants;

That in the trial of the defendant Seijas, beginning July 6, 1955, at Tacoma, Washington, certain photostatic copies of four diaries, previously furnished by Seijas to Government agents, were introduced into evidence by the Government. These four original diaries were produced by Seijas during a conference with Woolvin Patten, Assistant Regional Counsel for the Internal Revenue Service, on April 15, 1953. Shortly thereafter Seijas permitted these diaries to be photostated under the supervision of Willard Oftedal, Special Agent, Internal Revenue Service, subject to certain entries being concealed by Seijas by covering them during the photostating process. Two copies of these photostats were made of the original diaries at this time.

The diaries were for the years 1942, 1943, 1944 and 1945. The photostatic copies were marked Government's Exhibits 166, 167, 168 and 169 in the trial against Seijas and were admitted in the afternoon of July 14, 1955. The photostatic copies of the diaries continued in the possession of the Clerk of the Federal Court during the trial and thereafter until after January 30, 1956, when they were removed by Government agents under an order of the Court, and were returned to the custody of Government representatives pending disposition of the remaining Count of the Indictment. Seijas, while testifying in his own behalf, stated the original diaries had been lost or destroyed in some manner unknown to him. He similarly testified as a Government witness in the trial against William Forman. The original diaries were seen only on two occasions—the first by Woolvin Patten and the second, when photostated by Oftedal, and their present whereabouts or existence are unknown to any Government representative.

The two copies in the possession of the Government were complete as to all entries in the original diaries subject to those concealed by Seijas, which were identified by Seijas as pertaining to matters not pertinent to the tax investigation. Each of the photostatic copies contained a copy of the cover sheet of the original diaries, which showed that the diary for 1942 was given with the compliments of Lipman and Esfeld, and those for 1943, 1944 and 1945 were given by W. W. Conner Company. In

each instance, the address and phone number of the donor was also shown.

During the course of the trial in 1955 against Seijas, testimony was given by Government agents concerning the original diaries and the entries made therein, as described to them by Seijas. Seijas himself testified as to the manner in which he kept these diaries reflecting holdout money received from the pinball operations during the years 1942 through 1945.

George W. Mead, attorney of record for the defendant Forman since December 7, 1953, was present during various stages of the Seijas trial in 1955. He accompanied Thelma Endersby, an employee of the Forman Brothers (William and Albert) when she appeared pursuant to a subpoena to produce certain Forman Brothers partnership records. In addition, a transcript of the Seijas trial was obtained immediately after the trial by Mr. Forman which contained all testimony pertaining to these diaries. Mr. Mead had that transcript at counsel table during the trial of William Forman, begun July 30, 1956. This transcript was made available to Mr. Seijas or his representatives, according to information furnished this affiant, during the time Mr. Seijas was considering appeal of his conviction. Mr. Mead was also in contact with the United States Attorney's office during the Seijas trial and thereafter. No request to inspect these photostatic copies was made to the Govern-

ment representatives by Forman or his representatives until after July 16, 1956.

After the motion to quash the subpoena against Albert Forman was heard by the Court, sitting in Seattle, Washington, Mr. Mead requested of the Government representatives the opportunity to inspect the copies in the possession of the Government. Immediate consent was given to make them available although they were at that time in Tacoma. It was agreed that Mr. Mead would call at a later time for an appointment. On or about July 23, 1956, Mr. Bischoff phoned and 2:30 p.m., Tuesday, July 24, was set for the time the diaries would be made available.

At the appointed time the four photostatic copies introduced in the Seijas trial were given to Mr. Mead and Mr. Bischoff in the office of the affiant. The entries were explained to them by Government representatives, as they understood them. All questions concerning them were answered and full opportunity was given for examination. Each copy included the cover sheet upon which was printed the name, address and telephone number of the donor of the diary. Each cover sheet still contained the Exhibit Number Tag affixed by the Clerk during the Seijas trial.

On Thursday, July 26, Mr. James O'Hern, also an attorney of record for Mr. Forman, a member of a firm officing in the Tacoma Building, Tacoma, Washington, requested permission to make photo-

static copies of the copies in the possession of the Government. The same four copies of the diaries were given to Mr. O'Hern to photostat. The copies were returned by Mr. O'Hern the next day, and copies made by Mr. O'Hern were used by Mr. Mead during the trial of Mr. Forman.

During the conference with Mr. Bischoff and Mr. Mead on July 24, 1956, Mr. Mead inquired if the diaries had been examined by Government experts, and was told that they had not been so examined.

The diaries were introduced into evidence by the Government as Exhibits 76, 77, 78 and 79 on July 31, 1956, the second day of the trial against Mr. Forman. Thereafter, Mr. Seijas testified as a Government witness, and as the cross-examination continued, it became clear that the authenticity of the diaries would be challenged. On Thursday, August 2, James V. P. Conway, a Postal Inspector and an expert on questioned documents, was contacted at his office in San Francisco, and his services were requested. Mr. Conway arrived Monday evening, August 6, 1956, and gave testimony concerning the authenticity of the documents on Wednesday, August 8, 1956. The copies of the diaries having been introduced into evidence on July 31, 1956, continued in the possession of the Clerk of the Court and remained available for inspection by all parties.

The trial of Mr. Seijas in 1955 was reported extensively by the two Seattle newspapers, and particular emphasis was given the diaries at that time.

The trial of Mr. Forman was reported only by the Seattle Times, an afternoon paper. The Seattle Post-Intelligencer carried wire service stories only of the Forman trial. Reference to the diaries was made during the first part of the trial and duly reported during the period of July 31st to August 8. An examination of the Seattle newspapers for the period August 13 to August 17, 1956, discloses that no reference was made to the diaries in stories carried by either the Seattle Times or the Seattle Post-Intelligencer. This is the period cited in the affidavit of Mr. Robert McDonald. Clippings of these stories are enclosed as attached exhibits.

An examination of Exhibits 76, 77, 78 and 79 shows that there were ten entries covered in the diary for 1942 (Exhibit 76), beginning on June 13, ten entries covered in 1943 (Exhibit 77), twenty-two covered in 1944 (Exhibit 78), and thirty-eight entries covered in 1945 (Exhibit 79). In addition, 59 slips were affixed to the diary for 1945 by scotch tape for the period after May 2, 1945. During this same period there were 30 entries written directly upon the pages of the diary which were not covered by Seijas during the photostating process.

Mr. Forman and his attorney, Mr. Mead, were made aware of the existence of these diaries by Government agents, and of the copies in the possession of the Government shortly after April 15, 1953. However, no request was made for inspection prior to July 16, 1956, of any Government agent. From testimony introduced in the trials of both

Seijas and Forman, Seijas and Forman continued their close association after the disclosure of the diaries by Seijas in April, 1953.

At the trial of Mr. Forman, the only reference made to the authenticity of the diaries was in the opening statement of Mr. Mead and by implication in cross-examination of Government agents. No evidence was produced by the defense on this question at all. The affidavits of Mr. McDonald, filed by the defense and by the Government, do not in any way represent that the diaries photostated by the Government were the same ones furnished by Mr. McDonald to Mr. Seijas in 1952 or 1953.

/s/ JOHN S. OBENOUR.

Subscribed and sworn to before me this 7th day of September, 1956.

[Seal] /s/ [Indistinguishable],
Deputy Clerk, United States District Court, Western District of Washington, Southern Division.

Seattle Post-Intelligencer
Tues., Aug. 14, 1956

Government
Ends Its Case
In Taxes Suit

Tacoma, Aug. 13—(AP)—The government this morning ended presentation of its case against William R. Forman, who is charged with conspiracy to evade income taxes, in Federal District Court here.

Special Agent Edward J. O'Leary, Internal Revenue Service, testified that Army Seijas, business partner of Forman, failed to report some $82,548.33 in taxes for the years 1942-1945.

Seijas testified earlier in the trial that this amount represented one-half of unreported income from his pinball partnership with Forman, and that the other half went to Forman.

Tells of 'Loan'

O'Leary said that Forman told him and Williard Oftedal, another revenue agent, that he loaned Seijas one-half of the $30,000 he received for the sale of his interest in the pinball business to Henry Mornin.

The Government maintains that Forman actually remained a partner with Seijas after the sale, and that the $15,000 Seijas received was not a loan.

O'Leary said that Forman never provided any documentation to show that it was a loan

'Opportunity Day'

O'Leary testified that when he and Oftedal informed Forman and his attorney, George Mead, in 1953 that Seijas had implicated Forman in the tax holdouts that Mead replied, "It's opportunity day and everyone will have to paddle his own oar."

O'Leary said Forman's only statement was "Does this mean I will have to pay fraud penalties?" O'Leary said he told Forman that if Seijas' statements were true, "it could be a lot more serious than that."

Forman Found
Guilty In Tax
Conspiracy Case

Tacoma, Aug. 15—(AP)—A Federal Court jury tonight found William R. Forman, Seattle theater owner, guilty of conspiracy to evade federal income taxes.

The verdict coming after the jury had deliberated for nine hours, ended Forman's 13-day trial here.

Forman had been charged with conspiring with Army A. Seijas, Seattle attorney, to evade $165,000 in income taxes on income from their joint pinball enterprise in Kitsap County in 1942-45. Seijas, found guilty of income tax evasion last year, is serving a five-year term at McNeil Island Federal Penitentiary.

Maximum sentence on the verdict could be five years' imprisonment and a fine of $10,000.

Seattle Times
Aug. 13, 1956

U. S. Rests
In Forman
Tax Trial

By Associated Press.

Tacoma, Aug. 13—The government this morning rested its case against William R. Forman, who is charged with conspiracy to evade income taxes, in Federal District Court here.

Edward J. O'Leary, Internal Revenue Service agent, testified that A. A. (Army) Seijas, business partner of Forman, failed to report some $82,548.33 in taxes for the years 1942-1945.

Seijas testified earlier in the trial that this amount represented half of unreported income from his pinball partnership with Forman, and that the other half went to Forman.

O'Leary said Forman told him and Willard Oftedal, another revenue agent, that he lent Seijas half of the $30,000 he had received from the sale of his interest in the pinball business to Henry Morin.

Continued Partnership Charged

The Government maintains that Forman actually remained a partner with Seijas after the sale, and that the $15,000 Seijas received was not a loan.

O'Leary said Forman never provided documentation to show that it was a loan.

O'Leary testified that when he and Oftedal informed Forman and his attorney George Mead, in 1953, that Seijas had implicated Forman in the tax holdouts, Mead replied:

"It's opportunity day and everyone will have to paddle his own oar."

O'Leary said Forman's only statement was, "Does this mean I will have to pay fraud penalties?"

O'Leary said he told Forman that if Seijas' statements were true, "It could be a lot more serious than that."

Cross-Examination Begun

Mead began his cross-examination of O'Leary just before the noon recess. He was expected to begin his presentation of the defense later today.

Assistant United States Attorneys J. S. Obenour and Charles Billinghurst presented the government's case. E. J. Bischoff, attorney, is assisting Mead. Federal Court Judge George H. Boldt is hearing the case.

Seattle Times
Aug. 14, 1956

No Testimony
By Forman;
Defense Rests

By Dwight Schear
Times Staff Correspondent

Tacoma, Aug. 14—William R. Forman chose not to give a jury his version of a charge that he conspired against the government.

Forman's defense rested this afternoon without the defendant's having taken the stand.

United States District Court Judge George H. Boldt today told jurors the case will be placed in their hands tomorrow afternoon.

Mrs. William R. Forman gave five minutes of testimony for her husband today.

Mrs. Forman, an attractive brunette, has been married to Forman 22 years.

Mrs. Forman's testimony was confined to her

recollection of a telephone call she received in July, 1955, from A. A. (Army) Seijas, Seattle attorney.

Joint Conspiracy Charged

Seijas, serving a five-year prison term for income tax evasion, pleaded guilty, three days before the beginning of Forman's trial, to a conspiracy charge in which he was named with Forman.

Forman's attorneys say the charge against their client results from attempts at blackmail and extortion by Seijas, former partner with Forman in a lucrative Kitsap County pinball business.

Mrs. Forman was asked what Seijas said when he telephoned her in Los Angeles from Seattle just after Seijas' conviction of tax evasion.

Mrs. Forman said Seijas, referring to her husband, told her:

"Have him come up here right away * * *. Tell Bill if he knows what's good for him, he'll get right up here."

Seijas Denied Threats

Testifying as a government witness earlier in the trial, Seijas had denied ever threatening Forman. Seijas described the telephone call as an attempt to warn Forman that a document had been introduced in the Seijas trial that might incriminate Forman.

Today, George Mead, a Portland, Ore., attorney representing Forman, asked Mrs. Forman:

"Did Mr. Seijas say anything about any records he wanted Mr. Forman to see?"

"No," Mrs. Forman answered, "he didn't say anything about that."

Tax Counsel Called

Earlier, the defense called two witnesses who previously had appeared. They were Woolvin Patten, former assistant regional counsel for the Internal Revenue Service, and George V. Whittle, Seattle certified public accountant.

Patten described a conference he had had with Seijas on April 15, 1953. At the conference, Patten, said, Seijas disclosed that he had received $86,000 in unreported income during the Second World War years of his partnership with Forman.

Patten was asked if he had queried Seijas about Forman's share of the pinball money.

"* * * He (Seijas) said the $86,000 was merely his portion," Patten testified, "and that Forman also had made $86,000.

"I asked him what he thought Mr. Forman would say if we asked him about it. He said Mr. Forman would probably deny it."

Whittle, who prepared a net-worth statement for Seijas in 1951, said that on several occasions Seijas had mentioned to him that Forman owed Seijas money and the latter was trying to collect it.

Earlier today, three business associates of Forman appeared as character witnesses for him. They were Mike Barovic, Puyallup; Chester Nilsson, Tacoma, and Henry Schaefer, Seattle.

Seattle Times
Aug. 15, 1956

No Argument
For Forman;
Jury Gets Case

By Dwight Schear
Times Staff Correspondent

Tacoma, Aug. 15—William R. Forman's attorneys, in a surprise move, today allowed the Forman conspiracy-to-defraud case to go to the jury without a closing defense argument.

The six-man, six-woman jury received the case at 12:20 o'clock today after instructions from United States District Court Judge George H. Boldt. The jury went to lunch before beginning deliberations.

Judge Boldt emphasized to the jury that Forman was on trial only for conspiracy. The judge defined a conspiracy as "a partnership in crime."

Judge Boldt recalled in his instructions that Forman did not testify in his own defense, and added that the jurors should draw no adverse inference from Forman's failure to testify.

Charles W. Billinghurst, an assistant United States attorney, presented a 40-minute closing argument before yielding the floor to George Mead, one of Forman's two Portland, Ore., defense attorneys.

No Summation Made

Mead arose, faced the jury, and said simply:

"The defendant, Forman, submits the matter without argument."

Billinghurst, a former Pierce County deputy

prosecutor, said this was the first time he had participated in a jury case in which the defense offered no summation.

Forman, 43, Seattle theater man, has been on trial for two and a half weeks on a charge of conspiring to cheat the government on the income taxes of his former pinball-business partner, A. A. (Army) Seijas.

Seijas, 49-year-old Seattle attorney, is serving a five-year prison term for income tax evasion.

Today, Billinghurst told the jury:

"On numerous occasions in subsequent years (years following the Forman-Seijas pinball partnership during the Second World War) Seijas and Forman made false statements and false records to conceal or attempt to conceal knowledge of income of more than $160,000 from the government."

Money Was Split

The more than $160,000 was unreported pinball "holdout" money Forman and Seijas split equally between 1942 and 1945, Seijas testified.

Billinghurst described Forman as an "opportunist," and said Forman and Seijas were "talented people, endowed with creative intelligence."

The government attorney asserted Forman and Seijas conspired shrewdly to protect each other from disclosure of their unreported income.

The conspiracy ran on the rocks, Billinghurst told the jury, when Seijas borrowed $100,000 from Forman in 1948 to finance expansion of theater interests in California.

Loan Caused Trouble

"It was because of that $100,000 loan," Billinghurst declared, "that Mr. Seijas came a cropper with the income tax people. The government didn't know he had that kind of money."

The final defense witness was Matt McCusker, Seattle insurance broker, who was a partner with Seijas in the operation of three Kitsap County taverns during the years of the Forman-Seijas pinball partnership.

McCusker indicated he doubted Seijas' testimony that large sums of money could be taken out of pinball machines by pinball operators without the knowledge of the pinball location owners—such sums as the "holdout" money described by Seijas.

"The manager (of a tavern or restaurant)," said McCusker, "can determine pretty well, down to about $5 or $10 a week, what's in that machine. * * * He knows how many nickels he had on hand at the start of the week."

Seattle Times
Thursday, August 16, 1956

Forman Guilty,
Released on
$5,000 Bail

By Dwight Schear
Times Staff Correspondent

Tacoma, Aug. 16—Wiliam R. Forman, Seattle theater man, convicted of conspiracy to defraud the government, today was released from federal custody on $5,000 cash bail.

Forman, 43, was found guilty last night by a jury which deliberated nine hours.

United States District Judge George H. Boldt today set September 7 for sentencing. The maximum sentence Judge Boldt could give Forman is five years in prison and a $10,000 fine.

Judge Boldt granted Forman's attorneys until August 30 to present written motions for a judgment of acquittal, or, failing that, a new trial. The motions will be argued September 7.

If Judge Boldt denies the motions, Forman's attorneys—George Mead and S. J. Bischoff, both of Portland, Oregon—are expected to appeal to the United States Circuit Court of Appeals in San Francisco.

After the verdict last night, Forman and his wife, Dorothy, embraced, and Forman was led away in the custody of the United States marshal. He remained in confinement overnight.

Forman had been at liberty on $1,500 bail since his indictment in November, 1953.

Forman was found guilty of conspiring with A. A. (Army) Seijas, Seattle attorney, to defraud the government on Seijas' taxes.

Forman and Seijas were partners in a lucrative pinball business in Kitsap County during the Second World War. Seijas, now in prison for tax evasion, testified he and Forman each received $86,000 in unreported pinball "holdout" money between 1942 and 1945.

Service of copy acknowledged.

[Endorsed]: Filed September 7, 1956.

[Title of District Court and Cause.]

MOTION FOR CORRECTION OF DESIGNATION OF RECORD

Comes now defendant, William R. Forman, and moves the Court for an Order correcting the Designation of Record on appeal heretofore filed herein, by including therein the following portions of the record, to wit:

(1) Affidavit of Robert McDonald, filed August 29, 1956;

(2) Affidavit of John Philip Lycette, filed August 29, 1956;

(3) Affidavit of George W. Mead, filed August 29, 1956;

(4) Affidavit of John W. McGee, filed August 29, 1956;

(5) Affidavit of Robert McDonald, filed September 7, 1956;

(6) Affidavit of John S. Obenour, filed September 7, 1956,

and directing the Clerk of this Court to cause a Supplemental Record to be prepared, certified and forwarded to the Clerk of the United States Court of Appeals for the Ninth Circuit.

This Motion is made under Rule 75(h) of the Federal Rules of Civil Procedure and Rule 39 of the Federal Rules of Criminal Procedure.

Dated: March 14, 1957.

/s/ S. J. BISCHOFF,

/s/ GEO. W. MEAD,

Attorneys for Defendant
William R. Forman.

STATEMENT IN SUPPORT OF MOTION

The undersigned, one of the attorneys for defendant Forman, does hereby represent to the Court that, simultaneously with the filing of defendant's motion for a new trial, there was filed in support of said motion, the Affidavits numbered (1), (2), (3) and (4) of this Motion, and the Plaintiff filed Affidavits numbered (5) and (6) in opposition thereto. Said Affidavits were filed herein and were considered by the Court in passing on the motion for a new trial on the ground of newly discovered evidence.

That through inadvertence and mistake, the undersigned omitted to specify and designate, particularly the aforesaid documents, in the Designation of Record and as a result thereof, the Clerk of this Court did not cause the said Affidavits to be included in the record on appeal filed with the Clerk of the United States Court of Appeals.

I certify that it was not the intention to omit said Affidavits from the record; that it is necessary and important to defendant that said Affidavits

should be made a part of the record on appeal for consideration by the Court of Appeals.

I, therefore, respectfully pray for an Order correcting the Designation of Record in the respects referred to above and directing the Clerk of the Court to prepare a Supplemental Record, certify the same, and forward the same to the Clerk of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

/s/ S. J. BISCHOFF,
Of Counsel for Defendant
William R. Forman.

[Endorsed:] Filed March 15, 1957.

[Title of District Court and Cause.]

ORDER

On motion of the defendant, William R. Forman, it is Ordered, that the Clerk of this Court prepare a Supplemental Record on appeal consisting of:

(1) Affidavit of Robert McDonald, filed August 29, 1956;

(2) Affidavit of John Philip Lycette, filed August 29, 1956;

(3) Affidavit of George W. Mead, filed August 29, 1956;

(4) Affidavit of John W. McGee, filed August 29, 1956;

(5) Affidavit of Robert McDonald, filed September 7, 1956;

(6) Affidavit of John S. Obenour, filed September 7, 1956.

That said Supplemental Record be duly certified by the Clerk and that it be forwarded, for filing, to the Clerk of the United States Court of Appeals for the Ninth Circuit.

Dated: March 18, 1957.

/s/ GEORGE H. BOLDT,
Judge.

[Endorsed]: Filed March 18, 1957.

United States District Court, Western District of Washington, Southern Division

District Court No. 16275
Circuit Court No. 15324

[Title of Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENT RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to Supplemental Designation of Defendant William R. Forman, and Order of the District Court, filed and entered on March 18, 1957, I am transmitting herewith the following original papers, as a Supplemental Record on Appeal of defendant William R. Forman, in the above-entitled cause, to wit:

1. Affidavit of Robert McDondald (filed Aug. 29, 1956);
2. Affidavit of John Philip Lycette (filed Aug. 29, 1956);
3. Affidavit of George W. Mead (filed Aug. 29, 1956);
4. Affidavit of John W. McGee (filed Aug. 29, 1956);
5. Affidavit of Robert McDonald (filed Sept. 7, 1956);
6. Affidavit of John S. Obenour (filed Sept. 7, 1956);
7. Motion for Correction of Designation of Record (filed Mar. 15, 1957);
8. Affidavit of S. J. Bischoff (filed Mar. 15, 1957);
9. Supplemental Designation of Record (filed Mar. 15, 1957);
10. Order for Transmittal of Supplemental Record (filed Mar. 15, 1957).

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court, at Tacoma, Washington, this 22nd day of March, 1957.

MILLARD P. THOMAS,
Clerk;

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 15324. United States Court of Appeals for the Ninth Circuit. William R. Forman, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed March 25, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 1922]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 15, 1957 (omitted in printing)

[fol. 1923]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—September 15, 1958 (omitted in printing)

[fol. 1924]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,324

WILLIAM R. FORMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Western District of Washington, Southern Division

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Before: Healy, Pope and Fee, Circuit Judges.

OPINION—September 15, 1958

POPE, Circuit Judge.

Appellant Forman was found guilty and sentenced under the fifteenth count of a fifteen count indictment returned

against him and one Seijas. The first fourteen counts of the indictment stated charges against Seijas only, and they are not involved in this appeal. In the fifteenth count it was charged that Seijas and Forman entered into a conspiracy to defraud the United States and to violate certain sections of the Internal Revenue Code and the Criminal Code, among them section 145(b) of the Internal Revenue Code (1939),[1] relating to attempts to evade or defeat income tax. As the case is presented here the key portions of this count were stated in paragraphs "C" and "D", as follows:

[fol. 1925] "C. To violate Section 145(b) of the Internal Revenue Code, 26 U.S.C., Section 145(b), by knowingly and willfully attempting to defraud and evade a large portion of the income taxes owed by Armador A. Seijas and his wife, Betty L. Seijas, and others to the United States for the years 1942 to 1945, inclusive, upon their share of the unreported income of the afore-mentioned partnerships.

"D. To violate Section 1001 of the New Criminal Code, 18 U.S.C., Section 1001, and Section 145(b) of the Internal Revenue Code, 26 U.S.C., Section 145(b), by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive."

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[1] "(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." At the trial the violation of sections other than this one were removed from consideration of the jury as a basis of conspiracy.

The count listed 33 overt acts alleged to have been committed in furtherance of the conspiracy.

Seijas in a separate trial was found guilty, under counts 9 through 13, of substantive offenses pertaining to the evasion or attempt to evade his tax and that of his wife for the years 1946 through 1948. He pleaded guilty to the charge against him in count 15. Forman was tried alone upon that count and Seijas, who was then serving his sentence under the other counts, was produced as a witness for the Government.

The evidence tended to show that during the years 1941-1945, inclusive, Seijas and Forman, as partners, were conducting the business of operating pinball machines in Kitsap County, Washington; that they carried on this business under an arrangement whereby the pinball machines were placed in taverns and other locations; that the coins in the machines were collected by employees of the partnership and the amounts so taken would be divided equally between the partnership and the proprietor of the pinball location; that instead of accounting for all of the collections made, the collectors by direction of the partners held out a portion of the actual amounts collected and turned over [fol. 1926] to the partnership bookkeeper for entry in the partnership books only a portion of the actual collections; that in this manner some $172,400 was held out of the pinball receipts during the years 1942 through 1945; that this amount was neither reported to the location owners nor entered in the partnership books, nor reflected in the income tax returns,—it was split between Forman and Seijas neither of whom reported any part of these sums upon his own tax returns.

Forman's participation in the setting up of this arrangement and in the handling of the partnership books and the making of the partnership information returns, so as to conceal the receipt of these funds during the years 1942 to 1945, was proven by credible evidence, and there was abundant proof of Forman's participation in a conspiracy such as that described in paragraph C quoted above, namely, one to defraud and evade Seijas' income taxes for the years 1942 through 1945.

The outcome of this case, however, does not turn upon any such question since the court instructed the jury that a conspiracy to commit the offenses referred to in paragraphs C and D of the indictment, insofar as they were for the purpose of evading the tax liability of Seijas and wife, were subject to a six year period of limitation, and prosecution must be commenced within six years of the last overt act in furtherance of such conspiracy. The court stated to the jury:

"I charge you that the conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax returns of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statute of limitations would run from that time." The indictment was filed November 19, 1953.

However, as bearing upon that portion of the indictment, quoted above as paragraph D, and relating to a conspiracy to violate section 145(b) of the Internal Revenue Code, "by furnishing false books and records and making false statements, for the purpose of concealing . . . their share of the unreported income . . . and for the purpose of concealing . . . the true income tax liability" of Seijas and his wife, the court charged the jury as follows: "If you find that the defendant Seijas and Forman conspired to attempt [fol. 1927] to evade the tax liability of Seijas and his wife and others for the years 1942 to 1945, inclusive, you must find the defendant Forman not guilty unless you are convinced beyond a reasonable doubt that they also conspired to conceal the alleged conspiracy in order to prevent prosecution therefor and that such additional conspiracy was a continuing one. You cannot imply that there was a continuing conspiracy to conceal the offense from the fact that they may have conspired to attempt to evade the tax liability of Seijas and wife. That is to say, the mere fact that they may have conspired to evade the tax liability of Seijas and his wife for the years in question, if it be a fact, does not warrant the conclusion that they also conspired to conceal the commission of the offense. You would have to be convinced beyond a reasonable doubt that they actually conspired to conceal the conspiracy and that they com-

mitted an overt act or acts in furtherance of such subsidiary conspiracy. As previously stated, the understanding or agreement for such conspiracy need not have been entered into by written or formal oral expression, but may be determined from a consideration of the conduct and statements of the parties and all of the evidence as shown by the evidence in the case." [2] It will thus be noted that the jury were told that it was not sufficient merely to prove conspiracy to attempt to evade tax liability of Seijas and wife from 1942 to 1945, inclusive, but that the jury must be convinced beyond a reasonable doubt that they also conspired to conceal the conspiracy to evade the tax liability in order to prevent prosecution thereof and that such addi-[fol. 1928]tional conspiracy was a continuing one. The court further made this point very clear by concluding its charge in respect to these matters as follows:

"Summarizing with respect to the statute of limitations, you must first find that Forman knowingly and wilfully conspired with Seijas to attempt to evade the tax liability of Seijas, Mrs. Seijas and others;

"Second, that part of this conspiracy was to make continuing efforts to avoid detection and prosecution under the condition just referred to;

"Third, that one or more of the alleged conspirators committed an overt act or acts within a period of six years

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[2] This was followed by the following portion of the charge which contains the part previously quoted: "If you find that the defendants only conspired to attempt to evade the tax liability of defendant Seijas and his wife and did not form the additional conspiracy to conceal the same, then I charge you that the conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax returns of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statutes of limitations would run from that time, and if you so find, your verdict would have to be not guilty.

"If you find that there was no subsidiary conspiracy to conceal as I have just outlined it to you, but acts of concealment were thereafter committed as an after-thought and were conceived after the filing of the returns in March, 1946, then, of course, your verdict must be for the defendant Forman."

of the conspiracy and during its continuance to accomplish the object of the conspiracy just referred to; namely, attempted evasion of tax liability of Seijas, Mrs. Seijas and others.

"If you cannot answer all three of these questions in the affirmative, as shown by the evidence beyond a reasonable doubt, then you must return a verdict of not guilty."

Appellant argues that the court should have granted his motions for judgment of acquittal, contending that there was not sufficient evidence to establish: "(a) a conspiracy between defendant and Seijas to evade Seijas' tax liability; and (b) a subsidiary conspiracy to conceal the aforesaid conspiracy."

As above indicated, we think the proof of the conspiracy to evade Seijas' tax liability was entirely adequate and so strong as to be almost overwhelming. Actually, as their collector testified, they "stole" from the machines. They were engaged in perpetrating a fraud upon the location operators who were supposed to receive half of the proceeds. They sent false reports to their own bookkeeper as to the partnership gross receipts. This led to the false partnership returns and the evasion of the taxes owing by Seijas.

Clear as this evidence of their guilt of a conspiracy to evade Seijas' taxes is, it is not the important part of this suit in view of the fact that this portion of the conspiracy was consummated, as the court told the jury, on the filing [fol. 1929] of Seijas' tax returns in March, 1946. As the court's instructions stated, if this is all there was to the conspiracy, the statute of limitations would run from that time and the prosecution would be barred.

As to the contention that there was no evidence to prove that there was a subsidiary conspiracy to conceal, or to prove that the conspiracy itself included the actual conspiracy to accomplish not only the evasion of the taxes but the concealment of that evasion, appellant leans heavily upon the testimony given by defense witnesses that Forman ceased all participation in the pinball machine operations and in his association with Seijas in that business about

interest in the pinball machine partnership business to one Morin and written agreements were executed evidencing the assignment by Forman of 49% of his interest to Morin and 1% to Seijas. At the same time Seijas and Morin adopted the articles of copartnership formerly executed between Forman and Seijas which recited that Morin was accepted as a partner by Seijas instead of Forman. There was also evidence to indicate that the "hold out" practices previously carried on between Seijas and Forman ceased and terminated about that time.

The Government claimed on the other hand that notwithstanding the execution of these instruments, Forman remained a secret partner as respect to Seijas' interest in the pinball business. Thus it was shown that half of $30,000 received from Morin for sale of Forman's interest to him was paid over to Seijas who testified that it was agreed that Forman was to have a secret one-half interest in Seijas' 51% of the Seijas-Morin partnership.[3] Appellant contends that he has established by "overwhelming" evidence that the payment of the $15,000 was a loan from Forman to Seijas and not a division of the purchase price paid by Morin.

Wholly apart from this dispute as to whether Forman did or did not continue to hold a secret interest in the pinball business, we think there was adequate proof, although circumstantial in character, of the Government's contention that there was an actual subsidiary conspiracy to conceal. [fol. 1930] The whole common enterprise from beginning to end was marked by efforts of concealment. When the parties first opened up their business in Kitsap County they concealed their part in it by having the licenses to operate the machines issued in the names of other persons. These persons were employed simply to lend their names. The licenses were taken in the names of United Amusement Company and Bremerton Amusement Company, which were

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[3] This testimony was confirmed by a written agreement, dated August 9, 1946, signed by Seijas and Forman, reciting that "W. R. Forman is the owner and partner of the remaining 51% in equal shares with Army Seijas."

the names under which Seijas and Forman were then doing business. During this period Seijas and Forman undertook other enterprises and in connection with those their actual activities were concealed by subterfuge and misrepresentations. They acquired an enterprise known as "Dock Concessions", put friends in charge to operate it with percentage interests to them, and made provisions that Forman was to be a silent partner. At the same time Seijas had a silent one-half interest in Forman's silent one-half interest. Seijas bought out some interests of one Heberling in three other pinball routes and Forman and Seijas had a secret agreement that they each had equal interests in the routes purchased. Seijas divided what he collected with Forman and this continued after September 1, 1946, when the sale to Morin became operative.

In 1950 internal revenue agents began an investigation of Seijas, and between that date and the time when the indictment was returned on November 19, 1953, both Seijas and Forman gave numerous false statements to the agents, denying any unreported income from the 1942-1945 pinball operations. Typical of this sort of thing was the conduct of Forman listed in overt act No. 29 of the indictment as follows:

"On or about September 1, 1948, in Seattle, Washington, William R. Forman concealed from an officer and employee of the Treasury Department of the United States engaged in an official re-examination of his and his wife's personal income tax returns for the year 1945 that during that year he received income from the afore-mentioned partnerships with Armador A. Seijas in addition to the amounts shown on the information returns filed by said partnerships."

In an audit of the February 28, 1947 return, Seijas and Forman gave the internal revenue agent the books and records of the partnership for 1944-1945 representing that [fol. 1931] they showed all the receipts for those years. They concealed the holdout pinball income. The same thing was done with another investigating agent in 1948 who received the first partnership records. These transactions are listed among the overt acts specified in the indictment. Throughout the periods here mentioned Seijas and Forman

together in various theatre enterprises. Up to the time of the indictment and even through the trial Forman and Seijas continued to conceal the interest which Forman had in the Seijas-Morin partnership.

The theory of the Government was plainly that which had been recently accepted and approved in United States v. Grunewald, 2 cir., 233 F. 2d 556, 565. There the court said: "The record contains ample proof of efforts by the conspirators to forestall suspicion and wipe out traces of their operations and these efforts developed later and in 1951 and 1952 into an intensified campaign of concealment." The court then proceeded to distinguish the cases of Krulewitch v. United States, 336 U.S. 440, and Lutwak v. United States, 344 U.S. 604, and concluded: "In the case before us now it was charged in the indictment that one of the terms of the illegal agreement was that continuing efforts would be made 'to avoid detection and prosecution by any governmental body' and much of the proof adduced at the trial was admitted in support of this charge. The jury were instructed that no such term of the agreement could be implied but that they must make a finding based upon the evidence before them, and that if the efforts to conceal were 'no more than an afterthought' they must find defendants not guilty. * * * In Lutwak, despite the fact that the indictment charged an agreement to conceal, there was no evidence to support it. The clear implication is that, if the allegation had been supported by evidence, the court would have arrived at a different conclusion, for it is stated in the opinion, 344 U.S. at page 616, 73 S. Ct. at page 488: 'But there is no statement in the indictment of a single overt act of concealment that was committed after December 5, 1947, and no substantial evidence of any. Such acts as were set forth and proved were acts that revealed and did not conceal the fraud.' Here the record is replete with evidence of acts of concealment."

Here, also as in the Grunewald case, the record is replete with evidence of acts of concealment, acts participated in by both Forman and Seijas and circumstantial evidence [fol. 1932] that one of the terms of the illegal agreement was that continuing efforts would be made to avoid detec-

tion and prosecution through concealment and false representations to the investigating officers.

As the case was presented to the trial judge (the trial began July 30, 1956 and the verdict was returned August 15, thereafter), the Grunewald case had but recently been concluded in the court of appeals. The language we have just quoted contains quotations from the Lutwak case which convinced the Second Circuit that the Government's theory was a tenable one. In the Krulewitch case the language of the court would appear to lend color to what the Government contended in the Grunewald case, namely, that in Krulewitch the court was simply refusing to accept a contention that in case of any conspiracy there is an implied agreement and understanding that the conspirators will continue to conceal what they have done. The court said: "We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admissions of hearsay evidence."[4]

However, we possess an advantage here that the trial court did not have. After the court below was required to rule upon these questions, and to frame its instructions to the jury, the decision of the court of appeals in the Grunewald case was reversed in Grunewald v. United States, 353 U.S. 391. There the Supreme Court dealt with two contentions of the Government as to why the Grunewald conviction should be sustained. The second alternative contention, which does not concern us here, was held by the court to present a legal theory which the court found "unexceptional"; but the first of those contentions presented precisely the same theory upon which the present case was

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[4] See also the language of Mr. Justice Jackson in his concurring opinion, 336 U.S. p. 455: "I suppose no person planning a crime would accept as a collaborator one on whom he thought he could not rely for help if he were caught, but I doubt that this fact warrants an inference of conspiracy for that purpose. *Of course, if an understanding for continuous aid had been proven, it would be embraced in the conspiracy by evidence and there would be no need to imply such an agreement. Only where there is no convincing evidence of such an understanding is there need for one to be implied.*" (Emphasis supplied.)

submitted to the jury which returned the verdict against [fol. 1933] Forman. This the Supreme Court rejected, holding that notwithstanding the subsidiary conspiracy may have arisen from an *actual* agreement to conceal, which was established by circumstantial evidence, and not a mere *implied* conspiracy to conceal *implied* from the fact that the main conspiracy was kept secret, yet the period of the statute of limitations was not extended by reason of the agreement to conceal being included as a subsidiary element or part of the original conspiracy. The court set forth this portion of the Government's theory as follows: "First, it urges that even if the main object of the conspiracy was to obtain decisions from the Bureau of Internal Revenue not to institute criminal tax prosecutions—decisions obtained in 1948 and 1949—the indictment alleged, and the proofs showed, that the conspiracy also included as a subsidiary element an agreement to conceal the conspiracy to 'fix' these tax cases, to the end that the conspirators would escape detection and punishment for their crime. Says the Government, 'from the very nature of the conspiracy . . . there had to be, and was, from the outset a conscious, deliberate, agreement to conceal . . . each and every aspect of the conspiracy. . . .' It is then argued that since the alleged conspiracy to conceal clearly continued long after the main criminal purpose of the conspiracy was accomplished, and since overt acts in furtherance of the agreement to conceal were performed well within the indictment period, the prosecution was timely."

That contention the court rejected. It said: "Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators." It met the Government's efforts to distinguish the Krulewitch and Lutwak cases as involving only *implied* conspiracies to conceal, whereas the Grunewald conspiracy was said to be an actual one, by saying: "True, in both Krulewitch and Lutwak there is language in the opinions stressing the fact that only an implied agreement to conceal was relied on. Yet when we look to the facts of the present cases, we see that the evidence from which the Government here asks us to

deduce an 'actual' agreement to conceal reveals nothing beyond that adduced in prior cases. . . . * * * We find in all this nothing more than what was involved in Krulewitch, that is, (1) a criminal conspiracy which is carried out in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to [fol. 1934] cover up after the crime begins to come to light; and so we cannot agree that this case does not fall within the ban of those prior opinions. * * * In effect, the differentiation pressed upon us by the Government is one of words rather than of substance. In Krulewitch it was urged that a continuing agreement to conceal should be implied out of the mere fact of conspiracy, and that acts of concealment should be taken as overt acts in furtherance of that implied agreement to conceal. Today the Government merely rearranges the argument. It states that the very same acts of concealment should be used as circumstantial evidence from which it can be inferred that there was from the beginning an 'actual' agreement to conceal. As we see it, the two arguments amount to the same thing: a conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment. There is not a shred of direct evidence in this record to show anything like an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission."

Thus it seems plain that the Supreme Court was developing from considerations of policy a rule which it deemed essential to prevent a wiping out of the statute of limitations altogether in conspiracy cases. In Krulewitch the Government only undertook to argue that in every case of conspiracy, from the very nature of things a conspiracy to conceal was present and implied. In Grunewald, with no more evidence, the Government elaborated its argument by saying that the secrecy and concealment employed shows, circumstantially, that the original agreement between the conspirators actually had, as one of its intended objectives the carrying out of concealment. The policy that blocked the theory stated in Krulewitch blocks this one also. Upon

the authority of this decision of the Supreme Court we hold that it was error to permit this case to go to the jury.

The judgment is reversed and the cause remanded ~~with directions to enter judgment for the appellant~~. for a new trial.

As amended by Order filed October 27, 1958.

[File endorsement omitted]

[fol. 1935]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,324

WILLIAM R. FORMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Western District of Washington, Southern Division

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JUDGMENT—Filed and Entered September 15, 1958

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for a new trial.

Filed and entered: September 15, 1958, as modified by Order filed October 27, 1958.

[fol. 1936]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Healy, Pope and Fee, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING—October 27, 1958

Ordered that the typewritten per curiam opinion this day rendered by this Court in above cause on petition for rehearing, be forthwith filed by the Clerk.

[fol. 1937]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,324

WILLIAM R. FORMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Before: Healy, Pope and Fee, Circuit Judges.

OPINION UPON APPELLEE'S PETITION FOR A REHEARING—October 27, 1958

PER CURIAM.

Upon petition for a rehearing the United States asks us to modify our decision by ordering the cause remanded to the district court for a new trial.

We think this suggestion is a proper one. In our opinion we accepted the position taken by the court below in its instructions that the conspiracy charged "was consummated upon the filing of the individual tax returns." We then proceeded, upon the authority of Grunewald v. United States, 353 U.S. 391, to hold that the case had been improperly submitted to the jury with instructions that there

might be a conviction if it was a part of the conspiracy "to make continuing efforts to avoid detection and prosecution."

The Government concedes that the case was submitted to the jury on an impermissible theory but says that as in the Grunewald case, the indictment here presented an alternative theory. That alternative theory, closely paralleling the alternative legal theory in the Grunewald case, which the Supreme Court held "unexceptionable" is based upon the allegations of paragraph "D" of the indictment quoted in our opinion which charges that the conspiracy was one [fol. 1938] "to violate . . . §145(b) of the Internal Revenue Code . . . by furnishing officers and employees of the Revenue Department false books and records and false financial statements, and by making false statements to such officers and employees, for the purpose of concealing from the Treasury Department their share of the unreported income . . . and for the purpose of concealing . . . the true income tax liability of Amador A. Seijas. . . ." So read the indictment alleges furnishing false books and reports and making false statements in an attempt to evade taxes within the meaning of §145(b) which imposes penalties upon "any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter". Such an attempt may be made by false statements to Treasury representatives. United States v. Beacon Brass Co., 344 U.S. 43.

It now appears to us that the case might have been tried upon this alternative theory, namely, that the conspiracy continued past the filing of the returns for the purpose of protecting the taxpayers from tax prosecution. What was said in the Grunewald case about this alternative aspect of the Government's case sufficiently indicates that certain of the overt acts listed in the indictment and charged to have occurred in 1948, 1951 and 1952, involving false statements, could well have been in furtherance of and during a conspiracy having as its objective not the concealment of the conspirators' conspiracy but tax evasion. Tax evasion may include attempts not only to block prosecution of the taxpayers but to block collection of the tax. In the case of a false or fraudulent return there is no limitation of time for collection of tax. Revenue Code 1939, §276(a), Code 1954, §6501(c)(1). The distinction between the acts of

concealment which were referred to in the court's instructions upon the first trial and the acts of concealment to which we now refer, was stated by Judge Frank in his dissent when the Grunewald case was in the Court of Appeals, (United States v. Grunewald, 233 F. 2d at p. 593), with which dissent the Supreme Court agreed. As Judge Frank put it: the distinction is between "(1) acts of concealment intended (at least in part) to block prosecution of the taxpayers for tax evasion, and (2) acts of concealment intended solely to block prosecution of the conspirators for conspiracy, . . ."

[fol. 1939] We now think that the record does not require a conclusion that the conspiracy here was consummated by the filing of the individual tax returns.

The last paragraph of our opinion is modified so as to provide that the judgment is reversed and the cause remanded for a new trial.

[File endorsement omitted]

[fol. 1940]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Pope, Healy and Fee, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING—February 26, 1959

Ordered that the typewritten per curiam opinion this day rendered by this Court in above cause on petition for rehearing be forthwith filed by the Clerk.

[fol. 1941]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,324

WILLIAM R. FORMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Before: Pope, Healy and Fee, Circuit Judges.

OPINION UPON APPELLANT'S PETITION FOR REHEARING—
February 26, 1959

PER CURIAM.

On September 15, 1958 we handed down our decision herein reversing the judgment with directions to enter judgment for the appellant. On October 27, 1958, upon petition for rehearing filed by appellee, we modified our decision so as to provide that the judgment was reversed and the cause remanded for a new trial. This action was followed by a petition for further rehearing filed on behalf of the appellant in which the latter asserts that this court is without power to order a new trial.

Appellant's principal reliance is upon the case of Sapir v. United States, 348 U.S. 373, where the court summarily reversed the action of a court of appeals which modified an earlier opinion ordering an indictment dismissed so as to order a new trial.

In a concurring opinion Mr. Justice Douglas explained his view of that case as follows:

"The granting of a new trial after a judgment of acquittal for lack of evidence violates the command of the Fifth Amendment that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'
[fol. 1942] "The correct rule was stated in Kepner v. United States, 195 U.S. 100 at 130, 'It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered. . . .' If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen. If, as in the Kepner case, the trial judge had rendered a verdict

of acquittal, the guarantee against double jeopardy would prevent a new trial of the old offense. I see no difference when the appellate court orders a judgment of acquittal for lack of evidence."

We think the case before us presents an entirely different situation. In the Sapir case the Court of Appeals held that the evidence "did not establish an essential element of the offense charged" and that the trial court should have entered a judgment of acquittal. Sapir v. United States, 10 Cir. 216 F.2nd 722. Thus, in the words of Mr. Justice Douglas, the appellate court ordered "a judgment of acquittal for lack of evidence".

But in the case before us we did no such thing. We held that the case was submitted to the jury on an impermissible theory. The jury was simply not properly instructed. But as we noted in our modifying opinion, the indictment was sufficient here to present an alternative theory. Furthermore the record contains evidence which would tend to sustain proof of overt acts listed in the indictment which took place as late as 1948, 1951 and 1952.

Under this permissible alternative theory, while prosecution could be supported by proof of the filing of the false returns, the conspiracy was by no means consummated then. Under this theory the conspiracy continued past the filing of the returns for the purpose of evading collection of the tax.

Since the indictment permitted prosecution on that theory, since there was evidence to support it, this was not a reversal on the basis of lack of evidence; it was for error in the instructions, a ground of error, in the words of Mr. Justice Douglas, "that infected the trial".

Appellant renews his objection to the venue. We agree with the Government's contention that since some earlier overt acts were committed in the Southern Division while [fol. 1943] the later acts took place in the Northern Division, venue requirements were satisfied, notwithstanding only the later acts satisfy the requirements of the statute of limitations.

Appellant's petition for rehearing is denied.

[File endorsement omitted]

[fol. 1944] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1994]

PLAINTIFF'S EXHIBIT No. 139-A

Testimony of *Mr. Army Seijas*, taken in the office of the Intelligence Unit, Bureau of Internal Revenue, Room 223 U. S. Court House, Seattle, Washington, at 3:25 p.m. on January 11, 1952, in the matter of his own income tax liability to the United States.

Present: Mr. Army Seijas, taxpayer.
Mr. George V. Whittle, C.P.A. for taxpayer.
Mr. Edward J. O'Leary, special agent.
Mr. Willard A. Oftedal, special agent.
Shorthand Reporter: Eleanor M. Stokke

By Mr. Oftedal:

Q.1 Mr. Seijas, you have appeared here voluntarily as the result of our informal request made through Mr. Whittle, is that correct?

A. That is correct.

Q.2 It is our desire, Mr. Seijas, to ask you certain questions in regard to your income taxes, and it is to be understood that your statement must be entirely voluntary; also that you may refuse to answer any question without giving reason for such refusal. When your statement is completed it will be typed and you will be given an opportunity to read it and make any necessary corrections and you will be given a copy. Should you so desire, we will gladly allow you a subsequent opportunity to present any information or oral testimony that you desire on any points which may not be fully covered on this occasion. With that understanding, are you willing to proceed?

A. Yes.

Q.3 It is your preference that this statement be given without taking oath, is that correct?

A. That is right because we had discussed that this was going to be an informal discussion.

Q.4 Mr. Seijas, you have had an opportunity, have you

not, to go over the comparative net worth computation prepared by Mr. Whittle?

A. Yes.

Q.5 It is my understanding that the books, records, documents, and oral information used in preparing that net worth statement have been basically and substantially furnished by you?

A. Substantialiy furnished by me.

Q.6 And you have employed Mr. Whittle to do that work and make it available in an effort to straighten out your own income tax affairs, is that correct?

A. That is correct. I employed Mr. Whittle because he knows a hell of a lot more about books than I will ever know.

[fol. 1995] Q.7 Mr. Seijas, are you, after having reviewed this computation of Mr. Whittle, in agreement as to its substantial correctness?

A. I am in agreement with its substantial correctness, as far as I know.

Q.8 The net worth computation as prepared here indicates there was no unreported income up to and including the year 1945, and that all unreported income as disclosed by this computation falls within the three years 1946, 1947, and 1948. Do you believe that presents a true picture?

A. No; I do not know when I earned it.

Q.9 Were all of those years up to 1945 correct?

A. I do not understand your question as to what you mean, if I understand it, the figures that Mr. Whittle has computed here. He has computed it, and as I said before I do not know anything about the books, or the figures, or things like that. After all, you know lawyers are the world's worst bookkeepers, but if what you want to know is if I had that money, my net worth statement shows that money went through my hands, but when I got it I do not know.

Q.10 This statement indicates that all income had been reported. All income had been reported up through the year 1945. Is it your sincere belief that you had properly reported it for income tax purposes up to 1945?

A. Yes, it is my belief, and that I paid the tax on it, and wherever there was a mistake the Internal Revenue Department corrected it.

Q.11 This net worth statement further shows a substantial shortage in the years 1946, 1947, and 1948. Is it your personal belief that there was a shortage in those years?

A. Shortage of what?

Q.12 Of unreported income, of a substantial amount for the years 1946, 1947, and 1948. Is it your belief that those sums accurately reflected the amount of unreported income in those three years?

A. No, I don't think so. I don't think it accurately reflects it. Mr. Whittle says according to his figures it does. I said I thought he was working for the Government instead of for me. I am not trying to cast any aspersions on you, Mr. Whittle.

By Mr. Whittle:

Q.13 As the result of this unreported income in 1946, 1947, and 1948, what Mr. Oftedal wants to know is if it is correct that that was unreported income for those three years or prior years, or can you determine that?

A. If he wants to know when I earned it, I can't tell him. Just because I spent it in that year does not mean I earned it.

[fol. 1996] Q.14 The determination of unreported income for 1946, 1947, and 1948 is because of the vast difference in increase in net worth in those years. You must not confuse the assets represented in these years with the earnings in those years.

A. I do not know what you said.

By Mr. Whittle: It is difficult to get a lawyer to understand figures.

By Mr. Oftedal:

Q.15 The whole object in making a net worth computation was to attempt to arrive at the amount of unreported income, if any, and that is what Mr. Whittle has done in this case. My question is, "Do you believe this income properly belongs in the years in which this net worth statement shows it? Does all of this unreported income belong in the years 1946, 1947, and 1948?

A. I think so. Don't you, George? I think that is the way you got it down there. It shows my net worth condition at that time.

Q.16 For the year 1946, Mr. Seijas, this net worth statement reveals unreported income of $35,632.56. Would you care to comment as to the source of that income?

A. No, I wouldn't and I could not tell you that. I earned that money in 1946 over and above the $28,000 which is income reported on my income tax returns. I don't know.

Q.17 In the year 1947, Mr. Seijas, your net worth computation indicates an understatement for income tax purposes of $22,682.43. First, do you believe that accurately reflects unreported income earned in the year 1947?

A. No.

Q.18 Would you care to make any comment as to any possible source of that money?

A. I do not know anything about it. I do not know—I know it was not earned in 1947. I can't tell you where it came from. I do not know what year it was earned in. The same is true of the next year, 1948. I am looking at it and it says $3,000 income, and I have a net worth increase, or income to be accounted for, of $107,000. Obviously, Mr. Oftedal, I did not make that kind of money, in that year, 1948.

Q.19 Am I to understand that you don't believe there is unreported income in the amounts as shown here?

A. My candid opinion is that I think the figures are high.

Q.20 How much high do you think they are, Mr. Seijas?

A. I have no idea; that is 1948. I think that is the year I borrowed some money.

Q.21 That is correct.

A. Is it?

[fol. 1997] Q.22 That is shown in your statement that there was some money owing the first of the year and that might cause an adjustment to this $107,000 figure.

A. I borrowed money.

Q.23 The fact that you borrowed money, however, has no bearing as to whether or not you had income during the year over and above the amount reported for tax purposes.

A. It does in my case because if I have the money I am

certainly not going out and borrow it. You have got to look at my personality. If I have money I don't borrow any.

Q.24 From your net worth computation—

A. I am talking to you as man to man, not from figures and books you see. That is why I say you would have to look at my personality because I would not borrow money if I have money in my box, but the books are different, I don't know anything about that.

Q.25 The borrowing of money still makes no difference, Mr. Seijas, because this statement indicates unreported income of $107,000 and that is substantiated by acquisition of additional assets to that extent. The fact that you have acquired another liability of borrowed money still does not change the picture that there has been, according to this statement, considerable earnings in that year over what was reported. Is that clear?

A. You are giving me a lecture on bookkeeping. Whatever you say I guess it is correct, if Mr. Whittle will verify it. That is a technical question, Mr. Oftedal. I do not know anything about that.

Q.26 Mr. Seijas, do you have any suggestions as to sources of this income which is disclosed by this net worth computation?

A. I have not any ideas or suggestions at all.

Q.27 Is any of this income the result of gambling operations?

A. No. I have only gambled once in my life.

Q.28 Have you had any interest in slot machines?

A. No. I have nothing to do with slot machines or pinball machines now.

Q.29 Did you not in 1946, 1947, and 1948, Mr. Seijas?.

A. Yes, I had an interest in the pinball business.

Q.30 Would any of this money be unreported income from the pinball business in the years 1946, 1947, and 1948?

A. I have not any idea; I do not know.

[fol. 1998] Q.31 Do you believe that any of this money is attributable—any of these amounts shown as unreported income are attributable to years prior to 1946?

A. Oftedal, I can't tell you because I just don't know where it comes on. I put it in the can, and that is it.

Q.32 It has been your practice to deal in cash, is that right?

A. That is right.

Q.33 Are you in agreement with Mr. Whittle here that you had approximately $50,000 cash on hand at the end of 1945?

A. If Mr. Whittle says I did I will agree with Mr. Whittle.

Q.34 Do you have any personal knowledge?

A. No, I have no personal knowledge as to how much I had.

Q.35 Is there any possibility that you could have had more than $50,000 in cash on hand not in banks at the end of 1945?

A. There is a possibility.

Q.36 How much more could you have had?

A. I do not know.

Q.37 What bank do you have your safety deposit box in town?

A. I do not have any safety deposit box in town, and I have not had for quite some time.

By Mr. Whittle:

Q.38 When you had this safety deposit box and cash on hand, did you keep any record of what you put in it or took out?

A. No, because nobody could get in the box except myself, not even my wife. She did not know that I had a safety deposit box.

Q.39 How many safety deposit boxes did you have during the year 1948 for example?

A. I can't tell you, but I would say two or three.

Q.40 Where were they located?

A. One at the Day and Night; I am not sure whether I had one at the Seattle First National Bank, and I think I had one at the Pacific National.

Q.41 When did you have a box in San Francisco?

A. That was a long time ago.

Q.42 How long ago, sir?

A. I can't tell you.

[fol. 1999] Q.43 More than four years?

By Mr. Seijas: The war was over in 1946?
By Mr. Oftedal: 1945.

A. I can't tell you. It has been a long time ago.

Q.44 How long did you maintain a box in San Francisco?

A. I don't know. The Bank of America would have a record and could tell you.

Q.45 Was it more than a year that you had it?

A. I think they closed it out. I think the box was in my name for more than a year, but I do not remember if I paid rent on it for more than a year.

Q.46 Why did you have a box in San Francisco?

A. I will tell you why I had all of the boxes. Like I told you, I dealt in cash and I did not want members of my family to know what I had and thought it was a good place to keep my money.

Q.47 Why have you dealt in cash, Mr. Seijas?

A. There used to be a bank in Seattle called the Scandinavian American Bank that went broke. I had money in it. I went there and asked for a job when I was nine years old, but they turned me down but I still kept putting money in it and they went broke, and then I had money in the Puget Sound Savings and Loan Association and they went broke, and then a man said to me once, and he was a wise man,—He said, "Why do you put money in the bank and earn 3% when you can make your money earn more money elsewhere." I have never forgotten that, but I have never taken advantage of that advice, so naturally I was always dubious of banks.

Q.48 Has your dealing in cash in any way been connected with a desire to conceal your wealth from other than your family?

A. I don't think so.

Q.49 Has it in any way been connected with any desire to evade income taxes?

A. No, as a matter of fact I have always been happy to pay income taxes.

Q.50 Mr. Seijas, I hand you the individual income tax returns of Betty L. and Army Seijas for the year 1946 and ask you are those the original returns filed by you and Mrs. Seijas?

A. Yes.

Q.51 Mr. Seijas, I hand you the 1947 individual income tax returns of Army Seijas and Betty L. Seijas and ask you if these are the original returns filed by yourself and your wife?

By Mr. Whittle: I don't think this is necessary.

By Mr. Oftedal: It is just routine.

[fol. 2000] By Mr. Whittle: You know they are his returns and he knows it, and it is admitted in the net worth statement. I don't think it is necessary though.

By Mr. Oftedal: I just want it for the record.

By Mr. Whittle: I object to the bringing forth of the returns for the purpose of comparison of the figures reported therein and on the net worth statement as it is immaterial and there is nothing in connection with anything that was to be brought out.

By Mr. Oftedal: Mr. Whittle, I see no objection to identifying these returns as to comparison of income.

By Mr. Whittle: I think it is a waste of time.

By Mr. Oftedal: It will only take a minute.

Q.52 These are 1948 original and amended returns of Betty L. and Army Seijas. Will you identify those as your original and amended returns?

A. Yes.

Q.53 I hand you the 1949 return of Betty L. and Army Seijas. Will you identify that as your original return?

A. Yes.

Q.54 At the time you filed those returns, Mr. Seijas, it was your intention that they be considered true and correct returns?

A. Yes, that was the way the bookkeeper prepared them.

Q.55 Do you have anything you wish to bring out, Mr. Whittle?

A. It is a fact that Mr. Seijas had various bookkeepers, alleged to be public accountants, and such people usually make such nominal fees that they must have quantities of clients in order to make a living, and in all of my years of experience with such people they don't attempt to spend any time with the client to try to get the actual facts of anything in connection with the returns because they are

doing it for a fee that would not permit the time to be spent. I think Mr. Seijas has been up against that kind of bookkeeping. Personally, I still can't see how Mr. Seijas could have earned $107,000 over and above what he reported from the assets then owned. It is my opinion that it is a carry over of cash of prior years and Mr. Seijas is unable to give us the amount of cash he held in safekeeping at the end of each year. It is very difficult for Mr. Seijas to explain assets and liabilities and earnings in words that we use, and I think his answers to some of the questions propounded to him at this conference will confirm that.

Q.56 Mr. Seijas, have you had any other sources of income during the years 1946, 1947, and 1948 other than disclosed in this net worth computation?

A. No.

Q.57 Mr. Seijas, will you make the books of your law practice available for us for a spot check?

A. The books of the law practice don't mean anything.

[fol. 2001] By Mr. Whittle: Do you have to go into this at this late date?

By Mr. Oftedal: I am asking if they would be available for a spot check of a few items that we would like to see.

By Mr. Whittle: I think Mr. Seijas and myself have gone a great ways to cooperate and to give you this final statement, and I think that speaks the whole truth.

By Mr. Oftedal: Mr. Whittle, do you personally have any objection to our seeing Mr. Seijas' books.

By Mr. Whittle: No, I don't really see any personal objection to it, but as I say I think that the examination has been complete and thorough, and I don't see any more that we can do.

Q.58 Will those books be made available to us, Mr. Seijas?

A. Anything that you and Mr. Whittle decide on will be all right with me.

Mr. Oftedal to Mr. Whittle:

Q.59 What about that, Mr. Whittle?

A. I will take it under advisement.

Mr. Oftedal to Mr. Seijas:

Q.60 May we have the opportunity of examining your canceled checks, Mr. Seijas?

A. Mr. Whittle has them, I think. You can take that matter up with him.

Q.61 Is that agreeable with you, Mr. Whittle?

A. Yes.

Q.62 Do you have anything that you want to say, Mr. Seijas?

A. I don't want you to think that I am being uncooperative when you ask me questions about the net worth statement or about bookkeeping, or what I earned, or didn't earn, but I just don't know. You are asking me technical questions, and I just don't know. If I give you a silly answer I want you to excuse it because I really don't know. As far as my answering your questions, I have tried to. I may not have answered them intelligently, but that is just ignorance on my part of bookkeeping practices, etc. I don't want you to hold it against me that I am not trying to work with you. I know that you have a job to do, and I am trying to help you. You said that I am the only person who can explain things to you. If I do not answer your questions intelligently I might not have a good selection of words in answering your questions.

Q.63 One more question, Mr. Seijas. Though you have indicated that you don't agree, at least entirely with the allocation of income to the years 1946, 1947, and 1948, do you believe that the total understatement of $165,000 approximately presents a true picture?

A. That is the part that I don't agree with. That is the point I want to make. Maybe you asked me a question and you have one impression, and that is not my impression at all. I don't disagree with Mr. Whittle the way that he has this thing allocated or anyone else. I disagree with the amount.

[fol. 2002] Q.64 You think the amount is too high?

A. Yes.

Q.65 By how much is it too high?

A. I have no idea.

Q.66 What is your idea of the amount of your unreported income?

A. I do not know.

Mr. Oftedal to Mr. O'Leary: Do you have any questions Mr. O'Leary?

By Mr. O'Leary:

Q.67 With the exception of the allocation of cash, do you disagree with any of the figures listed for the various assets?

By Mr. Seijas: You mean what he has put it down for?

By Mr. O'Leary: With the exception of the allocation of cash.

A.67 I do not know. I have no way of agreeing or disagreeing. I take it that he has done his job. That was what he was hired to do.

Q.68 You have read this statement over?

A. Yes.

Q.69 And there were no particular assets which impressed you as being wrong?

A. I don't know. I have no way of checking on Mr. Whittle. I don't know.

Q.70 Have you prepared income tax returns for clients and received fees for such work?

A. Probably four or five in all of the years that I have been practicing. Wage earners returns you know.

Q.71 I notice that the corporation income tax return of the Tacoma Auto View Theatres Corporation bore your signature as the person who prepared that return. Did you prepare the corporation return of the Tacoma Auto View Theatres?

A. I don't think so. I have never to my knowledge prepared a corporation return in my life. Are you sure I did not sign it as Secretary?

Q.72 The notation that I made carried your name as Treasurer and also signed as the person who prepared the return.

By Mr. Seijas: Is that the year that did not have any income.

By Mr. O'Leary: This was a corporation return for the year 1947 showing a net income of $44,784.57.

A.72 I never prepared it. Mr. O'Leary, I never prepared it, and if I signed it I must have signed it in an office holding capacity and somebody else must have prepared it. I have never prepared any corporation income tax returns in my life.

Q.73 What was your financial interest in the Castle Club?

A. I did work and collected fees.

[fol. 2003] Q.74 Your 1946 income tax return reveals income of approximately $1200 as partnership income from the Castle Club. Could you identify that income?

A. No. The Castle Club is a corporation; it could not be a partnership.

By Mr. Whittle: It was apparently in the return under the classification of a partnership, but it was not a partnership.

Q.75 Were you an officer of the Castle Club?

A. I don't remember whether I was or not. I think maybe I was at some time. Wasn't I vice-president?

By Mr. O'Leary: You were secretary.

A. I may have been secretary because I kept the minutes of the corporation.

By Mr. Whittle:

Q.76 You had no interest in that corporation?

A. No.

By Mr. O'Leary:

Q.77 I notice that your deposit slips for the year 1947 indicate amounts being received from the Castle Club. There is a deposit on February 20th in the amount of $265 and another deposit on September 18, 1947, for $265. Could you identify those deposits?

A. No. They probably were for traveling expenses. I have not any idea. What year was that?

By Mr. O'Leary: 1947.

By Mr. Seijas: Did they have a license from the state in 1947?

By Mr. O'Leary: I am not aware of their licenses.

By Mr. Seijas: I did them a lot of work in trying to get them a liquor license.

Q.78 Did you have an interest with Mr. William Capri in the slot machines of the Castle Club?

A. No.

Q.79 Did you have any financial dealings with Mr. Capri?

A. Yes. I was retained by Mr. Capri.

Q.80 For what purpose?

A. As attorney for the Castle Club.

Q.81 Did you receive any amounts from Mr. Capri which would not have been for or from the Castle Club?

A. You mean from him as an individual? I can't tell you. I don't recall of any. I do not know whether I did or not. I just got finished representing his sister a few months ago, and I got some money from his sister for a law suit down in Clark County. If I did get any money it was not very much.

[fol. 2004] Q.82 Did you know a girl by the name of Hattie McGuire, who I understand was a dice girl in the Casle Club?

A. I knew Hattie, but she was not a dice girl.

Q.83 Did you ever offer her employment as a dice girl in a tavern?

A. Not that I know of. She was a girl that I got a divorce for.

Q.84 Are you the sole stockholder of the Argus Investment Company?

A. No. You want to know if I control the company?

Q.85 I want to know if you are the sole stockholder of the Argus Investment Company?

A. I do not know how to answer that question.

Q.86 Does anyone else have a financial interest in the Argus Investment Company?

A. I do not know how to answer that question, but it is not important because I wind up with all of the company, but it makes no difference for your purpose.

Q.87 Did you originate the Argus Investment Company?

A. Yes.

Q.88 According to your net worth statement, you have an investment in capital stock of the Argus Investment Company of $2500. The articles of incorporation for the Argus Investment Company show a C. Davis as holding 2498 shares, R. F. Mahoney, 1 share, C. Hempstead 1 share; total paid in capital $2500. Could you identify these persons as to their connection with the corporation?

A. They are just dummies like you have in a law office where you have a clerk to sign papers for you.

Q.89 Do they actually own this stock or do you own it?

A. That goes back to the other question. I think I have had all of the stock transferred in blank, but I am not sure. That is why I say to you, Mr. O'Leary, for all practical purposes I have the whole company. I don't know whose name it is in now, but I think I have all of the shares endorsed in blank and I have possession of all of the stock endorsed in blank.

Q.90 What relationship to you is Miss or Mrs. C. Davis?

A. Sister-in-law.

Q.91 And what is the purpose of having this stock in the names of three dummies?

A. You just don't want people to know that you are negotiating for properties.

[fol. 2005] Q.92 What particular people?

A. Anybody.

Q.93 You previously testified that you held your money in the form of currency in various safe deposit boxes for the purpose of concealing these assets from your family. It is noted that while your investment in the Argus Investment Company appears to be concealed, it is not concealed from your sister-in-law.

A. That is right.

Q.94 Have you been concealing your investment in the Argus Investment Company as well as holding cash in your various safety deposit boxes for the purpose of evading your income taxes?

By Mr. Whittle: Let us have that question put a little differently. This Argus Investment Company was a later acquisition. It came up in 1947 as against cash that was

on hand since the year 1941. I can't see any connection between such different periods of time.

By Mr. O'Leary: The difference is that there appears to be a wilful concealing of assets and he has indicated that he wanted to conceal his cash from his family, whereas the assets concealed in the Argus Investment Company were known to his family. I believe it calls for additional explanation.

By Mr. Whittle: Then, let us ask Mr. Seijas if his wife knew he had the Argus Investment Company?

A. No, I do not think that she knows to this day.

Q.95 Is Mrs. Davis your wife's sister?

A. Mrs. Charlotte Davis is my brother-in-law's wife.

Q.96 That would be your wife's brother's wife?

A. Yes, three times removed.

Q.97 Would you care to briefly explain why you have been careful to conceal your connection with the Argus Investment Company?

A. I have already explained it to you, Mr. O'Leary.

Q.98 Would you briefly state it again?

A. I don't want members of my family and I don't want anybody—I won't say anybody because naturally when you are doing business—I just don't want them to know about my business.

By Mr. Whittle:

Q.99 For the purpose of trying to explain this alleged concealing from the family, did you have any trouble with your wife at the time that you organized the Argus Investment Company?

A. I had trouble long before. She had at one time consulted a lawyer.

Q.100 I was just trying to get the facts.

A. It is a personal matter, and I do not care to go into it. I never told you about that before, George. I just don't want to, you know.

[fol. 2006] By Mr. O'Leary:

Q.101 Who was Chick Nundy or Nundey?

A. I never heard of him or her. Who is it, male or female?

Q.102 I am trying to find out. You have a deposit of $5,000 May 22, 1947, and your deposit slip bears the notation Chick Nundey.

A. I do not know. Where did you get your information—from my deposit slips?

By Mr. O'Leary: From the bank's deposit slip.

By Mr. Seijas: What bank is it?

By Mr. O'Leary: Pacific National.

By Mr. Seijas: I will try to find out.

Q.103 Will the records of the Castle Club, Inc., show all of the payments which you have received from them?

A. I do not know what the records will show.

Q.104 Did you receive the payments from the Castle Club in the form of cash or check?

A. I can't tell you. I don't know. When do you show that I got the $1200 from the Castle Club?

By Mr. O'Leary: The 1946 return reflects that income.

By Mr. Whittle: Do you remember if you got that $1200 for acting as secretary?

By Mr. Seijas: I did not get any money as secretary. I got all of my money for services rendered. Maybe you would call it as secretary.

By Mr. Oftedal:

Q.105 Mr. Seijas, what was the occupation of Hattie McGuire at the time that you knew her?

A. She was bar maid or bartender.

Q.106 Was that at the Castle Club?

A. Yes. I have never known her any other place.

Q.107 Did she operate as a dice girl at the Castle Club?

A. Not to my knowledge. They would have meetings once a month, I guess, and I would sit in and write up the minutes for the meeting and I would get there—I would leave Seattle at the end of the business day for the meeting down there that night and go home that night. I did not spend any days in Vancouver.

Q.108 Did you receive any income from gambling from the Castle Club?

A. No.

Q.109 Did you operate the Seven Seas in Bremerton with Matt McCusker?

A. No.

[fol. 2007] Q.110 Did you own the Seven Seas?

A. No.

Q.111 Have you ever had a tavern called the Sea Island in Bremerton, Washington?

A. No, I never heard of it.

Q.112 What tavern did you have in Bremerton, if any?

A. The Blue Moon.

Q.113 Did you ever offer Hattie McGuire a job as dice girl in any tavern in Bremerton, Washington?

A. No, I never operated any tavern. I don't think I have ever been behind a bar in my life.

Q.114 You had a tavern that Matt McCusker had an interest in?

A. He operated it, I didn't. I never drew a glass of beer in my life. I wouldn't even know how to open up a keg of beer.

By Mr. Oftedal: I do not think of anything further that I wish to ask.

By Mr. O'Leary:

Q.115 With respect to your safety deposit boxes, you have stated that you had some in this city as well as one at the Bank of America in San Francisco. Did you at that same time have another box in Portland, Oregon?

A. I do not know if it was at the same time or whether I took my money out of California and put it in Oregon.

Q.116 Did you count your money at the time you made your transfer?

A. I can't tell you whether I did or didn't.

Q.117 You don't recall what the amount was at this time?

A. No. I can't tell you the amount I have in my pocket just now, and if I did know I could not tell you now.

Q.118 At the time that you made the transfer, did you buy cashier's checks or did you carry the money in the form of currency?

A. I don't know.

By Mr. Oftedal:

Q.119 Do you have anything else to add? If not, should anything come to mind when you have had an opportunity to read this statement and you wish to add to it you will be granted an opportunity.

By Mr. Whittle: Very nice of you, Mr. Oftedal.

Interview concluded: 4:50 p.m.

[fol. 2008]

PLAINTIFF'S EXHIBIT No. 139

Supplemental Testimony of *Mr. Army Seijas*, taken in the office of the Intelligence Unit, Bureau of Internal Revenue, Room 223 U. S. Court House, Seattle, Washington, at 2:25 p.m. on January 28, 1952, in the matter of his own income tax liability to the United States.

Present: Mr. Army Seijas, taxpayer.
Mr. George V. Whittle, C.P.A. for taxpayer.
Mr. Edward J. O'Leary, special agent.
Mr. Willard A. Oftedal, special agent.
Shorthand Reporter: Eleanor M. Stokke

By Mr. Seijas: Week before last I had an informal talk with Mr. Oftedal with regard to the testimony that I had given on January 11, 1952, here in this office, and after I corrected it he gave me a copy of that testimony, and I informally discussed with him that I understood from other sources that he had contacted, either directly or indirectly, three other witnesses, and that I was burned up or angry with the remarks that some of the witnesses had made, and I then explained to him in detail the basis of my anger. He suggested that possibly, if I wanted to, I could supplement the questions and answers that he and Mr. O'Leary had put to me on January 11th by going up to the Federal Court House and making a statement for the record, and that is the purpose of my being here today. It was my understanding that three individuals had testified, or at

least given statements, regarding my character, and I had mentioned at the time of my conversation with Mr. Oftedal that the statements made were unfriendly statements and came from either a biased or prejudiced, or a polluted source. In any event they were unworthy of belief and, further, that some of the prejudice, if prejudice did exist, and I believe that it did, that there was a factual basis to show why the prejudice existed.

First of all, I would like to mention about Selwin Kamins, who goes under the name of Stan Kamins, whose true name is Selwin Kaminski. Mr. Kamins was a butcher at the Safeway Store, near where my wife traded, earning approximately $50 or $60 a week when we first met him. He was married to a girl by the name of Cecelia, who I had known, and I had been very friendly with her family and her older sister. At her request, and on her representation that Mr. Kamins had bought some lots at the First Avenue West and West Mercer Street, Seattle, Washington, and that they had some money that they were going to put into a building, I arranged it so that Mr. Kamins—who I personally did not know until Cecelia introduced me—so that they could build a building. The total amount of money loaned was $35,000, which was more than had been anticipated in the beginning. The reason was that the contractor's costs exceeded the estimated cost. Usually that is the way it works out with contractors. At any rate, I caused him to get the money, and he never paid any interest on it, and in the meantime he did not have enough money to go into business, and he had wanted to get into the beverage store located in the building, which would be next door to the Washington [fol. 2009] State Liquor Store, and I believe he and I formed a corporation wherein I put in one-half of the money. Roughly speaking $1,000 or $1500, I do not recall, and he was to put in the balance, and we were to be equal partners in the corporation. He was to receive $100 a week, which was a lot more than he was getting at that time in other employment. At any rate, if I recall correctly, his wife came to me and advised me that I had to protect myself because Kamins was not giving me a fair and honest account on the revenues. I had noticed also that during the time that we were together that I had never received a profit and

loss statement, although I repeatedly asked for it. Two matters are called to my attention with regard to this; one was a mirror that I recall was placed on the books for $150, whereas in truth Mrs. Kamins told me that she had bought it for $75 at Rhodes Department Store and Kamins had paid himself off on the basis of its cost being $150. The other thing was that in the Coca Cola box for cooling coca cola, it had been paid for on the basis of X number of dollars wherein in truth and in fact it was ½ of X number of dollars. At any rate I told Kamins that I did not want to proceed with him and that he could buy or sell my one-half interest in the corporation. He stated that his one-half interest was worth $8,000, but was willing to give me only $1500 for my one-half interest, and after some argument I think I got either $2500 or $3500 for my one-half interest in the corporation. About this time Kamins was also having marital troubles with his wife, Cecelia, and I think he was getting $100 a week, and he had agreed to pay Cecelia $100 a month for the support of the child. He came to me and wanted me to reduce the payments to $50 a month, and I did not recommend it because I thought he was making enough money to take care of his child, and a dispute arose about that.

When he still had not made any payments on the mortgage loan—he was always finding excuses why he could not make any payments—at any rate the mortgage was foreclosed, and prior to judgment or execution, I do not remember which, he sold his equity in the building to First Realty Company of Seattle for, I believe, $55,000, which my recollection is gave him a $13,000 profit inasmuch as my recollection is that he was in to the building $42,000. At any rate, the Argus Investment Company, which I control, subsequently bought the building from Seattle First Realty and, naturally, he feels resentful thinking that I took the building away from him. Actually, I had no connection with the Seattle First Realty buying the building in the first instance, and I did not know until after he paid off the loan where he got his money, but his lawyer, as I recall, had a father who was vice-president of Henry Broderick, Inc., and through that connection his lawyer arranged to have First Realty take up his equity.

[fol. 2010] The next thing I object to were some statements that were made to the Internal Revenue Department by one Eddy Martin, who I believe stated that Matt McCuskor, a former associate of mine, was going to Bridgeport, Washington, to open up a night club with slot machines and also a trailer camp and also a sporting house, and that the only reason that I didn't go to Bridgeport with McCuskor was due to the influence that Eddy Martin had on me which persuaded me not to go into such a venture. I want to say first of all that McCuskor was already in the venture long before I visited Bridgeport. As a matter of fact when I saw the venture I had my wife and two small daughters with me and McCuskor and his associates were rebuilding a night club over there, and I told him at that time that I could not see where he could make any money, that he was using poor judgment as far as night clubs were concerned; that I did not know anything about prostitution and that I did not want to have anything to do with it in any way. I knew that he had involved himself in a trailer court transaction with some person and that a law suit has resulted therefrom. I did not want to go into any venture in Bridgeport for two reasons; first of all I had no money and second I did not see where anybody could make any money, if they did have any money. I had advised McCuskor that if he went into a night club he should have everything that was going on in a night club licensed by the city or state officials and not to operate anything without a license. He later retained an attorney by the name of Casey to advise him and protect him in these matters. Whatever became of the night club I do not know except that I know it is closed. I can't tell you how long it operated or anything else, or whether they had slot machines or not as licensed by the state.

The other witness who, as I understand, has made a statement to the Internal Revenue had to do with Hattie McGuire of Portland, Oregon. Hattie was a young lady who worked as a bartender or barmaid in Vancouver, Washington, and who I represented in a divorce action in Crescent City, California. She had personal difficulties with the management of the Castle Club and lost her job there. What the difficulties were I do not know and care less. If she made the statement that I offered her employment in Bremerton

in a dice game she is mistaken. In the first place, Matt. McCuskor ran the Blue Moon Tavern in which I was partners; I did not run it, and as I previously stated in my statement I had never had any previous experience in operating a tavern, all I did was buy in with a 50% interest as an investment in this particular tavern. After having talked to Mr. Oftedal a couple of weeks ago, I recall now that we never had any dice to my knowledge in the Blue Moon Tavern. Some of the taverns in Bremerton did have dice where the customers shot for cigars, or for drinks, or for candy. I, myself, personally do not know how to shoot dice or play cards. I am sure that if the girl were out of a job I probably told her to go to Bremerton and look for a job, and probably recommended that to her, but I never did offer her a job. If I did offer her a job I wonder why she would not go to get a job, if I were eligible to give her [fol. 2011] employment, and second if I had any employment to give to her. I am sure if Hattie made this statement that she was in error at the time that she made it. I also told Mr. Oftedal, and I want to reiterate it now, that my practice in the last twelve years has been exclusive of criminal practice, with the exception of two cases, both of which I tried gratis. I have no bootlegger clients, I have no gambling clients, I have no clients of any criminal nature. I have not been associated with gambling or prostitution in any way, shape, or form.

By Mr. Oftedal:

Q.1 How did you learn, prior to my acknowledging, that we had contacted Mr. Kamins?

A. I do not remember.

Q.2 If you thought a moment, would it refresh your memory?

A. I will think.

Q.3 Mr. Serjas, we have not contacted Mr. Eddy Martin. Where did you get an indication that he had told us anything regarding your business in Bridgeport?

A. I do not remember where I got that information. If you have not contacted him that is fine; it just proves that a lot of people do a lot of talking upon which there is no foundation in fact, and if you have not talked to him and

I volunteered this statement, it proves to me at any rate that a lot of people do a lot of talking about which they do not know a darn thing.

By Mr. O'Leary:

Q.4 With respect to the Mercer Street property, you stated that you loaned Mr. Kamins $35,000, which he invested in the construction of this building, along with approximately $7,000 of his own funds. He then sold this equity of $42,000 to the First Realty Company for approximately $55,000. How much then did you pay the First Realty Company for that building?

A. I can't tell you, but the books of the Argus Company will reflect the true amount of the deed.

Q.5 Can you recall how much offhand?

A. Maybe we paid $55,000, I do not know; I can't recall offhand.

Q.6 With respect to the other properties in the Argus Investment Company, do you recall how much you invested in the Kerfoot properties?

A. No. All of that is in the books, and I think you have seen the books.

By Mr. Oftedal:

Q.7 This was, as I understand your statement, an arm's length transaction when you purchased this building from this realty company?

A. Yes. I have a brother who has T.B. in the kidneys and he can't work. He was at Firlands Sanitarium, which is a T.B. sanitarium operated by the state. He can't work, [fol. 2012] and I wanted to put him in the beverage store, and I knew that ultimately he would be able to go in there, if possible. The beverage store is a pretty good business right there next to the liquor store. That was my purpose for that.

I want to enlarge on something else. I told Mr. Oftedal with respect to prostitution, which has aroused my Irish so to speak. My wife and I have been taking care of delinquent girls for years, and all of the girls that we have taken care of have been at the request of the Catholic

Bishop's office here in Seattle, and every single one of the girls that we have had have turned out 100% good, a girl that anybody would be proud to have as a daughter, both morally, physically and spiritually and, naturally, having daughters of my own—anybody that makes any statement about me being connected in any way with any racket such as that is way out of line.

Q.8 You did not know then that First Realty was purchasing this building from Mr. Kamins?

A. No, I did not. That was strictly an arm's length transaction.

Q.9 Mr. Seijas, in regard to transfer of a lease, Mr. Kamins testified in this office, I quote in part:

> "* * * And upon approaching Mr. Seijas personally for a release on the transfer of lease, he requested a sum of $2500 for consideration or transfer, but he was purely acting in behalf of his client. (Argus Investment Company) He was offered at first a $500 consideration for release on the transfer of lease, which was refused. He mentioned at this particular time that I was getting off fairly easy. He stated that a party had just paid $10,000 of a $12,000 down payment for the sale of a $25,000 tavern as consideration for a transfer of lease."

Do you have any comments to make on that, Mr. Seijas?

A. That probably happened. That is easy to explain. First of all, I don't remember the name of the tavern that he is talking about, but that is not unusual for the landlord to require a payment to be made to approve a new tenant, particularly if the new tenant is not reliable, and oftentimes where the old tenant is making a gigantic profit on the venture. The beverage store cost the corporation about $2500 or $3500 to get into business. At the same time Kamins wound up with a $100 a week job for eight hours a day plus all that he could steal, and he was turning around and selling that business to some fellow from Eastern Washington for $15,000, as I recall. Well, first of all I was not too happy about letting my brother stay on the side line and Mr. Kamins putting somebody else in there because it

would not seem right to have a man come in and buy a business which had three or four years to run and then kick him out and put my brother in. The man that was making the profit was Kamins because he was in there for $3,000 at the most and sold it for $15,000 and made a $12,000 profit. So, naturally, it is probably true that I asked him for $2500 [fol. 2013] of his $12,000 profit, which is not unusual. As a matter of fact, in the sale of beverage stores, I would guess, and taverns you don't pay for the equipment, most of the stuff is junk, you pay for the revenue producing qualities, I guess.

Q.10 If Mr. Kamins understood from your statement that you yourself had been the beneficiary to the extent of $10,000 for transfer of a lease on a tavern, was he correct in that understanding?

A. No, he was not.

Q.11 Have you in your practice, or have you made it a practice of assessing amounts for transfers of leases other than in this one instance?

A. I never have, and I was not successful in this instance with Kamins. Rather than go through with the deal it fell through. He was willing to take a $12,000 loss rather than give me any part of it.

Q.12 Mr. Seijas, we are still faced with the problem that there is $150,000 unreported income apparently in the years 1946, 1947, and 1948. After having had an opportunity to think the thing over, can you suggest any possible source of this unreported income?

A. I cannot give you any more explanation than I have already given you, except this thought occurs to me. I may be wrong on this, but you recall that when you threw that figure at me, which was the first time I was aware of that figure, I jokingly mentioned to Mr. Whittle that I wondered who he was working for, and Mr. O'Leary made some remarks along that line, but anyway I must have had a lot more money on hand back in 1935, 1936, 1937, 1938, 1939, and 1940, 1941, 1942, 1943, 1944 than I was given credit for on that net worth statement that Mr. Whittle prepared. I can't explain or comment much more than I did the other day.

Q.13 As I recall, Mr. Seijas, in informally speaking to you, you told us you never started to make money until the war. Is that correct?

A. Real money.

Q.14 Isn't it doubtful that you would have had much accumulated prior to the war?

A. I would not say that. I am a thrifty person. If you look at my socks today you will see that they don't match. I told my wife that I would not let her buy any. As I told you before, I don't go night clubbing, I don't keep any women, I don't buy any whiskey, I don't gamble, I don't do a thing but work like a beaver.

Q.15 Mr. Seijas, what portion of your working time is spent on your law practice? Have you any idea?

A. All of it.

Q.16 Don't your various investments and other interests take considerable of your time?

By Mr. Seijas: What other interests do you have in mind?

[fol. 2014] By Mr. Oftedal: Any investment such as taverns for the years 1946, 1947, 1948, pinball business, investment enterprises.

A. Mr. Oftedal, with regard to the pinball business, you must remember that I spent all of my time in Seattle—practically all of the time. The pinball business was not operated at all. After the thing got licensed, that was the end of my job. When the license was O.K., that was the end of it. We hired people to take care of the bookkeeping, and I took care of my law business, but I did spend some time with the taverns the Blue Moon and the White Elephant, and believe me it was a white elephant, and when I had those things on my mind naturally I neglected my law practice to some extent. During that particular year that I devoted to these outside interests, I can't tell you how much time it was, but I know that it was considerable at that time.

Q.17 Is it conceivable by any stretch of the imagination that your unreported income is from your law practice?

A. I can't answer that question because I do not know. I have no way of doing anything about that.

Q.18 If any attorney engaged in the practice of law made as much as $100,000 in three years wouldn't that be exceptional?

A. I could not tell you what other attorneys make. I do not know what my next door neighbor makes because I have no way of knowing.

Q.19 Mr. Seijas, it has been alleged that at the time you and Bill Foreman sold out the United Amusement Company, Kitsap County, to Heberling Brothers and Harry Schneiderman, that in so far as you knew the sale was being made to Harry Schneiderman alone, that he was furnished a list of the machines which were on that county route, but when the final papers were signed different machines than those originally listed were included in the agreement, is that correct?

A. I had nothing to do with it. Mr. Foreman made the sale to Heberling Brothers. I did not talk to them. I had nothing to do with the sale outside of preparing the bill of sale.

Q.20 Did you know any of the machines had been switched?

A. If any machines were switched it was probably two or three that had been constantly moved around, but if they were I am sure that Mr. Foreman made some adjustment.

Mr. O'Leary asked me a question about preparing income tax returns, if I knew how to prepare them. I think he had one of the Tacoma Auto View Theatres returns, and I told him that I never prepared it, and if I did it was some oversight if I so signed it. He also asked me if I had ever prepared any in my office, and I venture to say in all of the years that we have been practicing that we have never prepared more than twenty income tax returns, and I bet half of those were prepared by the stenographers, and I [fol. 2015] think all of the income tax returns that we prepared were on the workers on salaried income, short form I think you call it.

Interview adjourned at 3:30 p.m. 1/28/52.

April 11th, 1952.

Mr. Oftedal has asked me if I filed any income tax returns with intent to evade the payment of income taxes to which I say certainly not. There was absolutely no intent, wilful or otherwise, to evade the payment of taxes rightfully due from me in the preparation and filing of my income tax returns for the years herein involved.

This is a supplement to the statement above made as of Jan. 28, 1952.

/s/ Army Seijas

[fol. 2016]

Plaintiff's Exhibit No. 143

Testimony of William R. Forman, Taken in the Office of the Intelligence Division, Bureau of Internal Revenue, Room 501, Smith Tower, Seattle, Washington, at 9:35 A.M. on the 11th day of March 1953, in the matter of the income tax liability to the United States of Army A. Seijas.

Present: William R. Forman, Witness
Edward J. O'Leary, Special Agent
Willard A. Oftedal, Special Agent
Eleanor G. Anderson, Recorder

By Mr. O'Leary:

Q. 1. Mr. Forman, you have been summoned here today to testify in regard to the income tax liability of Army Seijas, and as it is desired that your testimony be under oath, will you please raise your right hand? Do you swear that the testimony that you are about to give will be the truth, the whole truth and nothing but the truth so help you God?

A. I do.

Q. 2. Will you identify yourself by stating your full name and address?

A. William R. Forman, 1016 Securities Building, Seattle.

Q. 3. What is your present business?

A. Theater owner and operator.

Q. 4. Will you describe your past association with Mr. Seijas so that we will know how long you have known him?

A. May I read a statement that Mr. Meade asked me to read?

Q. 5. Yes.

A. "Gentlemen: Now that I have been sworn to testify I want to state for the record that I have consulted my attorney, George Meade, regarding the subpoena that Mr. O'Leary served on me. It is my understanding that this questioning concerns the letter that I wrote to Mr. O'Leary on May 9, 1952 in which I explained the sale of my interest in the United Amusement Company of Bremerton to Henry Morin. As you know, my attorney, George Meade, is ill and unable to attend here, and I am attending this meeting without counsel although on previous questionings, under oath, I have always been represented by counsel. I have talked to Mr. O'Leary yesterday and advised him what my position would be here today; that I would appear voluntarily without counsel concerning the matter contained in that letter. However, I have been advised by Mr. Meade that if any questions were asked outside of that scope that I should state that I would like to have Mr. Meade present [fol. 2017] to represent me and that I must not sign anything without Mr. Meade having first passed upon it and approved the same. I am reading this into the record as per the suggestion of my counsel who, as I stated before, is ill and not able to be present at this meeting.

Q. 6. Mr. Forman, if there is any question propounded to you which you do not wish to answer without the advice of your attorney you may so state. Will you describe your past association with Mr. Seijas in order that we may know how long you have known him?

A. May I ask specifically how I should—I don't know—

Q. 7. Just briefly state what your past association has been with Mr. Seijas.

A. I have known him for many years. In college and when I started in the theater business independently I shared offices with him for sometime.

Q. 8. Have you been a partner with him in a number of businesses?

A. I was a partner with him in the United Amusement, well, these companies, the United Amusement Company in Bremerton and he has represented me in legal matters and has been a stockholder in some companies which I started.

Q. 9. Were you an equal partner with Seijas in the United Amusement Company?

A. Yes.

Q. 10. What type of business was the United Amusement Company?

A. It was leasing amusement machines known as pinball machines in Kitsap County.

Q. 11. When and to whom did you sell your partnership interest in the United Amusement Company?

A. It is my recollection that I sold the United Amusement Company of Bremerton in the fall of 1946.

Q. 12. What was the sale price of your interest?

A. $30,000.

Q. 13. Did Mr. Seijas represent you in this sale to Morin?

A. Yes.

Q. 14. Did you loan or advance Seijas the sum of $15,000 during the fall of 1946?

A. Yes, I did.

[fol. 2018] Q. 15. Will you describe the circumstances surrounding this loan?

A. He asked me at that time to—He asked me if he could borrow $15,000 and I was grateful for him arranging this deal and I agreed to do so.

Q. 16. Did he say why he needed the money or to what purpose he was going to put it?

A. No, he didn't.

Q. 17. Did you take a note from him at that time of the loan?

A. I don't remember whether it was a note or a letter. I believe it was one or the other.

Q. 18. Is there any available record covering this loan and the repayment?

A. No, I didn't put it through any books because there was nothing to be reported on. It was a personal arrange-

ment and he paid it back over a period of time and I believe the note or letter was returned to him when it was completed.

Q. 19. In response to our previous inquiries, have you previously made an attempt to locate any record relative to this loan and repayments on it?

A. No, I haven't.

Q. 20. Do you believe that you could locate a record relative to this loan?

A. To the best of my knowledge I don't believe I could.

Q. 21. What is your recollection as to the date of this loan?

A. To the best of my recollection it was at the time that the deal was made or shortly thereafter. I cannot remember the date or detail at this time. It was whenever we sold that route.

Q. 22. According to the records, you sold your interest to Mr. Morin in the fall of 1946. Is that at the time of the loan?

A. Yes, to the best of my recollection now.

Q. 23. When did Seijas repay this loan?

A. To the best of my recollection it was repaid in 1947 and 1948.

Q. 24. Could you break down the amount that was paid in 1947 and the amount that was repaid in 1948?

A. No, I cannot.

Q. 25. Do you think that the greater portion was repaid in 1947?

A. I don't remember.

[fol. 2019] Q. 26. Your recollection then is that it was paid in the following two years?

A. Yes.

Q. 27. Why did you sell your interest in the United Amusement Company?

A. I was devoting all of my time to expanding in the theater business and wished to get rid of my investment in this business.

Q. 28. At the time you were looking for a buyer for your interest did Mr. Seijas indicate that he wished to remain in that business?

A. Yes. Well, I wouldn't say that he wished to remain in the business but he didn't want to dispose of his investment at that time.

Q. 29. Had the business been profitable for you?

A. Yes.

By Mr. Oftedal:

Q. 30. Mr. Forman, earlier in this statement when you mentioned that Bremerton Amusement Company leased amusement machines known as pinball machines in Kitsap County did you not really intend to convey the understanding that the Bremerton Amusement Company actually owned the machines but placed them in various locations throughout the county where they were operated under the supervision of the location?

A. Yes, that's right.

Q. 31. And, in fact, the Bremerton Amusement Company handled the collection of the proceeds from those machines and distributed the share of profit between the company and the location owner. Is that correct?

A. Yes.

Q. 32. Earlier in this statement when you mentioned a loan was made to Seijas "At the time the deal was made or shortly thereafter," you had reference to the sale of your interest to Henry Morin. Is that correct?

A. Correct.

By Mr. O'Leary:

Q. 33. Did you or Mr. Seijas take the more active part in the management of the United Amusement Company?

A. The last few years that I was in it Mr. Seijas took the active operating part in it.

Q. 34. Do you have any other comments that you would like to make, Mr. Forman?

A. No.

[fol. 2020] By Mr. Oftedal:

Q. 35. Have you made any other loans to Army Seijas on which he owed you money at the end of any year?

A. Well, I don't know. I would have to check that. You mean during this period?

Q. 36. During the period from 1945 up through 1949.

A. Mr. Oftedal, I would have to check my records on that.

Mr. Oftedal—Would you check please for us on that.

Q. 37. Have you borrowed any money from Seijas during the years 1945 through 1949 on which you would have owed him any money at the end of those years?

A. I would like to check my records on this matter.

Statement concluded at 10:15 A.M.

Affidavit

WILLIAM R. FORMAN, being first duly sworn, on his oath deposes and says:

That he has read the foregoing transcript of this statement consisting of Pages 1 to 5; that he has been given an opportunity to correct the same; that he knows the contents thereof, and the same are true to the best of his knowledge and belief.

.....

Subscribed and sworn to before me
this ..... day of 1953,
at Seattle, Washington.

Special Agent, Intelligence Division

[fol. 2021]

SUPREME COURT OF THE UNITED STATES

No. 779, October Term, 1958

WILLIAM R. FORMAN, Petitioner

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—May 4, 1959

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

File this return with Collector of Internal Revenue on or before March 15, 1946. Any balance of tax due (item 8, below) must be paid in full with return. See separate Instructions for filing out return.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1945

1945

For fiscal year beginning ..... 1945, and ending ..... 19..

Do not write in these spaces

File No. 1 b 1

Serial No. 3011683

Washington
(Collector's District)

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2, as your return, if your total income was less than $5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than $100 of other wages, dividends, and interest.

NAME ARMY A. SEIJAS (Betty L.)
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 1812 Smith Tower
(PLEASE PRINT. Street and number or rural route)

Seattle 4 (City or town, postal zone number) King (County) Washington (State)

Occupation Lawyer Social Security No. .....

Your Exemptions

List your own name.
If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other above relatives (as defined in instruction 1) with 1945 income of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

	Name (please print)	Relationship	Name (please print)	Relationship
1.	Yourself, Army A. Seijas	x x x x x x x x x		
	Wife, Gloria Seijas	daughter		
	576.84			

Your Income

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1945, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. (Members of armed forces and persons claiming travelling or reimbursed expenses, see instruction 2.)

	Name of Employer's Business	Where Employed (city and State)	
2.			
	576.84		
			22,724.22

3. Enter here the gross amount of your dividends and interest (including capital gains from Government obligations unless wholly exempt from taxation) .....

4. If you received any other income, give details on page 2 and enter the total here ..... $ 45,448.44

5. Add amounts in items 2, 3, and 4, and enter the total here ..... $ 45,448.44

If item 5 includes incomes of both husband and wife, show husband's income here, $ 1/2 ; wife's income here, $ 22,724.22

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and complete your tax on page 2.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and complete your tax on page 2. You may either take a standard deduction of $500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 4, or from line 15, page 3 ..... $ 8307.11

7. How much have you paid on 1945 income tax?
(A) By withholding from your wages ..... $
(B) By payments on 1945 Declaration of Estimated Tax 7500.00
Enter total here → 7500.00

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here ..... $ 807.11

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here ..... $

Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1946 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1944

To which Collector's office was it sent? Tacoma

To which Collector's office did you pay amount claimed in item 7 (B), above? Tacoma

Is your wife (or husband) making a separate return for 1945? Yes (If "Yes," write below: "Yes" or "No")

Name of wife (or husband) Betty L. Seijas

Collector's office to which sent Tacoma

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return) (Dept) (Signature of taxpayer) (Date)

(Name of firm or employer, if any) (If this is a joint return of husband and wife, it must be signed by both)

16—47704-1

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Page 4

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)		4. Total amount received this year	
2. Amount received tax-free in prior years		5. Excess, if any, of line 4 over line 3	
3. Remainder of your cost (line 1 less line 2)		6. Enter line 5, or 3 percent of line 1, whichever is greater (Which figure should be used if annuity ended during year)	

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Taxes (explain in Schedule G)	5. Other expenses (explain in Schedule G)
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)				

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Partners should obtain Form 1065)

(State (1) nature of business: Law; (2) business name? Arne Soliae)

1. Total receipts			10,110.74
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letter "C" or "C or M" on lines 2 and 8 if inventories are valued at cost, or cost or market, whichever is lower)		**OTHER BUSINESS DEDUCTIONS**	
2. Inventory at beginning of year		11. Salaries and wages not in line 4	
3. Merchandise bought for sale		12. Interest on business indebtedness	
4. Labor		13. Taxes on business and business property	52.46
5. Material and supplies		14. Leases (explain in Schedule G)	
6. Other costs (explain in Schedule G)		15. Bad debts arising from sales or services	
7. Total of lines 2 to 6		16. Depreciation, obsolescence and depletion (explain in Schedule F)	
8. Less inventory at end of year		17. Rent, repairs, and other expenses (explain in Schedule G)	1,098.07
9. Net cost of goods sold (line 7 less line 8)		18. Amortization of emergency facilities (attach statement)	
10. Gross profit (line 1 less line 9)		19. Net operating loss deduction (attach statement)	
		20. Total of lines 11 to 19	1,150.53
		21. Total of lines 9 and 20	1,150.53
		22. Net profit (or loss) (line 1 less line 21)	8,960.21

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)	11,000.00
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)	

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and address of partnership, syndicate, etc. See attached list	Amount,	25,488.25
Name and address of estate or trust	Amount,	
Other sources (state nature)	Amount,	
Total		25,488.25
Total income from above sources (Enter as item 4, page 1)		45,448.96

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If building, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Accumulated depreciation allowed or allowable in prior years	5. Depreciation allowable in prior years	6. Depreciation allowed or allowable in current year	7. Estimated life used for computing depreciation this year	8. Estimated remaining useful life at beginning of year	9. Depreciation allowable this year

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Schedule and line No.	2. Explanation	3. Amount	1. Schedule and line No.	2. Explanation	3. Amount
17	Auto Expense	27.77			
17	Dues & subscriptions	54.40			
17	Entertainment	98.82			
17	Travel Expense	814.30			
17	Office supplies	62.58			

Army A. Seijas Explanations of Earnings 1945

Partnership Earnings:		
United Amusement Co. of Bremerton	1/1/45 to 3/31/45	658.78
United Amusement Co. of Bremerton	4/1/45 to 12/31/45	5,708.04
United Amusement Company		3,644.76
Seijas & Forman - Rent Income		1,960.22
Dock Concessions		1,263.83
Blue Moon Tavern		3,061.94
Green Parrot Theatre		9,190.68
TOTAL FROM PARTNERSHIPS		25,488.25
Law Business		8,960.19
Long-Term Capital Gains		11,000.00
Adjusted Gross Income		45,448.44
One-half Share		22,724.22

Schedule D (Form 1040)

U. S. TREASURY DEPARTMENT
Internal Revenue Service

SCHEDULE OF GAINS AND LOSSES

FROM SALES OR EXCHANGES OF (1) CAPITAL ASSETS AND (2) PROPERTY OTHER THAN CAPITAL ASSETS

(TO BE FILED WITH THE COLLECTOR OF INTERNAL REVENUE WITH FORM 1040)

For Calendar Year 1945

Or fiscal year beginning ....., 1945, and ending ....., 1945

(See instructions on other side)

Name of taxpayer ANNE A. SELIAS (Betty L.)

Address 1812 Smith Tower, Seattle 4, Washington

(1) CAPITAL ASSETS

1. Kind of property (If necessary, attach separate statement of descriptions details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (Enumerate price)	5. Cost or other basis	6. Expense of sale and cost of improvements, unless allowed separately in connection with return for March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	8. Gain or loss (column 4 plus column 7 less the sum of columns 5 and 6)	Gain or loss to be taken into account: (c) Per cent applied	(d) Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS									
			$	$	$	$	$	100	$
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									$
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS									
Assignment of leases	1941	1944	$22000.00	$445.25		$445.25	$22,000.00	50	$11,000.00
								50	
								50	
								50	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									$11,000.00

SUMMARY OF CAPITAL GAINS AND LOSSES

1. Classification	2. Capital loss carry-over (attach statement)	3. Net gain or loss to be taken into account from column 10, above: (a) Gain	3. (b) Loss	4. Net gain or loss to be taken into account from partnerships and estates (attach statement): (a) Gain	4. (b) Loss	5. Total net gain or loss (also to be entered in columns 2, 3, and 4, of this summary): (a) Gain	5. (b) Loss
1. Total net short-term capital gain or loss	$	$	$	$	$	$	$
2. Total net long-term capital gain or loss		$11,000.00		$	$	$11000.00	$
3. Net gain in column 5, lines 1 and 2. (Enter on line 1, Schedule D, page 2, Form 1040)						$11000.00	
4. Net loss in column 5, lines 1 and 2. (The amount to be entered on line 1, Schedule D, page 2, Form 1040, is (1) this item or (2) net income, or adjusted gross income if tax is computed by use of the tax table on page 4, Form 1040, computed without regard to capital gains or losses, or (3) $1,000, whichever is smallest)							$

COMPUTATION OF ALTERNATIVE TAX 1/2 Community Property

Use only if you had an excess of net long-term *capital gain* over net short-term *capital loss*, and line 9, page 3, Form 1040, exceeds $10,000

1. Net income (line 3, page 3, Form 1040)	$22,226.22	10. Surtax on line 9. (See Surtax Table in Form 1040 Instructions)	$ 8070.38
2. Excess of net long-term capital gain over net short-term capital loss (line 2, column 5 (a), less line 1, column 5 (b), of summary above) 1/2	5,500.00		
3. Ordinary net income (line 1 less line 2)	$16,726.22	11. Partial tax (line 6 plus line 10)	$ 8557.11
4. Less: Normal-tax exemption (line 4, page 3, Form 1040)	500.00		
5. Balance subject to normal tax. (If partially tax-exempt interest is included in line 3 above, see Tax Computation Instructions on page 4 of Form 1040 Instructions)	$16,226.22	12. 50% of line 2	2750.00
		13. Alternative tax (line 11 plus line 12)	$ 8307.11
6. Normal tax (3% of line 5)	$ 486.78		
7. Ordinary net income (line 3, above)	$16,726.22	14. Total normal tax and surtax (line 6 plus line 10, page 3, Form 1040)	$ 8557.38
8. Less: Surtax exemptions (line 8, page 3, Form 1040)	1,000.00		
9. Balance (surtax net income)	$15,726.22	15. Tax liability (line 13 or line 14, whichever is the lesser). (Enter on line 11, page 3, Form 1040)	$ 8307.11

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Kind of property	2. Date acquired	3. Gross sales price (Enumerate price)	4. Cost or other basis	5. Expense of sale and cost of improvements, unless allowed separately in connection with return for March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	7. Gain or loss (column 3 plus column 6 less the sum of columns 4 and 5)
		$	$	$	$	$
Total net gain (or loss) (enter on line 2, Schedule D, page 2, Form 1040)						$

If any item in this schedule was acquired by you otherwise than by purchase, attach a statement explaining how acquired.

16—42352-0

Do not itemize deductions if—(1) You determine your tax from the tax table on page 4, or
(2) Your total income is $5,000 or more and you claim the $500 standard deduction.
If husband and wife filing together all of your file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

DEDUCTIONS

Itemize deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.

		Amount
Contributions		
	Allowable Contributions (not in excess of 15 percent of item 5, page 1)	$
Interest		
	Total Interest	
Taxes		
	Total Taxes	
Losses from fire, storm, shipwreck, or other casualty, or theft		
	Total Allowable Losses (not compensated by insurance or otherwise)	
Medical and dental expenses		
	Net Expenses (not compensated by insurance or otherwise)	$
	Enter 5 percent of item 5, page 1, and subtract from Net Expenses	
	Allowable Medical and Dental Expenses. See Instruction for limitation	
Miscellaneous (See Instruction)		
	Total Miscellaneous Deductions	
	TOTAL DEDUCTIONS	$

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	$ 22,724.22	
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of $500)	500.00	
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$ 22,224.22	
4. Enter your Normal-Tax Exemption ($500 if return includes income of only one person; otherwise see Tax Computation Instructions)	500.00	
5. Subtract line 4 from line 3. Enter the difference here. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)	$ 21,724.22	
6. Enter here 3 percent of line 5. This is your Normal Tax. (Figure your Surtax below and enter in line 10)		$ 651.73
7. Copy the figure you entered on line 3, above	$ 22,224.22	
8. Enter your Surtax Exemption ($500 for each person listed in item 1, page 1)	1,000.00	
9. Subtract line 8 from line 7. Enter the difference here. This is your Surtax Net Income	$ 21,224.22	
10. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 9. Enter the amount here		7945.86
11. Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)		$ 8597.59
If you used the $500 standard deduction in line 2, disregard lines 12, 13, and 14, and copy on line 15 the same figure you entered on line 11		
12. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)	$	
13. Enter here any income tax paid at source on tax-free covenant bond interest		
14. Add the figures on lines 12 and 13 and enter the total here		
15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax		$

16—42937-1

NOT INVESTIGATED

File this return with Collector of Internal Revenue on or before March 15, 1946. Any balance of tax due (item 8, page 2) must be paid in full with return. See separate Instructions for filing out return.

Page 1

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1945

CONFIDENTIAL when proved

1945

4,686.71
21.01
1776.78
3168
2-17-46
3139 2c 49

or fiscal year beginning ..... 1945, and ending 1945

Do not write in these spaces
File No. 247
Serial No. 301:3295
District
(Cashier's Stamp)

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2, as your return, if your total income was less than $5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than $100 of other wages, dividends, and interest.

NAME William R. Forman
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 1012 Smith Tower Bldg.
(PLEASE PRINT. Street and number or postal route)

Seattle, Washington
(City or town, postal zone number) (County) (State)

Occupation ..... Social Security No. .....

Your Exemptions

List your own name.
If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

	Name (please print)	Relationship
1. Your name	Wm. R. Forman	
	Michael Forman	son

List names of other close relatives (as defined in instruction 1) with 1945 income of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)	Relationship

Your Income

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1945, BEFORE PAY-ROLL DEDUCTIONS for taxes, fees, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see instruction 2.

2. Pay Employer's Name	Where Employed (City and State)	Amount	
A.		$	
B.	Schedule Attached		
C.			
		Enter total here →	$ 74,136 14

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) 11,000 00

4. If you received any other income, give details on page 2 and enter the total here 11,000 00

5. Add amounts in items 2, 3, and 4, and enter the total here ..... $ 85,136 14

If item 5 includes incomes of both husband and wife, show husband's income here, $ ..... ; wife's income here, $ .....

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 2.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 2. You may either take a standard deduction of 10% or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 4, or from line 13, page 3 ..... $ 20,182 43

7. How much have you paid on your 1945 income tax?
(A) By withholding from your wages ..... $
(B) By payments on 1945 Declaration of Estimated Tax 20,000 00
Enter total here → 20,000 00

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here ..... $ 182 43

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here ..... $
Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1946 estimated tax ☐

If you filed a return for a prior year, what was the latest year? Yes
To which Collector's office was it sent? Tacoma, Wash.
To which Collector's office did you pay amount claimed in item 7 (B), above? Tacoma, Wash.

Is your wife (or husband) making a separate return for 1945? Yes (Write "Yes" or "No")
If "Yes," write below:
Name of wife (or husband) Dorothy Forman
Collector's office to which sent Tacoma, Wash.

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Thelma E Inderbitzen — (Date)
(Signature of person (other than taxpayer or agent) preparing return)

William R. Forman 3/4/46
(Signature of taxpayer) (Date)

Secretary to Attorney
(Name of firm or employer, if any)

(If this is a joint return of husband and wife, it must be signed by both)

16—47777-1

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Schedule A.—[illegible] FROM ANNUITIES OR INSURANCE

1. Cost of annuity (total amount you paid in)	$	4. Total amount received this year	$
2. Amount received tax-free in prior years		5. Balance, if any, of line 4 over line 3	
3. Remainder of your cost (line 1 less line 2)	$	6. Enter line 5, or 3 percent of line 1, whichever is greater (this amount should be not entered again if taxable)	$

Schedule B.—[illegible] FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rents or royalties	3. Expenses of [illegible]	4. [illegible]	5. [illegible]
	$	$	$	$
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	$	$	$	$

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Persons should obtain Form 4068)

(Items (1) nature of business ..... ; (2) business name .....)

1. Total receipts			$
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C," "L," or "M" on lines 2 and 6 if inventories are valued at either cost, or cost or market, whichever is lower)		**OTHER BUSINESS DEDUCTIONS**	
2. Inventory at beginning of year	$	11. Salaries and wages not in line 4	$
3. Merchandise bought for sale		12. Interest on business indebtedness	
4. Labor		13. Taxes on business and business property	
5. Material and supplies		14. Losses (explain in Schedule G)	
6. Other costs (explain in Schedule G)		15. Bad debts arising from sales or services	
7. Total of lines 2 to 6	$	16. Depreciation, obsolescence and depletion (explain in Schedule F)	
8. Less inventory at end of year		17. Rent, repairs, and other expenses (explain in Schedule G)	
9. Net cost of goods sold (line 7 less line 8)	$	18. Amortization of emergency facilities (attach statement)	
10. Gross profit (line 1 less line 9)	$	19. Net operating loss deduction (attach statement)	
		20. Total of lines 11 to 19	$
		21. Total of lines 9 and 20	$
		22. Net profit (or loss) (line [illegible] less line 21)	

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D) .....
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D) .....

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and address of partnership, syndicate, etc.	Amount	$
Name and address of estate or trust	Amount	
Other sources (state nature)	Amount	
Total		
Total income from above sources (Enter as Item 4, page 1)		$

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis for use in [illegible]	4. Amount fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Depreciation and other basis to be recovered	7. Estimated life used to compute [illegible]	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		$	$	$	$			$

Schedule G.—EXPLANATION OF SOLUTIONS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Schedule or Line No.	2. Explanation	3. Amount	1. Schedule or Line No.	2. Explanation	3. Amount
		$			$

WILLIAM R. AND DOROTHY FORMAN
1812 Smith Tower Bldg.
Seattle, Wash.

Year of 1945

PARTNERSHIP INCOMES:

United Amusement Co. of Bremerton 1812 Smith Tower Bldg. Seattle, Washington		$ 6,366.82
United Amusement Company 1812 Smith Tower Bldg. Seattle, Washington		3,644.77
A. A. Seijas and W.R. Forman 1812 Smith Tower Bldg. Seattle, Washington		1,960.22
Forman Brothers 1990 NW Glisan Portland, Oregon		47,327.29
Film Classics of NW. 925 NW 19th Portland, Oregon	Loss	(212.81)
Green Parrot Theatre (Seattle) 1990 NW Glisan Portland, Oregon		13,786.02
Dock Concessions Ferry Terminal Bldg. Bremerton, Washington		1,263.83
		$74,136.14
Gain on Sale of the United Amusement Company		22,000.00
		$96,136.14

Schedule D (Form 1040)

U. S. TREASURY DEPARTMENT
Internal Revenue Service

SCHEDULE OF GAINS AND LOSSES

FROM SALES OR EXCHANGES OF (1) CAPITAL ASSETS AND (2) PROPERTY OTHER THAN CAPITAL ASSETS

(TO BE FILED WITH THE COLLECTOR OF INTERNAL REVENUE WITH FORM 1040)

For Calendar Year 1945

Or fiscal year beginning ....., 1945, and ending ....., 1946

(See instructions on other side)

Name of taxpayer Mrs. X. Forman

Address 1512 Smith Tower Bldg., Seattle, Washington

(1) CAPITAL ASSETS

1. Kind of property (If necessary, attach description of transaction details not shown below)	2. Date acquired Mo. Day Yr	3. Date sold Mo. Day Yr	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	8. Gain or loss (subtract 6 plus column 7 from the sum of columns 5 and 6)	Gain or loss to be taken into account: 9. Per cent age	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS									
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS									
1/2 Interest United Amusement Co.	6/4/41	1945	44000 00				22000.00	50	11000 00
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									11000 00

SUMMARY OF CAPITAL GAINS AND LOSSES

1. Classification	2. Capital loss carry-over (attach statement)	3. Net gain or loss to be taken into account from column 10, above (a) Gain	3. (b) Loss	4. Net gain or loss to be taken into account from partnerships and common trust funds (a) Gain	4. (b) Loss	5. Total net gain or loss taken into account in columns 2, 3, and 4 of this summary (a) Gain	5. (b) Loss
1. Total net short-term capital gain or loss							
2. Total net long-term capital gain or loss		11000 00				11000 00	
3. Net gain in column 5, lines 1 and 2. (Enter on line 1, Schedule D, page 2, Form 1040)						11000 00	
4. Net loss in column 5, lines 1 and 2. (The amount to be entered on line 1, Schedule D, page 2, Form 1040, is (1) this item or (2) net income, or adjusted gross income if tax is computed by use of the tax table on page 4, Form 1040, computed without regard to capital gains or losses, or (3) $1,000, whichever is smaller)							11000 00

Mrs. Dorothy Forman

COMPUTATION OF ALTERNATIVE TAX

Use only if you had an excess of net long-term *capital gain* over net short-term *capital loss*, and line 9, page 3, Form 1040, exceeds $16,000

1. Net income (line 3, page 3, Form 1040)	41437.40	10. Surtax on line 9. (See Surtax Table in Form 1040 Instructions)	16369.31
2. Excess of net long-term capital gain over net short-term capital loss (line 2, column 5 (a), less line 1, column 5 (b), of summary above)	6500 00	11. Partial tax (line 6 plus line 10)	17432.43
3. Ordinary net income (line 1 less line 2)	35937.40	12. 50% of line 2	2750.00
4. Less: Normal-tax exemption (line 4, page 3, Form 1040)	500.00		
5. Balance subject to normal tax. (If partially tax-exempt interest is included in line 3 above, see Tax Computation Instructions on page 4 of Form 1040 Instructions)	35,437.40	13. Alternative tax (line 11 plus line 12)	20182.43
6. Normal tax (3% of line 5)	1063.12	14. Total normal tax and surtax (line 6 plus line 10, page 3, Form 1040)	21269.92
7. Ordinary net income (line 3, above)	35937.40		
8. Less: Surtax exemptions (line 8, page 3, Form 1040)	1000.00	15. Tax liability (line 13 or line 14, whichever is the lesser). (Enter on line 11, page 3, Form 1040)	20182.43
9. Balance (surtax net income)	34937.40		

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	7. Gain or loss (column 3 plus column 6 less the sum of columns 4 and 5)
Total net gain (or loss) (enter on line 2, Schedule D, page 2, Form 1040)						

If any item in this schedule was acquired by you otherwise than by purchase, attach a statement explaining how acquired.

16—41228-4

Do not itemize deductions if—(1) You determine your tax from the tax table on page 4, or (2) Your total income is $5,000 or more and you elect the 10% standard deduction. If husband and wife (living together all year) file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

Page 2

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.

			Amount
Contributions	Federated Jewish Fund	$ 200 00	
	Council of Jewish Women	25 00	
	Seattle Community Chest	100 00	
	Allowable Contributions (not in excess of 15 percent of item 5, page 1)		$ 425 00
Interest	Washington Mutual Bank	$ 201 88	
	Total Interest		201 88
Taxes	Sales Tax	$ 125 00	
	Real Estate Tax	218 00	
	Auto Licenses	12 84	
	State Income	231 27	
	Total Taxes		589 11
Losses from fire, storm, shipwreck, or other casualty, or theft.		$	
	Total Allowable Losses (not compensated by insurance or otherwise)		
Medical and dental expenses		$	
	Net Expenses (not compensated by insurance or otherwise)	$	
	Enter 5 percent of item 5, page 1, and subtract from Net Expenses		
	Allowable Medical and Dental Expenses. See instruction for limitation		
Miscellaneous (See instructions)	Entertainment not reimbursed by partnerships	$ 489 69	
	Travel not reimbursed	285 04	
	Depreciation - Auto	175 00	
	Total Miscellaneous Deductions		949 73
	TOTAL DEDUCTIONS		$ 2261 35

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	$ 80,136 14		
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of $500)	2,261 35		
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$ 77,874 79		
4. Enter your Normal-Tax Exemption ($500 if return includes income of only one person; otherwise see Tax Computation Instructions)	41,437 40 500 00		
5. Subtract line 4 from line 3. Enter the difference here. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)	$ 40,937 40		
6. Enter here 3 percent of line 5. This is your Normal Tax. (Figure your Surtax below and enter in line 10)			$ 1,228 13
7. Copy the figure you entered on line 3, above	$ 41,437 40		
8. Enter your Surtax Exemptions ($500 for each person listed in item 1, page 1)	1,000 00		
9. Subtract line 8 from line 7. Enter the difference here. This is your Surtax Net Income	$ 40,437 40		
10. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 9. Enter the amount here			20,042 80
11. Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)			$ 21,271 93
If you used the 1000 standard deduction in line 2, disregard lines 12, 13, and 14, and copy of line 11 the same figure you entered on line 15			
12. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)	$		
13. Enter here any income tax paid at source on tax-free covenant bond interest			
14. Add the figures on lines 12 and 13 and enter the total here			-0-
15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax			$

1/2 Dorothy Forman

10—42787-1

DEC 28 1948

SEATTLE DIVISION

Name and address on return:
Name William R. Forman
Street 1812 Smith Tower Bldg.
City Seattle State Washington

Present name and address, if different:
Name
Street
City State

Time spent: Original D 4 H 4
Additional D 4 H. 0

Related cases: Dorothy Forman (wife)

Place Seattle, Washington

Date - Original April 12, 1948
Resubmitted December 9, 1948

Internal Revenue Agent in Charge
Seattle, Washington

An examination of the books and records of the above-named individual for years indicated below disclosed the following:

SUMMARY

Year	Deficiency	Overassessment	~~Penalty (State kind)~~	District in which return was filed
		INCOME TAX		
1945	$ 1,686.71			Washington

*_____

*(Insert appropriate tax description shown in Paragraph 322 Manual)

*_____

*(Insert appropriate tax description shown in Paragraph 322 Manual)

INTERNAL REVENUE
DEC 28 1948

(Over)

Nature of business: various partnerships
Authority for examination: 1945 Original return
Comparison has been made with available books and records
Method elected in deducting bad debts: none claimed
[redacted]
Method of accounting employed: Cash basis
Revenue Agent who made prior examination: W. V. Clodfelter
With whom was examination discussed? Taxpayer
Was an agreement to the findings procured? Yes
Consents (date of expiration): 6/30/50 for 1945 (being signed by Commissioner)
Claims (date and years covered): None
Correspondence from the Bureau: None
What other years, reported separately, were covered during this investigation?
None

Other information:

Taxpayer is a member of seven partnerships, mostly doing business as movie theaters and pin ball games. The following partnerships have been examined by a revenue agent prior to this examination:

United Amusement Company of Bremerton
United Amusement Company
Forman Brothers

The partnership return of Film Classic of Northwest was surveyed before assignment.

The following partnership returns were examined by this agent from the retained copies and no change was found to be warranted:

A. A. Seijas & W. R. Forman
Green Parrott Theatre
Desk Concessions

Non-business deductions were found to be allowable.

Upon examining the assets of the United Amusement Company which were transferred to the vendee, it was found that $7,870.57 unexpired licenses had been charged to expense on the books of the United Amusement Company, and all assets transferred carried a zero book value. To present a clearer picture to the taxpayer, this expense was not disallowed to the partnership, but the assets transferred were still held to be zero in this report and the gain on the sale of licenses was taxed as a short-term capital gain. They had been held for less than six months, so no difference in tax liability would result from increasing partnership income and increasing the basis of assets transferred, the proper adjustment to make.

[redacted]

(Continued)

(Do not write below this line)

An attempt was made to determine what was sold and what price was paid for each item sold for a total of $44,000.00. The business being a side line with the taxpayer, not much detail could be obtained. A separate contract was written up by the taxpayer and the vendee whereby each agreed not to compete with the other in their respective pin-ball route districts. Therefore, no part of the $44,000.00 of this contract could be allocated to an agreement not to compete. Unexpired licenses were transferred at costvalue of $7,870.57, leaving $36,129.43 paid for 88 pin-ball machines and goodwill, if any. Affidavits were produced by the taxpayer, affidavits were procured by this agent, and magazines printed during the taxable year advertising pin-ball games for sale were examined. No definite value of the machines sold was established, the estimates running from $20,000.00 to $40,000.00. At the very last of the examination, taxpayer finally remembered how the purchase price was derived. Evidently all pin-ball routes are sold at a price based primarily on the gross income of the machines in their present locations. Using that formula, the price of the route in question was far above that which the purchaser would have been willing to pay. The final agreed price of $44,000.00 came so close to the estimated fair market value of the machines alone that to attempt to put a price on the goodwill of the route sold (a non-depreciable asset to the vendee) would be highly debatable and not warrant the conference time to settle the point with the vendee in regard to his income tax return.

Prepayment credits were verified from a letter from the Collector's office in Tacoma dated April 9, 1948.

Ind. Grade A

Enclosures:
1945 Original Return
Form 870

W. V. Clodfelter
Internal Revenue Agent

Index:

Examining Officer W. V. Clodfelter

STATEMENT OF TOTAL TAX LIABILITY

YEAR	DEFICIENCY		PREVIOUSLY ASSESSED		ADJUSTMENTS PROPOSED IN THIS REPORT			
					TAX		PENALTY	
	Tax	Penalty	Tax	Penalty	Deficiency	Overassessment	Deficiency	Overassessment
INCOME TAX								
1945					$ 1,688.71			
TOTAL								
TOTAL								
TOTAL								

*Summary of Adjustments of Assessments Year 19

	INCOME TAX			
Originally assessed	$	$	$	$
Deficiency assessed, 19__,				
Overassessment scheduled, 19__,				
NET PREVIOUS ASSESSMENTS				

Year 19

Originally assessed	$	$	$	$
Deficiency assessed, 19__,				
Overassessment scheduled, 19__,				
NET PREVIOUS ASSESSMENTS				

U. S. GOVERNMENT PRINTING OFFICE 16—57770-1

PRELIMINARY STATEMENT

The deficiency in income tax for 1945 results from an understatement of partnership income and an improper classification of capital gains, offset by an understatement of allowable contributions.

Taxpayer was married the entire year, and all income is properly reported as community income with taxpayer's wife, Dorothy Forman. Taxpayer is the chief support of his dependent son.

The findings were discussed with the taxpayer, who has signed an agreement.

Form 606 J—Rev. March 1945
TREASURY DEPARTMENT
Internal Revenue Service

Name William R. Forman

Schedule No. 1 Year 1945

ITEM ADJUSTMENTS

	Return	Additions to Income	Deductions from Income	Total Combined	Wife's Share
1					
2					
3					
4					
5					
6 Capital Gains	$ 11,000 00	1,967 64		$ 12,967 64	$ 6,483 82
7 Partnership Income	74,136 14	2,869 17		77,005 31	38,502 65
8					
9 Adjusted Gross Inc.	$ 85,136 14			$ 89,972 95	$ 44,986 47
10 Contributions	$ 425 00		412 42	$ 837 42	$ 418 71
11 Interest	301 51			301 51	150 75
12 Taxes	585 11			585 11	292 55
13					
14					
15 Miscellaneous	949 73			949 73	474 97
16 Total Deductions	$ 2,261 35			$ 2,673 77	$ 1,336 88
17					
18 Net Income	$ 82,874 79			$ 87,299 18	$ 43,649 59
19					
20					
21					
22 Net income,					

Wife's net income or loss $ 43,649.59

Husband's net income or loss $ 43,649.59

U. S. Government Printing Office 16—62410-1

SCHEDULE 1 - A
EXPLANATION OF ITEMS CHANGED

(6.) Capital Gains understated $ 1,967.64

On November 10, 1945, taxpayer, in partnership with Army A. Seijas, sold the United Amusement Company, a partnership, to Harry Schneiderman for $44,000.00. Taxpayer reported all assets sold as having no cost basis, making a profit of $44,000.00, $22,000.00 of which was allocable to this taxpayer. This profit was reported as a long-term capital gain under Section 117(j) of the Internal Revenue Code and taxed under the alternative method on the $11,000.00 included in gross income. Upon examination it was found that of the assets transferred to the vendee, $7,870.57 was paid by the vendee for licenses which taxpayer had acquired over a period less than six months prior to the date of sale. Accordingly, the income from the sale of these licenses is held to be short-term capital gain and includible in income 100%. Taxpayer's share is $3,935.28, of which $1,967.64 had already been included in income as long-term capital gain. Capital gains are therefore increased $1,967.64 for a total of $12,967.64, consisting of $3,935.28 short-term capital gain and $9,032.36 long-term capital gain.

(7.) Partnership Income understated $ 2,869.17

In accordance with Revenue Agent Riedel's report on the United Amusement Company of Bremerton, a partnership, for 1945, the taxpayer's share of partnership profits is increased $844.00 for a total of $7,210.82.

In accordance with Revenue Agent Riedel's report on the United Amusement Company, a partnership, for 1945, the taxpayer's share of partnership profits is increased $1,500.25 for a total of $5,145.02.

In accordance with Revenue Agent Kendall's report on the Forman Brothers, a partnership, for 1945, the taxpayer's share of partnership profits is increased $524.92, for a total of $47,852.21.

The total of the above three adjustments is $2,869.17.

(10.) Contributions understated $ 412.42

In accordance with Revenue Agent Kendall's report on the Forman Brothers, a partnership, for 1945, the taxpayer's share of partnership contributions is $412.42, none of which had previously been claimed by taxpayer.

Form 1802-B
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(June 1947)

NAME William R. Forman

SCHEDULE No. 2 Year Period } ended December 31, 1945

COMPUTATION OF INCOME TAX—INDIVIDUAL
FOR CALENDAR YEARS 1944 AND 1945

1. Net income, from Schedule No. 1	$ 43,649.59	
2. Less: Surtax exemption	1,000.00	
3. Surtax net income	42,649.59	
4. Surtax		$ 21,568.22
5. Net income, from Schedule No. 1	$ 43,649.59	
6. Less: ~~Partially tax-exempt interest*~~ $		
Normal-tax exemption	500.00	
7. Balance subject to normal tax	$ 43,149.59	
8. Normal tax at 3 percent		$ 1,294.49
9. Total income tax (item 4 plus item 8) or		$ 22,862.71
Total alternative tax, from Schedule No. 3		21,869.14
10. ~~Less: Income tax paid to a foreign country or U. S. possession*~~ $		
~~Income tax paid at source*~~		
11. Income tax liability		$ 21,869.14
12. Income tax liability disclosed by return		20,182.43
13. Deficiency (~~overassessment~~) in income tax		1,686.71

* Not applicable if taxpayer elects to take the Standard Deduction.

U. S. GOVERNMENT PRINTING OFFICE 16 48870-3

Name of Taxpayer William R. Forman

SCHEDULE NO. 5 Year) ended December 31, 1945
Period)

COMPUTATION OF ALTERNATIVE TAX - I. R. C.
(For Calendar Year 1945)

INDIVIDUAL

1.	Net income, from Schedule No. 1	$ 43,649.59
2.	Minus: net long-term capital gain over net short-term capital loss (Community one-half)	4,516.18
3.	Ordinary net income	$ 39,133.41
4.	Less: Surtax exemptions	1,000.00
5.	Balance (surtax net income)	$ 38,133.41
6.	Surtax on line 5	$ 18,452.05
*7.	Ordinary net income	$ 39,133.41
8.	Less: Normal-tax exemption	500.00
9.	Balance subject to normal tax	$ 38,633.41
10.	Normal tax at 3 per cent	$ 1,159.00
11.	Partial tax (sum of lines 6 and 10)	$ 19,611.05
12.	Plus: 50% of line 2	2,258.09
13.	Alternative tax	$ 21,869.14

* Same as line 3, unless partially tax-exempt interest is included. If so, eliminate such interest unless optional standard deduction was elected. (Sec. 23(aa)(2), I.R.C.)

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
Seattle DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Seattle 1, Washington

FEB 10 1949

Mr. Army A. Seijas
1512 Smith Tower Bldg.
Seattle, Washington

Report Dated: Dec. 9, 1948

Years: 1945

Dear Mr. Seijas:

There is enclosed for your information and files a copy of a report covering the examination of your income tax return(s) for the year(s) indicated, recently made by a representative of this office. You have indicated your agreement to the adjustment of tax liability shown in the report.

The item checked below explains briefly how settlement of the agreed tax liability will be accomplished through the office of the Collector of Internal Revenue for your district.

Respectfully,

HAH:ml

Internal Revenue Agent in Charge.

Enclosure.

☒ Deficiency: The Collector will present to you at an early date a bill for payment of the tax, together with interest, at which time remittance should be made to that official, provided you have not already paid the full amount due.

☐ Net Deficiency: After the overassessment(s) have been certified to the Collector by the Commissioner of Internal Revenue, you will be presented with a bill for the amount due, at which time remittance should be made to the Collector.

☐ Net Overassessment: After the overassessment(s) have been certified to the Collector by the Commissioner of Internal Revenue, you will be advised as to how the overassessments have been applied, and will receive a check for the amount due you.

☐ Overassessment: After the overassessment(s) have been certified to the Collector by the Commissioner of Internal Revenue, you will receive a check in payment of the overassessment and interest, provided there are no outstanding taxes against which the amount should be credited.

Form 886
(Revised April 1943) 16—11677-1

REEXAMINATION

T-1

Examining Officer: W.V.Clodfelter

Time spent: 2 Days 2 Hours

Name and address on return:

Army A. Seijas
1312 Smith Tower Bldg.
Seattle, Washington

Related case: Betty Seijas (wife)

Seattle, Washington
December 9, 1948

Internal Revenue Agent in Charge
Seattle, Washington

An examination of the books and records of the above-named individual for year indicated below disclosed the following:

SUMMARY
Income Tax

Year	Deficiency	District
1945	$ 576.86	Washington

Nature of business: Attorney, various partnerships
Authority for examination: Original return Wm. R. Forman, partner
Comparison has been made with available records.
Method elected in deducting bad debts; None claimed
Method of accounting employed: Cash basis
Revenue Agent who made prior examination: A.M.Riedel
With whom was examination discussed? Taxpayer
Was an agreement to the findings procured? Yes
Consents (date of expiration): Signed by Taxpayer, awaiting return
Claims (date and years covered): None
Correspondence from the Bureau: None
What other years, reported separately, were covered during this investigation? None

Other information:

See concurrent report on taxpayer's partner, William R. Forman.

Enclosures: Form 870

IND. Grade A

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/s/ W. V. Clodfelter
Internal Revenue Agent

Form 886-T
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised Feb. 1942)

Name of Taxpayer [illegible] Sojus 1.

Date of Report December 9, 1942, 194

Index:

Examining Officer W. T. Gledfelter

STATEMENT OF TOTAL TAX LIABILITY

YEAR	LIABILITY		PREVIOUSLY ASSESSED*		ADJUSTMENTS PROPOSED IN THIS REPORT			
					TAX		PENALTY	
	Tax	Penalty	Tax	Penalty	Deficiency	Overassessment	Deficiency	Overassessment
INCOME TAX								
1945	$ 9,496.92		$ 8,920.06		$ 576.86			
TOTAL								
TOTAL								
TOTAL								

*Summary of Adjustments of Assessments Year 19

	INCOME TAX			
Originally assessed	$8,307.11	$	$	$
Deficiency assessed, 1947	612.95			
~~Overassessment scheduled, 19~~				
NET PREVIOUS ASSESSMENTS	$8,920.06			

Year 19

Originally assessed	$	$	$	$
Deficiency assessed, 19				
Overassessment scheduled, 19				
NET PREVIOUS ASSESSMENTS				

U. S. GOVERNMENT PRINTING OFFICE 16—17779-1

PRELIMINARY STATEMENT

This report is supplemental to that made on February 28, 1947, and is necessary because of an improper classification of capital gains made in that report and on taxpayer's return. The additional deficiency in tax for 1945 results from reclassifying a portion of the long-term capital gains reported by taxpayer into short-term capital gains.

The findings were discussed with the taxpayer, who has signed an agreement.

SCHEDULE NO. 1 Year 1945
Item Adjustments

	Revenue Agent's Report dated 2/28/47	Additions to Income	Total Corrected	Wife's Share
9. Adj. Gross, Inc.	$ 47,792.68	$ 1,967.64	$ 49,760.32	$ 24,880.16
17. Standard Deduction	1,000.00		1,000.00	500.00
18. Net Income	$ 46,792.68		$ 48,760.32	$ 24,380.16

Wife's net income or loss $ 24,380.16
Husband's net ins. or loss $ 24,380.16

SCHEDULE NO. 1-A
Explanation of items changed

(9.) Adjusted gross income increased $ 1,967.64

On November 10, 1945, taxpayer, in partnership with William R. Forman, sold the United Amusement Company, a partnership, to Harry Schneiderman for $ 44,000.00. Taxpayer reported all assets sold as having no adjusted cost basis, making a profit of $ 44,000.00, $ 22,000.00 of which was allocable to this taxpayer. This profit was reported as a long-term capital gain under Section 117(j) of the Internal Revenue Code and taxed under the alternative method on the $11,000.00 included in gross income. Upon examination it was found that of the assets transferred to the vendee, $ 7,870.57 was paid by the vendee for licenses which taxpayer had acquired over a period less than six months prior to the date of sale. Accordingly the income from the sale of these licenses is held to be short term capital gain and includible in income 100%. Taxpayer's share is $ 3,935.28, of which $ 1,967.64 had already been included in income as long-term capital gain. Capital gains are therefore increased $ 1,967.64 for a total of $ 12,967.64, consisting of $ 3,935.28 short-term capital gain and $ 9,032.36 long-term capital gain.

Name: Army A. Sadjan

3.

SCHEDULE NO. 2 Year) ended: 12/31/45
Period)

COMPUTATION OF INCOME TAX - INDIVIDUAL

Individual Income Tax Act of 1944

1.	Net income, from Schedule No. 1	$ 24,380.16	
2.	Less: Surtax exemption	1,000.00	
3.	Surtax net income	23,380.16	
4.	Surtax		$ 9,198.49
5.	Net income, from Schedule No. 1	24,380.16	
6.	Less: [redacted] Normal-tax exemption	500.00	
7.	Balance subject to normal tax	$ 23,880.16	
8.	Normal tax at 3%		716.40
9.	Total income tax (item 4 plus item 8) or Total alternative tax, from Schedule No. 3		9,914.89
10.	[redacted]		
11.	Income tax liability		$ 9,914.89
12.	Income tax liability disclosed by Revenue Agent's Report 2/22/47		8,938.04
13.	Deficiency (overassessment) in income tax		$ 976.85

* Not applicable if taxpayer elects to take the Standard Deduction.

122 Rev.

Name of Taxpayer [redacted]

SCHEDULE NO. 2 Year) ended [redacted]
Period)

COMPUTATION OF ALTERNATIVE TAX - I. R. C.
(For Calendar Year 1948)

INDIVIDUAL

1.	Net income, from Schedule No. 1	$ 24,300.16	
2.	Minus: Excess of net long-term capital gain over net short-term capital loss	4,936.18	
3.	Ordinary net income	$ 19,863.98	
4.	Less: Surtax exemptions	1,000.00	
5.	Balance (surtax net income)	$ 18,863.98	
6.	Surtax on line 5	$	$ 6,697.9[illegible]
*7.	Ordinary net income	$ 19,863.98	
8.	Less: Normal-tax exemption	500.00	
9.	Balance subject to normal tax	$ 19,363.98	
10.	Normal tax at 3 per cent	$	[illegible]
11.	Partial tax (sum of lines 6 and 10)	$	$ 7,[illegible]
12.	Plus: 50% of line 2		[illegible]
13.	Alternative tax	$	$ 9,[illegible]

* Same as line 3, unless partially tax-exempt interest is included. If so, eliminate such interest unless optional standard deduction was elected. (Sec. 23(aa)(2), I.R.C.)

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
Seattle Division

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Seattle 1, Washington

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Corr.

Mr. Army A. Seijas
1812 Smith Tower Bldg.
Seattle, Washington

Report Dated: Feb. 28, 1947

Dear Mr. Seijas:

Years: 1944, 1945

There is enclosed for your information and files a copy of a report covering the examination of your income tax return(s) for the year(s) indicated, recently made by a representative of this office. You have indicated your agreement to the adjustment of tax liability shown in the report.

The item checked below explains briefly how settlement of the agreed tax liability will be accomplished through the office of the Collector of Internal Revenue for your district.

Respectfully,

Internal Revenue Agent in Charge.

Enclosure.
LSB:ki

☒ Deficiency: The Collector will present to you at an early date a bill for payment of the tax, together with interest, at which time remittance should be made to that official, provided you have not already paid the full amount due.

☐ Net Deficiency: After the overassessment(s) have been certified to the Collector by the Commissioner of Internal Revenue, you will be presented with a bill for the amount due, at which time remittance should be made to the Collector.

☐ Net Overassessment: After the overassessment(s) have been certified to the Collector by the Commissioner of Internal Revenue, you will be advised as to how the overassessments have been applied, and will receive a check for the amount due you.

☐ Overassessment: After the overassessment(s) have been certified to the Collector by the Commissioner of Internal Revenue, you will receive a check in payment of the overassessment and interest, provided there are no outstanding taxes against which the amount should be credited.

Form 886
(Revised April 1942) 16—11497-1

Examining Officer Arthur M. Riedel Time spent 2 days 1 hr. T-1

Name and address on return:

Army A. Seijas
1812 Smith Tower Bldg.
Seattle, Wash.

Related cases Betty Seijas
United Amusement Co.

Seattle, Washington
Feb. 28, 1947

Internal Revenue Agent in Charge
Seattle, Washington

An examination of the books andrecords of the above-named individual for years indicated below disclosed the following:

SUMMARY

Year	Deficiency	District
	INCOME TAX	
1944	401.87	Washington
1945	612.95	Washington

Nature of business: Attorney
Authority for examination: Original return of United Amusement Co. of Bremerton 1944
Comparison has been made with available books and records
Method elected in deducting bad debts: None taken
Method of accounting employed: Cash basis
Revenue Agent who made prior examination: Hugh C. Fortner
With whom was examination discussed? Taxpayer
Was an agreement to the findings procured? Yes
Consents: None
Claims: None
Correspondence from the Bureau: None
What other years, reported separately, were covered during this investigation? None

Other information:

Taxpayer is an attorney however the greater part of his income is from his interests in the United Amusement Co, of Bremerton and the United Amusement Co. operators of pinball routes in the Bremerton area. Taxpayer was married during theentire period under examination and files on the community property basis with his wife Betty L. Seijas. There are two dependent daughters Betty Lou, and Gloria Seijas, each parent claiming one daughter as a personal exemption. All items of income and expense were verified and found allowable with exception of the understatement of

Army A. Seijas

Other information: (continued)

partnership income due to disallowance of deductions for legislative and political expenses to the partnership in which taxpayer is interested, United Amusement Co. of Bremerton and United Amusement Co. capital gain on sale of taxpayer's interest in the United Amusement Company in November 1945 is correctly reported and was verified from bill of sales and books of vendee and vendor.

Examination was made from taxpayer's retained copies of the 1944 and 1945 returns. Tax payments were verified from cancelled checks and receipts for bank drafts payable to Collector of Internal Revenue.

/s/ Arthur M. Riedel
Internal Revenue Agent

Enclosures:
Form 3870

Grade:A

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Form 886-T
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised Feb. 1942)

Name of Taxpayer Amy A. Seijas 1

Date of Report Feb. 28, 1947 , 194

Examining Officer Arthur M. Riedel

Index:

STATEMENT OF TOTAL TAX LIABILITY

YEAR	LIABILITY		PREVIOUSLY ASSESSED*		ADJUSTMENTS PROPOSED IN THIS REPORT			
					TAX		PENALTY	
	Tax	Penalty	Tax	Penalty	Deficiency	Overassessment	Deficiency	Overassessment
INCOME TAX								
1944					401.87			
1945					612.95			
TOTAL					1,014.82			
TOTAL								
TOTAL								

*Summary of Adjustments of Assessments Year 19

	INCOME TAX			
Originally assessed	$	$	$	$
Deficiency assessed, 19 ,				
Overassessment scheduled, 19 ,				
NET PREVIOUS ASSESSMENTS				

Year 19

Originally assessed	$	$	$	$
Deficiency assessed, 19 ,				
Overassessment scheduled, 19 ,				
NET PREVIOUS ASSESSMENTS				

16—17779-1

PRELIMINARY STATEMENT Years 1944, 1945

The cause of the deficiency recommended in this report is the increase in partnership income from the United Amusement Company and the United Amusement Company of Bremerton. For full details see the concurrent reports covering these two partnerships.

Taxpayer is a member of the following partnerships in addition to United Amusement Company and United Amusement Company of Bremerton. Since no changes made in following partnerships no separate reports on their returns were made. Examination made from retained copies.

Bremerton Amusement Company
Seijas and Fortuan
Dock Concessions

Taxpayer's share in profits from these partnerships is correctly reported on his personal returns.

SCHEDULE NO. 1 Year 1944

Item adjustments

	Return	Additions to income	Corrected
5. Adjusted gross income	16,744.29	803.75	17,548.04
12. Standard deduction	500.00		500.00
22. Net income	16,244.29	803.75	17,048.04

SCHEDULE 1 A Year 1944

Explanation of items

(5) Partnership income increased $803.75

Taxpayer's income from his interest in the United Amusement Co. and the United Amusement Company of Bremerton increased as follows as the result of the examination and subsequent adjustment to the income of said partnerships.

		% Interest	Per return	As corrected	Increase
United Amusement Co.	1944	50%	9,630.76	10,805.76	1,175.00
United Amusement Co. of Bremerton	1944	25%	4,375.13	4,807.63	432.50
Total			14,005.89	15,613.39	1,607.50
1/2 to wife - Betty L. Seijas					803.75
1/2 to husband - Army A. Seijas					803.75

Name Army Ae. Se. Jas

SCHEDULE NO. 2 Year) ended 12/31/44

COMPUTATION OF INCOME TAX __ INDIVIDUAL

Individual Income Tax Act of 1944

1. Net income, from Schedule No. ___	$ 17,048.04	
2. Less: Surtax exemption	1,000.00	
3. Surtax net income	16,048.04	
4. Surtax		$ 5,224.02
5. Net income, from Schedule No. ___	$ 17,048.04	
6. Less: ~~Partially tax exempt~~ *Interest x Normal-tax exemption	500.00	
7. Balance subject to normal tax	$ 16,548.04	
8. Normal tax at 3%		$ 496.44
9. Total income tax (item 4 plus item 8) or		5,720.46
Total alternative tax, from Schedule No. ___		5,719.02
10. Less: *Income tax paid to a foreign country or U. S. possession $ _____ *Income tax paid at source $ _____		
11. Income tax liability		5,719.02
12. Income tax liability disclosed by return		5,317.15
13. Deficiency (~~overassessment~~) in income tax		401.87

* Not applicable if taxpayer elects to take the Standard Deduction.

122 Rev.

Name of Taxpayer Arry A. Seijas

SCHEDULE NO. 3 Year) ended 12/31/44
Period)

COMPUTATION OF ALTERNATIVE TAX - I. R. C.
(For Calendar Year 1944)

INDIVIDUAL

1.	Net income, from Schedule No. ___	$17,0[illegible]
2.	Minus: Excess of net long-term capital gain over net short-term capital loss	1,228.71
3.	Ordinary net income	$15,81[illegible].33
4.	Less: Surtax exemptions	1,000.00
5.	Balance (surtax net income)	$14,81[illegible].33
6.	Surtax on line 5	$ 4,645.09
*7.	Ordinary net income	$15,81[illegible].33
8.	Less: Normal-tax exemption	500.00
9.	Balance subject to normal tax	$15,319.33
10.	Normal tax at 3 per cent	$ 459.58
11.	Partial tax (sum of lines 6 and 10)	$ 5,104.67
12.	Plus: 50% of line 2	614.35
13.	Alternative tax	$ 5,719.02

* Same as line 3, unless partially tax-exempt interest is included. If so, eliminate such interest unless optional standard deduction was elected. (Sec. 23(aa)(2),I.R.C.)

SCHEDULE NO. 4 Year 1945

Item adjustments

	Return	Additions to income	Corrected
9. Adjusted gross income	22,724.22	1,172.12	23,896.34
12. Standard deduction	500.00		500.00
22. Net income	22,224.22	1,172.12	23,396.34

SCHEDULE 4 A Year 1945

Explanation of items

(5) Partnership income increased $1,172.12

Taxpayer's income from his interest in the United Amusement Co. and the United Amusement Co. of Bremerton increased as follows as the result of the examination and subsequent adjustment to the income of said partnerships.

		% interest	Per return	As corrected	Increase
United Amusement Co.	1945	50%	3,644.76	5,145.01	1,500.25
United Amusement Co. of Bremerton	1945	50%	5,708.04	6,552.04	844.00
Total			9,352.80	11,697.05	2,344.25

1/2 to wife - Betty L. Seijas 1,172.12
1/2 to husband - Arny A. Seijas 1,172.13

Name Army A. Seijas

SCHEDULE NO. 5 Year) ended 12/31/45

COMPUTATION OF INCOME TAX — INDIVIDUAL

Individual Income Tax Act of 1944

1. Net income, from Schedule No. —	$23,396.34	
2. Less: Surtax exemption	1,000.00	
3. Surtax net income	22,396.34	
4. Surtax		$ 8,613.88
5. Net income, from Schedule No. —	$ 23,396.34	
6. Less: Interest / Normal-tax exemption	500.00	
7. Balance subject to normal tax	$22,896.34	
8. Normal tax at 3%		$ 686.89
9. Total income tax (item 4 plus item 8) or		9,300.73
Total alternative tax, from Schedule No. —		8,920.06
10. Less: *Income tax paid to a foreign country or U. S. possession	$	
*Income tax paid at source	$	
11. Income tax liability		8,920.06
12. Income tax liability disclosed by return		8,307.11
13. Deficiency ( ) in income tax		612.95

* Not applicable if taxpayer elects to take the Standard Deduction.

122 Rev.

Name of Taxpayer [redacted]

SCHEDULE NO. 6 Year) ended 12/31/45
[redacted])

COMPUTATION OF ALTERNATIVE TAX - I. R. C.
(For Calendar Year 1944)

INDIVIDUAL

1.	Net income, from Schedule No. ___	$ 23,396.34
2.	Minus: Excess of net long-term capital gain over net short-term capital loss	5,500.00
3.	Ordinary net income	$ 17,896.34
4.	Less: Surtax exemptions	1,000.00
5.	Balance (surtax net income)	$ 16,896.34
6.	Surtax on line 5	$ 5,668.17
*7.	Ordinary net income	$ 17,896.34
8.	Less: Normal-tax exemption	500.00
9.	Balance subject to normal tax	$ 17,396.34
10.	Normal tax at 3 per cent	$ 521.89
11.	Partial tax (sum of lines 6 and 10)	$ 6,190.06
12.	Plus: 50% of line 2	2,750.00
13.	Alternative tax	$ 8,940.06

* Same as line 3, unless partially tax-exempt interest is included. If so, eliminate such interest unless optional standard deduction was elected. (Sec. 23(aa)(2),I.R.C.)

[fol. 1980]

WHITTLE & WHITTLE
CERTIFIED PUBLIC ACCOUNTANTS
SEATTLE

GEORGE V. WHITTLE, C. P. A. (WN. ORE. CAL.)
GEORGE CLIFFORD WHITTLE, C. P. A. (WN.)

MEMBERS
AMERICAN INSTITUTE OF ACCOUNTANTS

SMITH TOWER
SEATTLE 4

December 28, 1951.

Mr. Army A. Seijas,
Smith Tower,
Seattle, Washington.

Dear Sir:

In accordance with your request there have been prepared and are attached hereto Comparative Net Worth Statement for years ending December 31, 1941 through 1949 and subsidiary schedule showing increase in net worth each year and cash used and expended.

These statements have been prepared from certain partnership returns, individual income tax returns, certain records, trial balances, work sheets and working papers of public accountants who have handled some of these matters and information supplied by taxpayer.

Taxpayer had an accountant, Edward Renstrom, keeping records of various partnerships and he occupied, as a sub-tenant, one of the offices of attorney, Edward Phelan, Room 1811 Smith Tower. The building management desired to clean and paint Mr. Phelan's offices and as a result thereof, there were discarded many records and files that had served their purpose and inadvertently had discarded useful records kept by Mr. Renstrom among which were those of the partnerships of United Amusement Co., American Amusement Co., Bremerton Amusement Co. and the United Amusement Co. of Bremerton. There is on file an affidavit of Mr. Phelan under date May 21, 1946 acknowledging the foregoing facts.

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Considerable cash was handled in the years 1942 to 1945, inclusive, in the pinball operations and it is difficult to allocate, at this time, the amount of cash taxpayer had in safe-keeping at the end of each year in that period. The net worth statement attached hereto is therefore not sound without giving effect to what additional cash could be correctly shown as at the close of each of the years in the aforesaid period.

It is quite obvious, by reference to the net worth statement, that the assets owned during the period from 1941 to 1945 inclusive could produce more cash than that shown, while assets acquired in 1948 in an amount in excess of $100,000.00 over that of year 1947 could not have produced such an income to acquire such an increase in assets.

For the purpose of settlement, probably the most equitable basis would be to take the net worth at December 31, 1941, and the net worth at December 31, 1949, and arrive at the increase and then spread that increase on some basis over the years involved. It is utterly impossible for us or the taxpayer to state that the first four years 1942 to 1945, inclusive, are correct because by the end of 1945, taxpayer was out of the pinball machine business, and it is likewise impossible to state that the last four years 1946 to 1949, inclusive, are correct since no such money could be earned from those assets as was used to acquire assets.

The Green Parrot Theatres, a partnership, was losing money and under partnership agreement each partner was required to put up their pro rata share of such operating losses. Up to the end of year 1949, Mr. Seijas owed $1,963.55, which amount was subsequently paid and he retired as a partner as of December 31, 1949 as he could not continue to

stand such losses. Mr. Seijas sacrificed his investment as he considered losses in year 1950 would close him out anyway and he would not put up the losses to keep his investment. The amount of $1,963.55 has been set up as a liability at December 31, 1949 and the investment eliminated as at that date.

The investment in Savoy Investment Co., in the amount of $2,825.05 and the investment of $3,927.46 in the Burbank Investment Co. both of Pasco, Washington, were expended in fixtures and both taverns never opened as no licenses could be had and there was no recovery. Those investments were set forth as short term losses in the income tax return for year 1949, but, by error, were not included as a deduction in the computation of taxable income.

The loan to American Workers Club became a total loss in the year 1949 and was also set forth as a loss in the income tax return for the year 1949 but, by error, was not included as a deduction in the computation of taxable income.

Since the typing of the net worth statement attached hereto, it has been learned that indebtedness to H. B. Keisler of $13,500.00 which was paid to Mr. Keisler out of the proceeds from the sale of option on s tock, Pacific Drive-In Theatres, for $22,500.00 in 1949 and reported in the return for that year, originated in the year 1948 and not in the year 1949 as so treated. Therefore, the increase in net worth for the year 1948 should be reduced by that amount and a corresponding reduction in cash on hand December 31, 1949. On November 1, 1948, Mr. Seijas issued three promissory notes in favor of H. B. Keisler for $6,125.00, $3,975.00 and $5,625.00, representing loans, which amounts included interest at the rate of 10% per annum from November 1, 1948 to February 1,

1950. However, when Mr. Seijas sold his option on stock for $22,500.00 in August, 1949, said notes were paid in the amount of $13,500.00.

The details of losses, not taken on returns, in the amount of $11,116.06 follow:-

Savoy Investment Co.	$ 2,825.05
Burbank Investment Co.	3,927.46
American Workers Club	2,400.00
Green Parrot Theatres	1,963.55
	$ 11,116.06

It is our opinion that the net worth at December 31, 1941 and at December 31, 1949, subject to the adjustment of cash on hand of $13,500.00, hereinbefore referred to, which results in a decrease of net worth at that date, is approximately correct, but the years in between the aforesaid two dates could be subject to adjustments.

Respectfully,

WHITTLE & WHITTLE

Seattle-First National					875.90	883.91	2,975.88	840.10	1,703.68
Pacific National - Office A/C						903.40	(69.50)	(439.68)	76.71
Pacific National - Personal A/C						3,477.23	4,858.66	3,812.68	6,047.15
Seattle Trust & Savings	908.24	1,928.50	1,950.98	1,982.84	2,014.55	2,044.86	2,075.64	2,106.88	2,138.00
Citizens Federal	1,090.70	1,090.70	1,090.70	1,090.70	1,204.56	1,288.76	1,283.45	1,278.65	1,304.32
Peoples National Bank of Wash.						100.37	101.49	103.00	303.77
U. S. War Bonds		118.50	337.50	937.50	937.50	937.50	937.50	937.50	937.50
U. S. Treasury Notes		507.20							
U. S. Postal Savings									
Mother's Funds (Deceased Dec. 1934)	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00
Partnerships									
United Amusement Co.	3,395.23	3,678.72	3,378.25	9,110.68					
United Amusement of Bremerton	1,961.55	5,007.86	4,126.20	4,006.77	19,436.13	11,587.24	7,741.44	4,909.71	5,027.10
American Amusement Co.	903.05	758.34							
Bremerton Amusement Co.	791.68	778.71							
Bremerton Amusement Co. #2		3,887.72	307.57	102.48					
Town House	1,000.00	1,000.00							
Smoke Shop		768.59	3,061.66	-					
Dock Concessions				3,486.60	3,925.45	3,811.65	3,235.27	2,056.76	1,445.76
West Seattle Property			11,469.28	13,086.95	15,475.86	18,069.64	20,825.47	22,750.69	-
Green Parrot Theatre					14,085.66	10,082.74	6,882.68	6,755.11	-
Blue Moon Tavern					14,770.19	14,275.00	14,275.00		
Seijas and Keibler								754.56	391.96
Seijas and Anthony							1,125.20	1,125.20	-
White Elephant Tavern						12,500.00	12,500.00	12,500.00	-
Stocks and Loans - Corporations									
Seattle Auto View Theatre Stock							2,500.00	2,500.00	2,500.00
Seattle Auto View Theatre Loans								25,000.00	10,000.00
Moses Lake Development Co. Stock						15,000.00	15,000.00	15,000.00	15,000.00
Moses Lake Development Co. Loans						3,653.39	3,653.39	153.39	-
Moses Lake Investment Co. Stock						7,650.00	7,650.00	7,650.00	7,650.00
Moses Lake Investment Co. Loans						25,465.10	20,748.01	20,748.01	24,465.10
Argus Investment Co. Stock							2,500.00	2,500.00	2,500.00
Argus Investment Co. Loans						35,000.00	54,817.23	76,823.35	74,807.59
Apex Tavern, Inc. Stock								15,300.00	15,300.00
Bremerton Finance Stock	4,705.00	4,705.00							
Vesburg Mining Stock	450.00	450.00							
Gibson Packing Co. Stock	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00
Famous Players Stock							1,154.00	1,154.00	1,154.00
Canteen, Inc. Stock						1,075.00	1,075.00	1,075.00	1,075.00
Bethlehem Steel Stock	400.00	400.00	400.00	400.00	400.00	400.00	400.00	400.00	400.00
Western Air Stock	25.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00
Sick Brewing Co. Stock	465.00	465.00	465.00	465.00	465.00	465.00	465.00	465.00	465.00
Loans									
Coast Drive In								50,000.00	102,800.00
Savoy Investment Co.(not inc.)								2,825.05	-
Burbank Investment Co.(not inc.)								3,927.46	-
American Workers Club								2,400.00	
Pop's Inn & Seven Seas Loans					8,633.73	8,633.73	6,813.48	6,813.48	6,813.48
Pioneer Tavern				4,700.00	3,119.50	3,119.50	2,696.55	2,696.55	2,696.55

[fol. 1985]

ARNY A. and BETTY L. SEIJAS
Seattle, Washington

COMPARATIVE NET WORTH STATEMENT
(Continued)

	Dec.31,1941	Dec.31,1942	Dec.31,1943	Dec.31,1944	Dec.31,1945	Dec.31,1946	Dec.31,1947	Dec.31,1948	Dec.31,1949
Consolidated Petroleum-Stock Sub.								1,750.00	1,750.00
Seattle Loan & Discounts Co.	375 00								
Velvet Mining Stock	88.60								
Beverage Store					1,500.00	1,500.00			
Southland Amusement Co. Stock									2,000.00
Pin Ball Games	5,443.23	5,443.23	5,443.23	5,443.23					
Pin Ball Games		1,822.70	1,822.70						
Horses					250.00	250.00	1,100.00	1,100.00	1,100.00
Horse Ranch - Land							1,500.00	1,900.00	2,000.00
Barn, etc.							1,000.00	1,000.00	1,000.00
Lots in Pasco								300.00	300.00
Pontiac						1,965.76	1,965.76	1,965.76	1,965.76
Cadillac								3,956.00	3,956.00
Dodge				350.00	350.00				
Buick				1,400.00	1,400.00	1,400.00	1,400.00	-	-
Residence	6,151.00	6,151.00	6,151.00	6,151.00	6,151.00	6,151.00	6,151.00	6,151.00	6,151.00
Cash on Hand		28,197.39	39,142.54	47,376.10	50,432.57				19,667.78
Totals	30,653.16	68,870.16	81,071.61	108,613.85	147,349.88	193,135.76	213,432.24	317,270.19	329,418.18
Liabilities									
Mortgage on Home	3,607.08	1,983.88							
Due for Losses on Green Parrot Theatre									1,963.55
Net Worth	27,046.08	66,886.50	81,071.61	108,613.85	147,349.88	193,135.76	213,432.24	317,270.19	327,454.80
Beginning Net Worth		27,046.08	66,886.50	81,071.61	108,613.85	147,349.88	193,139.76	213,432.24	317,270.19
Increase in Net Worth		39,840.42	14,185.11	27,542.24	44,736.03	45,785.88	20,296.48	103,837.95	10,184.61
Living Expense		3,600.00	3,600.00	3,600.00	3,600.00	4,800.00	4,800.00	4,800.00	4,800.00
Income Taxes Paid		46.93	14,089.30	19,803.76	12,424.30	13,614.22	5,136.23	1,800.00	5,853.72
Total Income		43,487.35	31,874.41	38,946.00	60,760.33	64,200.10	30,232.71	110,437.95	18,838.13
Net Income Reported in Returns		43,719.10	33,075.50	38,488.58	49,760.33	28,567.54	6,550.28	4,132.87	9,827.75
50% Gains or (Losses)		(231.75)	867.50	457.42	11,000.00	-	1,000.00	(616.30)	20,126.44
Total		43,487.35	33,643.00	38,946.00	60,760.33	28,567.54	7,550.28	3,516.57	29,954.19
Losses Not taken on Returns		-	1,788.88	-	-	-	-	400.00	11,116.06
Totals		43,487.35	31,874.41	38,946.00	60,760.33	28,567.54	7,550.28	3,116.57	18,838.13
Income to be Accounted for						35,632.56	22,682.43	107,321.38	
Total						64,200.10	30,232.71	110,437.95	

1981

ARMY A. and BETTY L. SEIJAS
Seattle, Washington

STATEMENT SETTING FORTH DETERMINATION OF CASH USED AND REMAINING FROM NET INCOME AND INCREASE IN NET WORTH

1942			
Net Income Reported in Return			41,639.52
Additional Per R. A. R. - ½ Interest Sold - Short Term Capital Gain Not Reported			2,079.58
Total			43,719.10
Add: 50% of Capital Loss - Investment Lost			231.75
Total			43,950.85
U. S. Treasury Notes Purchased		507.20	
U. S. War Savings Bonds Purchased		112.50	
Paid on Mortgage on Home		1,823.42	
Increase in Investment Accounts			
United Amusement Co.	283.49		
United Amusement of Bremerton	3046.31		
Bremerton Amusement Co. #2	3687.72		
Smoke Shop	768.59		
Total	7786.11		
Less: Decrease in Investment A/cs.			
American Amusement Co.	150.69		
Bremerton Amusement Co.	12.97		
Total	163.66		
Net Increase		7,622.45	
Seattle Trust & Savings		1,018.26	
Pin Game Machines		1,222.70	
Total of Above		12,106.53	12,106.53
Less: Loss on Investments			
Seattle Loan & Discount Co.	375.00		
Velvet Mining Co.	88.50	463.50	
Total		11,643.03	
Increase in Cash On Hand		28,197.39	
Increase in Net Worth 12/31/42		39,840.42	
Total			31,844.32
Income Taxes Paid (1941)		46.93	
Living Expenses		3,600.00	3,646.93
Unexpended Income 12/31/42			28,197.39

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ARMY A. and BETTY L. SEIJAS
Seattle, Washington

STATEMENT SETTING FORTH DETERMINATION OF CASH USED AND REMAINING FROM NET INCOME AND INCREASE IN NET WORTH

1943

Net Income Reported in Return			28,397.59	
Additional Income Per R. A. R.			4,677.91	
Add back 50% Loss on Vosburg Mining Co.			225.00	
50% Capital Gain - Bremerton Finance Co.			792.50	
Total			34,093.00	
U. S. War Savings Bonds Purchased		225.00		
Paid on Mortgage on Home		1,983.66		
Interest Purchased in West Seattle Property		11,469.28		
Total		13,677.94		
Decrease in Investment Accounts				
United Amusement Co.	300.47			
United Amusement Co. of Bremerton	881.66			
American Amusement Co.	752.34			
Bremerton Amusement Co.	778.71			
Bremerton Amusement Co. #2	3,380.15	6,093.33		
Total		7,584.61		
Increase in Seattle Trust and Savings Account		24.48		
Total		7,609.09		
Assets Owned 12/31/41 Converted to Cash				
Bremerton Finance Co.	4,705.00			
U. S. Treasury Notes	507.20	5,212.20		
Total		2,396.89	2,396.89	
Less: Investments Written Off				
Town House	1,000.00			
Smoke Shop	768.59			
Vosburg Mining Co.	450.00	2,218.59		
Total		178.30		
Increase in Cash On Hand		14,006.81		
Increase in Net Worth 12/31/43		14,185.11		
Total			31,696.11	
Income Taxes Paid		14,089.30		
Living Expenses		3,600.00	17,689.30	
Unexpended Income 12/31/43				14,006.81

197.39

ARMY A. and BETTY L. SEIJAS
Seattle, Washington

STATEMENT SETTING FORTH DETERMINATION OF CASH USED AND REMAINING FROM NET INCOME AND INCREASE IN NET WORTH

1944

Net Income Reported in Return			33,488.58
50% Capital Gain			
Bremerton Amusement Co.		1,388.67	
Pin Games		1,068.75	2,457.42
Total			35,946.00
Interest in Dock Concessions		3,486.60	
Interest in Pioneer Tavern		4,700.00	
Dodge Car Purchased		350.00	
Buick Car Purchased		1,400.00	
U. S. War Savings Bonds Purchased		600.00	
Increase in Investment Accounts			
United Amusement Co.	5,732.43		
West Seattle Property	1,617.67		
Total	7,350.10		
Less: Decrease in Investment Accounts			
United Amusement Co. of Bremerton	120.43		
Bremerton Amusement Co. #2	205.09		
Total	325.52	7,024.58	
Total		17,561.18	
Assets Owned 12/31/42 Converted to Cash			
Pin Ball Machines		1,222.70	
Total		16,338.48	
Increase - Seattle Trust & Savings		31.86	
Total		16,370.34	16,370.34
Increase in Cash on Hand		5,171.90	
Increase in Net Worth 12/31/44		21,542.24	
Total			19,575.66
Income Taxes Paid		10,803.76	
Living Expenses		3,600.00	14,403.76
Unexpended Income 12/31/44			5,171.90

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ARMY A. and BETTY L. SEIJAS
Seattle, Washington

STATEMENT SETTING FORTH DETERMINATION OF CASH USED AND REMAINING FROM NET INCOME AND INCREASE IN NET WORTH

1945

Net Income Reported in Return			45,448.44
50% Capital Gains			11,000.00
Additional Per R. A. R. (1st Exam.)		2,344.25	
Additional Per R. A. R. (2nd Exam.)		1,967.64	4,311.89
Total			60,760.33
Investment - Green Parrot Theatre		14,085.66	
Investment - Blue Moon Tavern		14,770.19	
Loans - Pop's Inn and Seven Seas		8,633.73	
Increase in Bank Accounts		273.20	
Horse Purchased		250.00	
Investment - Beverage Store		1,500.00	
Increase in Investment Accounts			
United Amusement Co. of Brem.	15,430.36		
Dock Concessions	436.83		
West Seattle Property	2,388.91		
Total	18,258.10		
Less: Decreases			
Pioneer Tavern	1,580.50		
United Amusement Co. merged above	9,110.68		
Bremerton Amusement Co. merged	102.48		
Total	10,793.66	7,464.44	
Increase in Savings Accounts			
Seattle Trust & Savings	31.71		
Citizens Federal Savings and Loan	113.86	145.57	
Total		47,122.79	
Assets Owned 12/31/41 Converted into Cash		5,443.23	
Total		41,679.56	41,679.56
Increase in Cash on Hand		3,056.47	
Increase in Net Worth 12/31/45		44,736.03	
Total			19,080.77
Income Taxes Paid		12,424.30	
Living Expenses		3,600.00	16,024.30
Unexpended Income 12/31/45			3,056.47

ARMY A. and BETTY L. SEIJAS
Seattle, Washington

STATEMENT SETTING FORTH DETERMINATION OF CASH USED AND REMAINING FROM NET INCOME AND INCREASE IN NET WORTH

1946

Net Income Reported in Return			28,567.54
Investments Acquired			
Moses Lake Development Co.		18,653.39	
White Elephant Tavern		12,500.00	
Moses Lake Investment Co.		33,115.10	
Canteen Inc.		1,075.00	
Argus Investment		35,000.00	
Increase in Bank Accounts		3,991.34	
Pontiac Car Purchased		1,965.76	
Total		106,300.59	
Decrease in Investment Accounts			
Dodge	850.00		
United Amusement Co.	7,868.89		
Dock Concessions	113.80		
Green Parrot Theatre	4,002.92		
Blue Moon Tavern	495.19		
Total	12,830.80		
Less: Increase - West Seattle Property	2,593.78	10,237.02	
Total		96,063.57	
Increase in Savings A/cs.			
Seattle Trust & Savings	30.31		
Citizens Federal Savings and Loan	24.20		
Peoples National Bank of Washington	100.37	154.88	
Total		96,218.45	
Decrease in Cash on Hand		50,432.57	
Increase in Net Worth 12/31/46		45,785.88	45,785.88
Total			17,218.34
Income Taxes Paid			13,614.22
Living Expense			4,800.00
Income to be Accounted for 12/31/46			35,632.3

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ARMY A. and BETTY L. SEIJAS
Seattle, Washington

STATEMENT SETTING FORTH DETERMINATION OF CASH USED AND REMAINING FROM NET INCOME AND INCREASE IN NET WORTH

947

Net Income Reported in Return			6,550.28
50% Capital Gain - Beverage Store			1,000.00
Total			7,550.28
Investments Acquired			
Seijas and Anthony		1,125.20	
Seattle Auto View Theatres		2,500.00	
Argus Investment Co.		22,317.23	
Famous Players		1,154.00	
Horses		850.00	
Horse Ranch - Barn, etc.		2,500.00	
Total		30,446.43	
Decrease in Investment Accounts			
United Amusement Co.	3,825.80		
Dock Concessions	576.36		
Green Parrot Theatre	3,200.06		
Moses Lake Investment Co.	4,717.09		
Pop's Inn and Seven Seas	1,820.25		
Pioneer Tavern	422.95		
Total	14,562.51		
Less Increases:			
West Seattle Property	2,755.83	11,806.68	
Total		18,639.75	
Increase in Bank Accounts	3,100.14		
Increase in Savings Accounts			
Seattle Trust & Savings	30.78		
Citizens Federal Savings & Loan	24.69		
Peoples National Bank of Washington	1.12	3,156.73	
Total		21,796.48	
Assets Owned 12/31/46 Converted to Cash			
Beverage Store		1,500.00	
Increase in Net Worth 12/31/47		20,296.48	20,296.48
Total			12,746.80
Income Taxes Paid		5,136.23	
Living Expenses		4,800.00	9,936.23
Income to be Accounted for 12/31/47			22,682.43

ARMY A. and BETTY L. SEIJAS
Seattle, Washington

STATEMENT SETTING FORTH DETERMINATION OF CASH USED AND REMAINING FROM NET INCOME AND INCREASE IN NET WORTH

1948

Net Income Reported in Return			4,132.87
50% Capital Gain			
United Amusement Co.			28.07
50% Capital Loss			
Blue Moon Tavern			644.37
Total			4,805.31
Investments Acquired			
Seijas & Keisler		754.56	
Seattle Auto View Theatre		25,000.00	
Apex Tavern		15,300.00	
Coast Drive In		50,000.00	
Savoy Investment Co.		2,825.05	
Burbank Investment Co.		3,927.46	
American Workers Club		2,400.00	
Real Estate Lots in Pasco		300.00	
Cadillac Car Purchased		3,956.00	
Consolidated Petroleum		1,750.00	
Increase in Investment Accounts			
West Seattle Property	1,925.22		
Argus Investment Co.	22,006.12		
Horse Ranch & Barn	400.00		
Total	24,331.34		
Less: Decreases			
United Amusement Co.	2,831.73		
Dock Concessions	1,178.51		
Green Parrot Theatre	127.57		
Moses Lake Development Co.	3,500.00		
Total	7,637.81		
Total Increase	16,693.53		
Less: Decrease in Bank Accounts	3,451.58		
Total Increase	13,241.95		
Increase in Savings A/cs.			
Seattle Trust & Savings	31.24		
Citizens Federal Savings and Loan	25.18		
Peoples National Bank of Washington Savings Account	1.51	13,299.88	
Total		119,512.95	
Assets Owned 12/31/47 Converted to Cash			
Blue Moon Tavern	12,986.26		
Buick Car	1,000.00	13,986.26	
Total		105,526.69	105,526.69

(Continued)

[fol. 1993]

ARMY A. and BETTY L. SEIJAS
Seattle, Washington

STATEMENT SETTING FORTH DETERMINATION OF CASH USED AND REMAINING FROM NET INCOME AND INCREASE IN NET WORTH
(Continued)

948 (Continued)

Totals Carried forward		105,526.69	105,526.69
Loss on Blue Moon Tavern	1,288.74		
Loss on Buick Car Sold not in return	400.00	1,688.74	
Increase in Net Worth 12/31/48		103,837.95	
Total			100,721.38
Income Taxes Paid		1,800.00	
Living Expense		4,800.00	6,600.00
Income to be Accounted for 12/31/48			107,321.3

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JAMES R. BROWNING, Clerk

In the Supreme Court

of the United States

October Term, 1958.

No. [redacted] 43

WILLIAM R. FORMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD,
Of Counsel,
Public Service Building,
Portland, Oregon.

INDEX

	Page
Opinion Below	2
Statement of Jurisdiction	3
Questions Presented for Review	4
Reasons for Allowance of the Writ	8
Statement of the Case	11
Argument:	
Preliminary Statement	15
I. The Modification Directing a New Trial Instead of Direction for the Entry of a Judgment of Acquittal, Violates the Constitutional Prohibition Against Double Jeopardy Under the Circumstances of This Case	17
II. The Direction of a New Trial Was not an Appropriate and Just Judgment Under the Circumstances of this Case, and the Court Below Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision	26
III. The United States District Court for the Western District of Washington, Southern Division, Was Without Jurisdiction of the Offense	35
Conclusion	45
Appendix I:	
Original Opinion, September 15, 1958	47 to 64
Opinion rendered October 27, 1958, Modifying Former Opinion	65 to 67
Opinion Denying Petitioner's Petition for Re-Hearing Dated February 26, 1959	68 to 70

TABLE OF CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND DECISIONS

Fifth Amendment to the Constitution of the United States	7
Title 28, USCA, Section 2106	5, 7
Rule 30, Federal Rules of Criminal Procedure	8, 27

CASES CITED

	Page
Bateman v. U. S., 212 F. 2d 61	28
Berra v. U. S., 351 U.S. 131	30
Borgia v. U. S., 78 F. 2d 550	36
Bridges v. U. S., 346 U.S. 209	42
Bryan v. U. S., 338 U.S. 552	19
Carter Carburetor Corp. v. Riley, 186 F. 2d 148	28
Enriquez v. U. S., 188 F. 2d 313	30
Ford v. U. S., 273 U.S. 593	42
Green v. U. S., 355 U.S. 181	9, 25
Grunewald v. U. S., 353 U.S. 391	4
Hyde v. U. S., 225 U.S. 347	43
Independent Wireless Telegraph Co. v. Radio Corporation of America, 270 U.S. 81	30
Karn v. U. S., 158 F. 2d 568	9, 20
Kobey v. U. S., 208 F. 2d 583	29
Krulewitch v. U. S., 336 U.S. 440	4
Mitchell v. U. S., 213 F. 2d 951	28
Pollard v. U. S., 352 U.S. 354	32
Reidy v. Myntti, 116 F. 2d 725	29
Sapir v. U. S., 348 U.S. 373	9, 17
U. S. v. Achilli, 234 F. 2d 797, Aff'd 353 U.S. 373	30
U. S. v. Beacon Brass Co., 344 U.S. 43	33
U. S. v. Beaugh, 2 F. 2d 378	36
U. S. v. Chennault, 230 Fed. 942	36
U. S. v. Furlong, 191 F. 2d 1	29
U. S. v. Hoth, 207 F. 2d 386	28
U. S. v. Perlstein, 126 F. 2d 789	43
U. S. v. Tait, 6 F. 2d 942	36
Yates v. U. S., 354 U.S. 298	10
Zamloch v. U. S., 193 F. 2d 889	29

In the Supreme Court

of the United States

October Term, 1958

No.

WILLIAM R. FORMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your Petitioner WILLIAM R. FORMAN respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the portion of the Order and Judgment of the United States Court of Appeals for the Ninth Cir-

cuit entered in this case October 27, 1958, insofar as it modifies the Opinion and Judgment of said Court entered in this case on September 15, 1958, by directing a new trial instead of the original direction for entry of judgment of acquittal, and the Order and Judgment of said Court entered in this case on February 26, 1959, denying (Appellant's) Petitioner's Petition for Re-hearing.

OPINIONS BELOW.

There was no Opinion in the United States District Court.

On September 15, 1958, the United States Court of Appeals rendered its Opinion in which it reversed the Judgment of Conviction and remanded the cause "with directions to enter judgment for the Appellant" (Petitioner). The Opinion is reported in **259 F. 2d 128,** and a copy thereof is printed in the Appendix hereto (App. p. 47).

On October 27, 1958, the United States Court of Appeals for the Ninth Circuit rendered its Opinion on Appellee's Petition for Modification of the Opinion in which the Court granted the petition and directed that the former Opinion be modified so as to provide that the Judgment is reversed and the cause remanded for a new trial instead of directing the entry of judgment of acquittal as it did in the judgment of September 15, 1958. This Opinion is reported in **261 F. 2d 181.**

A copy of this Opinion is printed in the Appendix hereto (App. p. 65).

On February 26, 1959, the United States Court of Appeals for the Ninth Circuit rendered its opinion upon Appellant's Petition for Re-hearing, denying said petition. This Opinion has not yet been published in the Federal Reporter System. A copy of this Opinion is printed in the Appendix to this petition (App. p. 68).

STATEMENT OF JURISDICTION.

The Order and Judgment of the United States Court of Appeals for the Ninth Circuit, sought to be reviewed, were both dated and entered on October 27, 1958 (Tr. of R. 1935-6-7).

Within the time allowed by the Rules of the United States Court of Appeals for the Ninth Circuit, to-wit, within thirty days from the entry of said Judgment, Petitioner, Appellant in said cause, filed a petition for re-hearing. The Order denying the petition for re-hearing was entered on February 26, 1959 (Tr. of R. 1941).

On March 4, 1959, an Order was entered in said Court staying issuance of the Mandate until March 27, 1959, provided petition for writ of certiorari is filed in the Supreme Court on or before that date and, if filed, until final disposition in the Supreme Court.

The Jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Where the United States District Court submitted the case to the Jury on preemptory instruction that prosecution for the primary conspiracy to attempt to evade the tax was barred by the statute of limitations unless the Jury found that a subsidiary conspiracy was entered into (of the character described in **Krulewitch v. U. S., 336 U.S. 440,** and **Grunewald v. U. S., 353 U.S. 391**), which would prolong the life of the primary conspiracy, and the United States Court of Appeals determined that such a subsidiary conspiracy was not established and by reason thereof, it was

"error to permit the case to go to the Jury,"

and directed the entry of a judgment of acquittal, can the United States Court of Appeals thereafter direct a new trial because

"the case might have been tried"

on an "alternative theory"?

2. Does the judgment and order directing a new trial instead of a judgment of acquittal constitute a violation of the 5th Amendment to the Constitution of the United States which provides:

> ". . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

under the conditions prevailing in this case?

3. Does the judgment ordering a new trial, instead of directing the entry of a judgment of

acquittal, constitute an "appropriate judgment" and "just under the circumstances?" **(28 U. S. C. A., Section 2106).**

4. Is the direction for a new trial justified where the Petitioner was entitled, as a matter of law, to the entry of a judgment of acquittal in the United States District Court at the close of the entire case on the ground that the prosecution was barred by the statute of limitations and the United States Court of Appeals so determined?

5. Can the United States Court of Appeals for the Ninth Circuit, after reversing the conviction because "it was error to permit this case to go to the jury", remand the case for a new trial because "the case might have been tried" on an "alternative theory" different from the theory upon which the case was tried and submitted to the jury where the Government:

(a) did not in the Trial Court object or take exception to the instructions embodying the theory on which the case was submitted;

(b) did not request that the case be submitted upon any other theory;

(c) did not in its brief in the United States Court of Appeals assign, as error or contend, that the case was submitted on an erroneous theory;

(d) did not in oral argument make such contention and

(e) raised the question, for the first time, by petition to modify the decision, after the United States Court of Appeals rendered its decision reversing the conviction with directions for the entry of a judgment of acquittal.

6. Can the Appellee (the Government) in a criminal case who has not cross-appealed and cannot, as a matter of law cross-appeal, assert error, if any there be, with respect to the instructions of the Court and seek a new trial by reason thereof?

7. Has the Court below, by the judgment sought to be reviewed, so far departed from the accepted and usual course of judicial proceedings resulting in denial to the petitioner of the protection of the constitutional guarantee against double jeopardy for the same offense as to call for the exercise of this Court's power of supervision?

8. Did the District Court of the United States for the Western District of Washington, Southern Division, have jurisdiction of an indictment returned by a Grand Jury which:

(a) was directed to be composed of residents of the **Southern** Division only?

(b) was **empaneled to consider only offenses committed in the Southern Division,** where the indictment on its face discloses that the conspiracy itself was formed in the Northern Division and the only overt acts alleged to have been committed within the period of the statute of limitations are alleged to have been committed in the Northern Division and the only overt acts alleged to have been committed in the Southern Division were prior to the applicable period of the statute of limitations?

9. Did the District Court of the United States for the Western District of Washington, Southern Division, have jurisdiction of an indictment re-

turned by a Grand Jury composed, as above described, charging a conspiracy described in paragraph D of the indictment (Tr. of R. p. 5) where the only overt acts relevant thereto are alleged to have been committed in the Northern Division?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The following constitutional statutory provisions and rules of Courts are involved and are quoted herein in full.

The **5th Amendment to the Constitution of the United States** provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; **nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb**; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 28 U.S.C.A., Section 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause

and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Rule 30 of the Federal Rules of Criminal Procedure, so far as here material, provides:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

REASONS FOR THE ALLOWANCE OF THE WRIT

There are special and important reasons for granting a writ of certiorari in this case as follows:

(1) Each of the questions presented herein embodies important questions of Federal Law which have not been, but which should be, settled by this Court.

(2) The decision herein, directing a new trial because "the case might have been tried upon" an "alternative theory" after judgment reversing Petitioner's conviction and directing the entry of a judgment of acquittal, violates Petitioner's rights under the 5th Amendment to the United States Constitution in that it places him twice in jeopardy for the same offense.

(3) The decision, sought to be reviewed, is in conflict with the decision of the Ninth Circuit in

Karn v. United States, 158 F. 2d 568, holding that the only proper disposition of an appeal under similar circumstances is to direct the Trial Court to enter a judgment of acquittal.

(4) The decision, sought to be reviewed, is in conflict with the decision of this Court in **Sapir v. United States, 348 U.S. 373—75 S. Ct. 422,** in which this Court summarily reversed the decision of the United States Court of Appeals for the Tenth Circuit which, first reversed the judgment with instructions to dismiss the indictment because the evidence was insufficient to convict, but later, **on motion of the Government, modified the judgment so as to grant a new trial.**

The decision is also in conflict with the principles recognized and applied by this Court in **Green v. United States, 355 U.S. 184.**

(5) The decision, sought to be reviewed, unsettles the law which this Court settled in the **Krulewitch, Lutwak** and **Grunewald cases** on the question of the statute of limitations applicable to conspiracy cases. If the decision, sought to be reviewed, is allowed to stand, it

> "would for all practical purposes wipe out the statute of limitations in conspiracy cases"

and

> "extend indefinitely the time within which hearsay declarations will bind conspirators."

(6) The case involves the important **question of jurisdiction of the Court in conspiracy cases** where

the conspiracy itself is formed and all of the overt acts committed within the statutory period of limitation are committed **without** the jurisdiction of the Court and the only overt act alleged as committed within the jurisdiction is barred by the statute of limitations.

(7) To permit the Government in criminal cases to claim error in the instructions to the jury and seek a new trial by reason thereof, after the United States Court of Appeals reverses a conviction and directs the entry of judgment of acquittal, violates the law which denies to the Government the right to move for a new trial or to appeal from a judgment in a criminal case, whether the judgment of the Court below is right or wrong, or whether it is for conviction or acquittal. The Government's petition for modification of the judgment to direct a new trial, was, in legal contemplation, the equivalent of a motion by the Government for a new trial in the United States District Court and or an appeal by the Government after judgment of acquittal. **(Opinion of Justice Douglas in Sapir v. U. S., 348 U.S. 373).**

(8) The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

Petitioner and one Seijas were indicted in one Count (XV) with conspiracy to attempt to evade Seijas' tax liability. (Not Petitioner's tax liability.)

There were fourteen other counts charging Seijas only with the substantive offense of attempted tax evasion. These Counts are not involved. The conspiracy Count was divided into four paragraphs, A, B, C and D, charging conspiracy to violate various statutes. Paragraphs A and B were withdrawn from consideration of the Jury and are not here involved.

In paragraphs C and D it was charged that Petitioner and Seijas conspired (Tr. of Rec. 5):

> "C. To violate Section 145(b) of the Internal Revenue Code, 26 U. S. C., Section 145(b), by knowingly and willfully attempting to defraud and evade a large portion of the income taxes owed by Armador A. Seijas and his wife, Betty L. Seijas, and others to the United States for the years 1942 to 1945, inclusive, upon their share of the unreported income of the afore-mentioned partnerships.
>
> "D. To violate Section 1001 of the New Criminal Code, 18 U.S.C., Section 1001, and Section 145(b) of the Internal Revenue Code, 26 U.S.C., Section 145(b), by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the pur-

pose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive.";

Petitioner alone was tried on this Count, Seijas having pleaded guilty. Upon the trial, at the close of the Government's case, Petitioner moved for a judgment of acquittal on the ground that the prosecution was barred by the statute of limitations. The motion was denied. At the close of the entire case, Petitioner renewed the motion for judgment of acquittal on the ground, among others, that prosecution was barred by the statute of limitations. The motion was denied and exception allowed (Tr. of Rec. 1762).

In submitting the case to the Jury, the Court instructed the Jury:

> "The conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax returns of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statute of limitations would run from that time, and if you so find, your verdict would have to be not guilty.
>
> "If you find that there was no subsidiary conspiracy to conceal as I have just outlined it to you, but acts of concealment were thereafter committed as an after-thought and were conceived after the filing of the returns in March, 1946, then, of course, your verdict must be for the defendant Forman." (Tr. 1808).

After the return of the verdict of guilty and within the time provided for in **Rule 29(b) of the**

Federal Rules of Criminal Procedure, Petitioner renewed the motion for the entry of a judgment of acquittal on the ground, among others, that the prosecution was barred by the statute of limitations (Tr. 101). He did not seek a new trial in the alternative on that ground.

Petitioner also filed a motion for a new trial to be considered in the event that the motion for judgment of acquittal was denied (Tr. 101).

On appeal to the United States Court of Appeals for the Ninth Circuit, Petitioner assigned as error the denial of his motions for a judgment of acquittal on the ground that prosecution was barred by the statute of limitations.

On September 15, 1958, that Court made and entered its Opinion and Judgment, reversing the judgment of conviction "with directions to enter judgment for the Appellant" (Opinion, Appendix, pp. 47 to 64), on the ground "that it was error to permit this case to go to the Jury."

This conclusion was arrived at because the alleged primary conspiracy was barred by the statute of limitations and the evidence, under the **Krulewitch** and **Grunewald cases** was insufficient to establish by "direct evidence"

> "an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission."

The reversal was not predicated on any erroneous instruction, or other "error infecting the trial," but upon the basic ground that the evidence failed to establish a subsidiary conspiracy of the character contemplated by the **Grunewald case** which would prolong or continue the alleged conspiracy.

Thereafter, the Government filed a motion for a modification of the judgment of the United States Court of Appeals by providing for the direction of a new trial instead of direction of the entry of a judgment of acquittal.

On October 27, 1958, the Court entered a Per Curiam Opinion granting the Government's motion.

The Government's motion and the decision rendered thereon (Opinion, Appendix, p. 65) was predicated on the proposition that the indictment presented "an alternative theory" upon which the case might have been tried" parallel to the alternative theory discussed in the **Grunewald case.**

This contention was not advanced in the District Court. The Government did not interpose any objection or take exception to the instruction as given on the theory on which the case was submitted. It did not request any instruction embodying the alleged "alternative theory." It did not, upon consideration of the motion for renewal of the motion for judgment of acquittal, advance this theory. It did not, in its brief in the United States Court of Appeals, advance this contention. It did not, in the brief, assert that the District Court erred in its

instructions in any respect and it did not advance that contention in the oral argument before the United States Court of Appeals notwithstanding the fact that the Supreme Court had already decided the **Grunewald case** and it was discussed in the Government's brief.

The contention was advanced, for the first time, in the Government's petition for modification of the judgment, after the United States Court of Appeals entered the judgment directing the entry of a judgment of acquittal.

ARGUMENT

Preliminary Statement

The pertinent facts relevant to the questions presented are as follows:

(a) It is the Government (Appellee) and not the defendant who petitioned the Court of Appeals for a new trial after it reversed with directions to enter judgment of acquittal.

(b) The decision of October 27, 1958, modifying the former judgment by directing a new trial instead of the entry of judgment of acquittal, was based on the ground that the case **"might have been tried"** upon an "alternative theory." (Appendix, p. 65).

(c) The Government did not, in the United States District Court, object to the instructions

submitting the case on the theory on which it was decided, nor except thereto, and did not submit any instructions requesting submission of the case on "another theory." **(Rule 30, Federal Rules of Criminal Procedure.)**

(d) The Government did not, on defendant's appeal, contend in its brief or in oral argument in the Court of Appeals, that the case "might" have been submitted on "another theory" or that the case was submitted on erroneous instructions.

(e) The Government presented the contention that the case might have been submitted on another theory, for the first time, in its petition for modification of the judgment of the Court of Appeals.

(f) The original judgment of September 15, 1958, reversing the conviction with directions to enter judgment of acquittal, was reversed solely on the ground that the Government failed to establish the subsidiary conspiracy of the character described in the **Krulewitch and Grunewald cases** which would prolong the operation of the statute of limitations and by reason thereof, "it was error to permit this case to go to the jury." (Appendix, pp. 63-64).

(g) The case was not reversed for any error in the instructions or in the admission or rejection of evidence "infecting" the trial.

(h) The petitioner did not seek a new trial in connection with its contention that the evidence

was insufficient to be submitted to the jury. He sought only judgment of acquittal on that ground. Petitioner sought a new trial only in the event that the Court of Appeals did not sustain the contention that the evidence was insufficient to go to the jury and then only on grounds of error affecting the trial.

I.

The Modification Directing a New Trial Instead of Direction for the Entry of a Judgment of Acquittal, Violates the Constitutional Prohibition Against Double Jeopardy Under the Circumstances of This Case.

In **Sapir v. United States, 348 U.S. 373,** the Court of Appeals reversed the conviction with directions to dismiss the indictment **(216 F. 2d 722).** The Government then petitioned to modify the judgment by directing a new trial instead of a dismissal of the indictment. The Court of Appeals granted the Government's petition **and this Court granted certiorari.**

This Court, in a Per Curiam Opinion, held:

> " 'The petition for writ of certiorari is granted.
>
> 'We believe that the judgment of the Court of Appeals of October 20, 1954, 216 F. 2d 722, reversing and **remanding** this cause **with instructions to dimiss** the indictment **was correct.** It is not necessary for us to pass on the question presented under its subsequent judgment of November 17, 1954, directing a new trial. We vacate the latter judgment, which directed

the new trial, and we reinstate the former one which instructed the trial court to dismiss the indictment.'

Mr. Justice Douglas wrote a concurring Opinion in which he said:

'The granting of a new trial after a judgment of acquittal **for lack of evidence** violates the command of the Fifth Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

'The correct rule was stated in Kepner v. United States, 195 U.S. 100, at page 130, 24 S. Ct. 797, at page 805, 49 L. Ed. 114, "It is, then, the settled law of this court that former jeopardy includes one who has been **acquitted by a verdict duly rendered** * * *." **If the jury had acquitted,** there **plainly would be double jeopardy to give the Government another go at this citizen.** If, as in the Kepner case, the trial **judge had rendered a verdict of acquittal,** the guarantee against **double jeopardy would prevent a new trial** of the old offense. **I see no difference when the appellate court orders a judgment of acquittal for lack of evidence.**

. . . . .

'But an acquittal on the basis of lack of evidence concludes the controversy, as the Kepner case holds, and puts it at rest under the protection of the Double Jeopardy Clause, absent a motion by the defendant for a new trial.' (Emphasis suppled).

Justice Douglas also said:

'If petitioner had asked for a new trial, different considerations would come into play, for then the defendant opens

> the whole record for such disposition as might be just.'

But he pointed out the **distinction** between reversal

> 'on grounds of error that infected the trial'

and cases based on

> 'lack of evidence.'

In the case at bar, defendant did not seek a new trial in connection with the renewal of the motion for judgment of acquittal. He only sought a new trial in connection with the assertion of errors, 'on grounds that infected the trial.' " (Emphasis supplied).

In Petitioner's (Appellant's) Brief, the CONCLUSION was as follows:

> "The judgment should be reversed with directions to enter a judgment of acquittal, if reversal is based on **any one** of the Specifications of Error numbered I, II, III, IV, V and VII." (Errors which entitled Appellant to a judgment of acquittal as a matter of law.)
>
> "If reversal is based on Specifications of Error numbered VI, VIII, IX and X, a new trial should be ordered." (Errors affecting the trial which would only authorize a new trial.) (Matter in parentheses added.)

The case of **Bryan v. United States, 338 U.S. 552,** is not dispositive here because in that case the Appellant, although urging lack of evidence which would have entitled him to a judgment of acquittal, asked alternative relief of either judgment of acquittal or a new trial.

In the case at bar, Petitioner did not ask for

alternative relief in connection with his contention that the evidence was insufficient to sustain a conviction. On that contention, he sought only a judgment of acquittal.

The modification decision was contrary to the decision of this Court in the **Sapir case.**

In **Karn v. United States, 158 F. 2d 568** (9th Cir.), the Court held:

> "When the motion for a directed verdict was made, the trial judge, as a matter of law, should have instruced the jury to render a verdict of acquittal. **The right of appellant to a verdict of acquittal fully matured when he made his motion.** To remand the case with directions to grant new trial would, in our judgment, be a **serious invasion of rights which accrued to him** in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind.
>
> "While adhering to the view that this court may remand the case with directions to discharge the appellant, we are also persuaded that Rule 29 of the Federal Rules of Criminal Procedure is properly applicable to this situation, even though the trial was held before the new criminal rules became effective, since this proceeding is 'pending' within the meaning of Rule 59. See United States v. Bozza, 3 Cir., 155 F. 2d 592, 596. This simplified procedure is suitable to the case at bar.
>
> "The judgment of the district court is reversed and the cause remanded to the district court with directions to vacate the judgment of sentence herein and to enter a judgment of acquittal of the appellant."

In Foot Note 2, the Court held:

> "The power of an appellate court **to direct the lower court to do what in law it should have done** was admitted in the early case of Ballew v. United States, 160 U.S. 187, 16 S. Ct. 263, 40 L. Ed. 388, and then denied in Slocum v. New York Life Ins. Co., supra, but with four justices dissenting. Several years later the Supreme Court re-examined the rule, and in Baltimore & Co. Line v. Redmand, 295 U.S. 654, 659, 55 S. Ct. 890, 79 L. Ed. 1636, approved the views expressed by Justice Hughes in the dissent in the Slocum case. Such a procedure is not in derogation of the jury's powers, since the trial judge, when faced with a motion for a directed verdict,
>
> . . . . .
>
> must decide a **question of law.** That question is whether there is any evidence from which the jury could find a verdict. The erroneous decision of a trial judge cannot convert that question of law into a question of fact. It remains a question of law properly to be decided by the appellate court, and when so decided, (as it is here) there remains nothing to be done by the district court save enter a judgment of acquittal. For a particularly enlightening discussion see (citing many cases)."

The modification decision in the case at bar is contrary to the decision in the **Karn case.**

In the case at bar, the Court of Appeals, in its original judgment, determined that it was "error to submit the case to the jury" and directed the entry of judgment of acquittal. This was predicated on the ground that the evidence was insufficient to submit to the jury the question of the existence of a subsidiary conspiracy which would

prolong the operation of the statute of limitations of the character contemplated by the **Grunewald and Krulewitch cases.** The case was not reversed for errors infecting the trial.

Under this decision, the Petitioner was entitled, in the District Court, to the entry of a judgment of acquittal. His right thereto "matured" at that time and the Court of Appeals so determined.

The subsequent petition for a modification of the judgment to direct a new trial, was in legal contemplation, the equivalent of a motion for a new trial in the United States District Court after the entry of a judgment of acquittal and the equivalent of an appeal by the Government from a judgment of acquittal. **(Justice Douglas' Opinion in the Sapir case.)** The Government could not have moved for a new trial in the District Court if the Court had, as it should have done, entered a verdict of acquittal and the Government could not have appealed if the District Court had, as it should have done, entered a judgment of acquittal and that is true whether the judgment was right or wrong. **(Green v. U. S., 155 U.S. 184.)**

The law, as expressed in the **Sapir and Karn cases,** is especially applicable in the case at bar because the ground upon which the new trial was sought and allowed by the Court of Appeals was that the case "might have been tried" upon an "alternative theory." This is indeed granting to the Government "another go at this citizen" although

the Government did not seek submission on an alternative theory in the District Court.

If the Court of Appeals had affirmed the conviction, Petitioner could not have petitioned the Court of Appeals to send the case back for a new trial upon another theory of defense which he could have, but did not, urge in the District Court There is no apparent reason why the Government should be granted this extraordinary right, particularly in a criminal case in which a defendant is entitled to the constitutional prohibition against double jeopardy and the Government is denied the right to move for a new trial in the District Court and is denied the right to appeal from a judgment of acquittal.

The Court below held that the **Sapir case** was not applicable and distinguished it from the case at bar. It said:

> "In the Sapir case the Court of Appeals held that the evidence 'did not establish an essential element of the offense charged' and that the trial court should have entered a judgment of acquittal.
>
> . . . . .
>
> "But in the case before us we did no such thing. We held that the case was submitted to the jury on an impermissible theory. The jury was simply not properly instructed. . . .
>
> " . . . this was not a reversal on the basis of lack of evidence . . ."

We respectfully submit that this is an erroneous statement of the original decision. The reversal

was not based upon any alleged erroneous instruction. Appellant did not challenge the accuracy of the instructions. Appellant merely contended that there was no evidence to establish the alleged subsidiary conspiracy and, therefore, the prosecution was barred. The Court below, in its original Opinion, held that the evidence did not establish a subsidiary conspiracy that would extend the operation of the statute of limitations and that "it was error to permit this case to go to the jury."

The Court reversed with direction to enter judgment of acquittal for the very same reason that the Supreme Court reversed with directions for judgment of acquittal in the **Sapir case** because the evidence "did not establish an essential element of the offense charged."

In the case at bar, it was essential for the Government to establish the existence of the subsidiary conspiracy which would prolong the operation of the statute of limitations without which the prosecution was barred. The Court held that the evidence, when measured by the requirements of the **Grunewald and Krulewitch cases,** did not establish that subsidiary conspiracy.

Consequently, there is no valid distinction between the **sapir case** and the case at bar and its decision modifying the judgment insofar as it directs a new trial instead of directing the entry of a judgment of acquittal is contrary to the law as laid down by this Court in the **Sapir case.**

In **Green v. United States, 355 U.S. 184—78 S. Ct. 221,** the Court held:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
>
> . . . . .
>
> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempted to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> . . . . .
>
> "Thus it is one of the elemental principles of our criminal law that the Government cannote secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. United States v. Ball, supra; Peters v. Hobby, 349 U.S. 331, 344-345, 75 S. Ct. 790, 796, 99 L.Ed. 1129. Cfg. Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114; United States v. Sanges, 144 U.S. 310, 12 S. Ct. 609, 36 L.Ed. 445.
>
> . . . . .
>
> "Nevertheless the Government contends that Green 'waived' his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a **successful** appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, how-

ever, it connotes some kind of voluntary knowing relinquishment of a right.

. . . . .

"And as Mr. Justice Holmes observed, with regard to this same matter in Kepner v. United States, 195 U.S. 100, at page 135, 24 S.Ct. 797, at page 897, 49 L.Ed. 114: 'Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

II.

The Direction of a New Trial was not an Appropriate and Just Judgment, under the Circumstances of this Case, and the Court Below has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision.

The United States District Court, in submitting the case to the Jury, gave a summary instruction that the primary conspiracy, alleged in the indictment, was consummated on March 15, 1946, when the last individual income tax return of Seijas was filed and that the prosecution was, therefore, barred by the statute of limitations (Tr. of Rec. pp. 1807-8).

The Court instructed further that there must be a verdict of not guilty unless the Government established a subsidiary conspiracy of the character described in the **Grunewald and Krulewitch cases** which would have the effect of prolonging the oper-

ation of the statute of limitations. The case went to the Jury on these instructions. The Government did not object or take exception to these instructions and did not request any instructions which would submit the case to the Jury on any alternative or other theory as required by **Rule 30, Federal Rules of Criminal Procedure.**

On the appeal, the Government did not, in its brief or in oral argument, contend that the case should have been submitted upon any alternative or other theory. It presented the "alternative theory" contention for the first time in its petition for modification, seeking a new trial after the Court of Appeals had ajudicated that the Petitioner was entitled, as a matter of law, to the direction of a judgment of acquittal and that it was "error to submit the case to the jury" because there was no evidence of the existence of any subsidiary conspiracy that would prolong the operation of the statute of limitations.

Under Rule 30 of the Federal Rules of Criminal Procedure, and the Rules established by the decisions of this and other Courts, the action of the Court below, in making the Modification Order, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Rule 30 of the Federal Rules of Criminal Procedure provides as follows:

"**No party** may assign as error any portion

> of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (Emphasis supplied).

The rule says that **"no party"** may assign as error, etc. This clearly precludes the Government, Appellee, as well as the defendant.

In **United States v. Hoth, 207 F. 2d 386** (9th Cir.), this Court held:

> "The United States is not entitled, any more than the ordinary litigant, to raise questions on the appeal not presented or suggested below."

In **Carter Carburetor Corp. v. Riley,** 186 F. 2d **148** (8th Cir.), the Court held:

> "The court's **instructions, not** being **excepted to** by either party, **became the law of the case** and we must determine the question of the sufficiency of the evidence by the law as so announced." (Citing cases).

In **Bateman v. United States, 212 F. 2d 61** (9th Cir), this Court held:

> "Under Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., failure to except to an instruction on the ground urged on appeal **forecloses review** of the question. Berenbeim v. United States, 10 Cir., 1947, 164 F. 2d 679."

In **Mitchell v. United States, 213 F. 2d 951** (9th Cir.), the appellant attempted to assert error in the failure of the Trial Judge to instruct the jury re effect of a prior acquittal on criminal charges for

tax evasion. The Court refused to consider the alleged error and held:

> "The instruction complained of dealt with a **special fact-situation** of the case at bar, and was **not of a 'stock' nature.** It was therefore of a type that comes peculiarly within the sweep of **Rule 30,** as was pointed out at some length by us in the recent cases of . . ." (Citing 9th Cir. cases).

In **Reidy v. Myntti, 116 F. 2d 725** (9th Cir.), the Trial Court gave an instruction to the jury which represented

> "the theory upon which the trial was had."

On appeal, the defendant questioned the instruction. The Court held:

> "This theory of the case, accepted by both parties at the trial, **cannot be questioned for the first time on appeal.** New York, L. E. & W. R. Co. v. Estill, 147 U.S. 591, 13 S. Ct. 444, 37 L. Ed. 292"

The defendant also questioned the sufficiency of the evidence to support the amount of the recovery. The Court held:

> "We deem it sufficient to say in answer to this specification of error that the question of the sufficiency of evidence in this regard was **not raised in the trial court, nor** is there any sufficient **assignment of error** raising the question."

The following cases are to the same effect:

> Zamloch v. U.S., 193 F. 2d, 889 (9th Cir.);
> Kobey v. U.S., 208 F.2d 583 (9th Cir.);
> U. S. v. Furlong, 194 F. 2d 1 (7th Cir.), holding Court **"powerless"** to consider objection to instruction;

Enriquez v. U. S., 188 F. 2d 313 (9th Cir.);
Berra v. U. S., 351 U.S. 131—76 S. Ct. 685.

It is also well settled that **a new contention cannot be presented for the first time by a petition for re-hearing.**

Independent Wireless Telegraph Co. v. Radio Corporation of America, 270 U.S. 84;
United States v. Achilli, 234 F. 2d 797 (7th Cir), Affirmed 353 U.S. 373.

The Modification Order directing a new trial instead of directing a judgment of acquittal was made in violation of the foregoing rules. The violation of these rules is particularly objectionable and serious in criminal cases, under the conditions prevailing in this case, because it results in depriving a defendant of his constitutional protection against double jeopardy and grants the Government rights equivalent to a motion for a new trial after a judgment of acquittal in criminal cases, when the law denies these rights to the Government.

When a defendant in a criminal case becomes entitled, as a matter of law to a judgment of acquittal and the right has accrued, it is not "just" or "appropriate" to subject him to another trial so that he can be prosecuted on another "theory" for the same offense.

The fortuitous circumstance that the Trial Judge erroneously denied the defendant the judgment of acquittal to which he was entitled; as a matter of law, cannot, and should not, affect his

right to acquittal by a direction of the United States Court of Appeals.

It is "just" and "appropriate" that the Court of Appeals should direct the Trial Court to do that which it should have done as a matter of law.

If the Government cannot have a new trial in the District Court or an appeal from a judgment of acquittal, it is not "just" or "appropriate" that it should have a new trial by reason of the fortuitous circumstance that the Trial Court erroneously denied defendant a judgment of acquittal when the Court of Appeals reverses because of the Trial Court's failure to grant defendant the judgment of acquittal to which he was entitled as a matter of law.

The Government should not be allowed to acquire rights by reason of the Trial Court's failure to do that which the law required it to do in the first instance.

The action of the Court of Appeals in this case raises a far more serious issue than the possible guilt of the petitioner. The issue is the proper standard to which the Government should be held in criminal prosecution by law and by the Courts. To deprive a citizen of his liberty the law places upon the Government the burden of producing evidence legally sufficient to support conviction. This includes evidence establishing that prosecution is not barred by the statute of limitations. When the Government fails to carry this burden upon the

trial and the defendant becomes entitled as a matter of law to a judgment of acquittal, that should end the matter. The defendant should not then be subjected to another trial on another theory by reason of the fortuitous circumstance that the Trial Court erroneously failed to grant a judgment of acquittal. The Government should not be relieved from the requirements of **Rule 30 of the Federal Rules of Criminal Procedure** and from any of the other rules referred to above governing the proper presentation of questions for review in the Appellate Court. The Government should not be permitted to insist upon affirmance of the judgment of conviction and when defeated in this attempt, to seek "another go at the citizen" upon another theory.

The action of the Court below, which relieved the Government from the operation of all of the Rules discussed above, calls for the exercise of this Court's supervisory powers so that adherence to these Rules by the Government will be made mandatory upon the Government as it is upon the defendant.

In **Pollard v. United States, 352 U.S. 354,** in the dissenting Opinion of Chief Justice Warren, concurred in by Justices Black, Douglas and Brennan, he said:

> "The conclusion that the condonation of this succession of procedural shortcomings represents a restriction of petitioner's rights is inescapable. This Court has often said that

such departures from accepted standards should not be permitted—that to do so encourages looseness in many ways."

The observation is particularly applicable in the case at bar because the condonation by the Court below of the violation of the rules discussed above, results in depriving defendant of the constitutional guarantee against double jeopardy by subjecting him to another trial for the same offense although he was, at the conclusion of the trial, entitled, as a matter of law, to a judgment of acquittal.

In the Government's petition for modification, it asserts that the theory on which the case was submitted to the Jury was contrary to the law as laid down in **United States v. Beacon Brass Co., 344 U.S. 43,** but it did not request any instruction for submission of the case to the Jury on the theory involved in the **Beacon Brass Co. case** and it did not, in its brief in the Court of Appeals or in oral argument, contend that the case was submitted on a theory contrary to the **Beacon Brass Co. case** or that the case might have been submitted on such theory. Reliance on the **Beacon Brass Co. case** was asserted, for the first time, in the Government's petition for modification.

In the petition for modification (p. 6), the Government attempted to excuse its failure to request instructions for submission of the case on the alleged alternative theory on the ground that

this Court had not, at the time of the Trial, decided the **Grunewald case** and it says:

> "accordingly the Government made no objections to the Trial Court's instructions."

The excuse is untenable. The instructions given by the Court were in harmony with the law as it was expressed by the United States Court of Appeals for the Second Circuit in the **Grunewald case** and the principles were affirmed and reiterated by this Court. It was only decided by this Court in the **Grunewald case** that under the allegations of the indictment in that case and the evidence, the defendant was entitled to have the case submitted on an additional or alternative theory and that the instructions did not adequately present that alternative theory. The defendant raised the question in the trial court and assigned the error in the brief. But the principles established by the **Krulewitch and Lutwak cases,** as recognized by the Court of Appeals in the Second Circuit, were affirmed and emphasized.

In the case at bar, the District Court had before it the decision of the Circuit Court of Appeals of the Second Circuit when the case was submitted to the Jury and it formulated the instructions in accordance therewith. **The Government acquiesced in those instructions and it did not request any instructions for the submission of the case to the Jury on any additional or alternative theory.**

Moreover, when the Government wrote its brief.

in this case, this Court had already decided the **Grunewald case.** The Government discussed the decision in its brief, but did not argue that the case should, or might have been, tried on an "alternative theory." It did not confess error and ask for a new trial. It only urged that the judgment be affirmed.

There is not the slightest suggestion in the Government's brief in the Court of Appeals that the case was submitted on erroneous instructions, or on an erroneous theory. It argued only that the evidence was sufficient to go to the jury. The Court below held that the evidence was insufficient. **It did not in the Opinion modifying the judgment reverse itself on that issue.**

III.

The United States District Court for the Western District of Washington, Southern Division, was without Jurisdiction of the Offense.

The Grand Jury that returned the indictment in this case was created as follows:

On February 3, 1953, on motion of the United States Attorney, the United States District Court for the Western District of Washington, **Southern** Division, ordered the impaneling of a Grand Jury for the **Southern Division** of the Western District. (Tr. of Rec. 23).

On February 26, 1953, when the Grand Jury was being impaneled, the Court ruled that only **residents**

of the Southern Division were qualified to act as Grand Jurors (Tr. of Rec. 27).

After the Grand Jury was impaneled and sworn, **the Court instructed the Grand Jury that it could only consider offenses committed in the Southern Division** and that it could consider offenses in the Northern Division **only on stipulation** (Tr. of Rec. 50, 51, 52).

The indictment in this case was returned by the Grand Jury impaneled by the Court of the Southern Division and the case was tried in the Southern Division.

It is settled by a series of decisions that a Grand Jury, so impaneled, has no jurisdiction to consider offenses committed in another Division in the absence of stipulation and the Court to which the indictment is returned has no jurisdiction of the offense.

Borgia v. United States, 78 F. 2d 550 (9th Cir.);
United States v. Tait, 6 F. 2d 942;
United States v. Chennault, 230 Fed. 942;
United States v. Beaugh, 2 F. 2d 378.

This rule was not questioned by the Government.

The question that presented itself was whether the offense was committed in the Southern Division.

It is also settled that a conspiracy case may be prosecuted either in the jurisdiction where the

conspiracy was entered into or the jurisdiction in which an overt act was committed in furtherance of the conspiracy.

The indictment in this case alleges that the **conspiracy** was **formed** in Seattle, Washington, in the **Northern Division.** The question then remains, was an overt act committed in the **Southern Division?** (Tr. of Rec. 4).

The indictment alleges the commission of thirty-three overt acts (Tr. of Rec. 6 to 18).

Only seven of the acts are alleged to have been committed within six years prior to the indictment. These are 24, 26, 29, 30, 31, 32 and 33 (Tr. of Rec. 15 to 18).

It is alleged in the indictment that **all of these seven acts were committed in Seattle, Washington, Northern Division.** Consequently, if these were the only overt acts alleged, the District Court for the Southern Division would be without jurisdiction of the offense.

Of the remaining twenty-six alleged overt acts (all barred by the statute of limitations), seven of the acts, numbered 14 to 20 inclusive, are alleged to have been **committed in Tacoma,** Washington, **Southern Division.** They all consist of allegations of the filing of partnership information returns and some of Seijas' individual returns in the Collector's Office in Tacoma. All of them were committed more than six years prior to the indictment. **They are the only acts committed in the Southern Division.**

The question for determination, therefore, was whether overt acts committed within the jurisdiction more than six years prior to the indictment and barred by the statute of limitations can clothe the Court of the Southern Division with jurisdiction?

In the District Court, petitioner contended that the Southern Division of the Court was without jurisdiction.

The United States District Court rejected this contention and held that jurisdiction could be predicated upon overt acts committed within the jurisdiction although these overt acts were barred by the statute of limitations.

The Court of Appeals did not, in the original Opinion, pass upon the contention. But since it considered the case on the merits, it must be assumed that it rejected Appellant's contention **sub silentio.** But in the Opinion rendered February 26, 1959, the Court said:

> "We agree with the Government's contention that since some earlier overt acts (barred by the statute of limitations) were committed in the Southern Division while the later acts (not barred by the statute of limitations) took place in the Northern Division, venue requirements were satisfied, notwithstanding only the later acts satisfy the requirements of the statute of limitations." (Tr. of Rec. 1942, App. to this br., p. 70).

In the Government's petition for modification and the brief submitted in answer to Petitioner's

Petition for Rehearing, the Government **expressly disclaimed** that the indictment charges conspiracy to attempt to evade **by filing false returns** and insisted that the indictment only charged conspiracy to attempt to evade **by making false statements and submitting false records to Government Agents** as set forth in paragraph D of the indictment (Tr. of Rec. 5).

The Government's petition for modification says (p. 3):

> "These acts (referring to the filing of false returns) are **not even alleged as means of evasion** in the indictment, but are relegated to the category of overt acts. The **means of evasion alleged** in the charging part of the indictment are: by **furnishing officers and employees of the Treasury Department false books and records, and false financial statements,** . . . for the purpose of concealing . . . .'"

The Government assumed this position to avoid the force of the instruction that the primary conspiracy was consummated and the statute of limitations began to run upon the filing of Seijas' last individual return on March 15, 1943. This instruction was in accordance with the decision of this Court in the **Grunewald case.** This Court said:

> "The tax evasion cases were governed by a six year statute of limitations, which began to run when the last return, pertaining to the year 1946, was filed by the taxpayers."

Since the Government insists that the indictment only charged attempted evasion by making

false statements and submitting false records and not by filing false returns, the overt acts, numbered 14 to 20 inclusive, consisting of the filing of returns (barred by the statute of limitations) were **irrelevant to the conspiracy which the Government now contends is the basis of the prosecution.** The filing of returns would be relevant to and in furtherance of a conspiracy to attempt to evade by filing false returns, but are **not relevant to a conspiracy which merely contemplates making false statements and submitting false records** even if they were not barred by the statute of limitations.

In **Yates v. United States, 354 U.S. 298,** this Court held that an overt act must be **relevant to the particular objective of the conspiracy.** In that case, the indictment charged conspiracy to violate the Smith Act by "advocating" the over-throw of the Government by force and by "organizing" a communist organization to teach the over-throw of the Government.

Only two overt acts were committed within the statutory period of limitations. The Court reversed the conviction because the evidence only established one of the objectives, namely, "advocating" the over-throw of the Government by force, but it was impossible to tell from the verdict of the Jury whether the two overt acts were relevant to the "advocating" objective or the "organizing" objective.

In the case at bar, since the Government insists

that the indictment charged only one objective, namely, conspiracy to attempt to evade by making false statements and submitting false records to Government employees, there had to be overt acts committed within the statute of limitations **relevant to that particular objective.**

The filing of the returns were not overt acts relevant to that objective. The offense of attempted evasion by making false statements and submitting false records can be committed even without the filing of any returns. **(Beacon Brass Co. case).** The conspiracy charged in paragraph D does not depend on the filing of returns.

But whether relevant or not to the object of the conspiracy as now claimed by the Government, barred overt acts committed in the Southern Division, which could not, in any event, sustain a conviction for conspiracy, could not clothe the Court with jurisdiction.

The District Court charged the Jury that at least one of the overt acts had to be committed

> "at Tacoma within the Southern Division (Tr. of Rec. 1794);

that

> "the burden is on the Government to prove . . . . either the defendant Forman or any other member of the alleged conspiracy **committed at Tacoma, within the Southern Division** of this Court, any one or more of the overt acts alleged in the indictment," (Tr. of Rec. 1799).
> ". . . . that one or more of the alleged con-

spirators committed an overt act or acts **within a period of six years prior to the filing of the indictment"** (Tr. of Rec. 1809).

There had to be a concurrence of two elements:

(a) an overt act committed in the Southern Division; and

(b) within six years prior to indictment.

The indictment alleges on its face that the only acts committed in **Tacoma, in the Southern Division,** were barred by the statute of limitation, being more than six years before the indictment.

In a conspiracy case, the allegation of overt acts barred by the statute of limitations is clearly "surplusage" because they could not sustain a conviction.

In **Bridges v. United States, 346 U.S. 209,** where the statute of limitation was involved, the Court held:

> "The insertion of surplus words in the indictment does not change the nature of the offense charged."

In **Ford v. United States, 273 U.S. 593,** the Court said that "surplusage" in an indictment

> "is a useless averment, is innocuous and may be ignored."

Since the barred overt acts could not sustain a conviction, the allegation of these acts constitute "surplusage" and is innocuous for any purpose, whether it be to state an offense or to clothe the Court with jurisdiction.

In **United States v. Perlstein, 126 F. 2d 789,** (3rd Cir.) the Court recognized that

> ". . . . it must always be alleged and proved that the crime was committed prior to the date of the indictment, within the period of limitation, **and within the jurisdiction of the Court."** (Emphasis added)

In **Hyde v. United States, 225 U.S. 347,** this Court had under consideration the question of jurisdiction in a case where the conspiracy was formed out of the jurisdiction, but an overt act was committed within the jurisdiction. The Court sustained the jurisdiction, but said:

> " 'The conspiracy must have existed in the District of Columbia, and it must have existed and some overt act in pursuance of it must have been committed within three years next before the filing of the indictment.' "

There is an implication that there had to be concurrence of an act committed within the jurisdiction and within the statutory period.

The question involved is one of jurisdiction and not merely venue because the Grand Jury had no power or authority to consider the alleged offense committed in the Northern Division. The Grand Jury had limited authority. It was selected, empaneled and instructed specifically to consider only offenses committed within the Southern Division and that it could consider cases in the Northern Division only on stipulation. Consequently, the indictment returned by that Grand Jury for an

offense committed within the Northern Division was a nullity and did not clothe the Court with jurisdiction to try the defendant.

Unless jurisdiction in conspiracy cases is limited to overt acts committed:

(a) within the jurisdiction; and

(b) within the period of the statute of limitations,

defendant in conspiracy cases could in many instances be deprived of due process.

In conspiracy cases, a defendant is subjected to unusual hardship and hazards that are inherent in such prosecutions. Under the Government's contention, a defendant may be compelled to disprove an alleged overt act committed ten, fifteen or twenty years prior to indictment by (a) persons other than the defendant, (b) who may be unknown to him, (c) of which he has no knowledge, and (d) committed thousands of miles from the place of trial. He would be prevented, by reason of the lapse of time, from obtaining evidence with which to disprove such overt act.

The same considerations which preclude prosecution on an overt act barred by the statute of limitations, should also preclude jurisdiction when predicated on an act barred by the statute of limitations.

CONCLUSION

It is respectfully submitted that the Petition should be granted, and the Writ issued.

WILLIA R. FORMAN,
Petitioner,
By SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD
Of Counsel
Public Service Building,
Portland, Oregon.

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

William R. Forman, Appellant,	)	
vs.	)	No. 15,324
	)	Sept. 15, 1958
United States of America, Appellee.	)	

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Before HEALY, POPE and FEE, Circuit Judges.

POPE, Circuit Judge.

Appellant Forman was found guilty and sentenced under the fifteenth count of a fifteen count indictment returned against him and one Seijas. The first fourteen counts of the indictment stated charges against Seijas only, and they are not involved in this appeal. In the fifteenth count it was charged that Seijas and Forman entered into a conspiracy to defraud the United States and to violate certain sections of the Internal Revenue Code and the Criminal Code, among them section 145(b) of the Internal Revenue Code (1939),[1] re-

[1] "(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by

lating to attempts to evade or defeat income tax. As the case is presented here the key portions of this count were stated in paragraphs "C" and "D", as follows:

"C. To violate Section 145(b) of the Internal Revenue Code, 26 U.S.C., Section 145(b), by knowingly and willfully attempting to defraud and evade a large portion of the income taxes owed by Armador A. Seijas and his wife, Betty L. Seijas, and others to the United States for the years 1942 to 1945, inclusive, upon their share of the unreported income of the afore-mentioned partnerships.

"D. To violate Section 1001 of the New Criminal Code, 18 U.S.C., Section 1001, and Section 145(b) of the Internal Revenue Code, 26 U.S.C., Section 145(b), by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive."

this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." At the trial the violation of sections other than this one were removed from consideration of the jury as a basis of conspiracy.

The Count listed 33 overt acts alleged to have been committed in furtherance of the conspiracy.

Seijas in a separate trial was found guilty, under counts 9 through 13, of substantive offenses pertaining to the evasion or attempt to evade his tax and that of his wife for the years 1946 through 1948. He pleaded guilty to the charge against him in count 15. Forman was tried alone upon that count and Seijas, who was then serving his sentence under the other counts, was produced as a witness for the Government.

The evidence tended to show that during the years 1941-1945, inclusive, Seijas and Forman, as partners, were conducting the business of operating pinball machines in Kitsap County, Washington; that they carried on this business under an arrangement whereby the pinball machines were placed in taverns and other locations; that the coins in the machines were collected by employees of the partnership and the amounts so taken would be divided equally between the partnership and the proprietor of the pinball location; that instead of accounting for all of the collections made, the collectors by direction of the partners held out a portion of the actual amounts collected and turned over to the partnership bookkeeper for entry in the partnership books only a portion of the actual collections; that in this manner some $172,400 was held out of the pinball receipts during the years 1942 through 1945; that this amount was neither reported to the location owners nor entered in the

partnership books, nor reflected in the income tax returns,—it was split between Forman and Seijas neither of whom reported any part of these sums upon his own tax returns.

Forman's participation in the setting up of this arrangement and in the handling of the partnership books and the making of the partnership information returns, so as to conceal the receipt of these funds during the years 1942 to 1945, was proven by credible evidence, and there was abundant proof of Forman's participation in a conspiracy such as that described in paragraph C quoted above, namely, one to defraud and evade Seijas' income taxes for the years 1942 through 1945.

The outcome of this case, however, does not turn upon any such question since the court instructed the jury that a conspiracy to commit the offenses referred to in paragraphs C and D of the indictment, insofar as they were for the purpose of evading the tax liability of Seijas and wife, were subject to a six year period of limitation, and prosecution must be commenced within six years of the last overt act in furtherance of such conspiracy. The court stated to the jury:

"I charge you that the conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax returns of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statute of limitations would run from that time." The indictment was filed November 19, 1953.

However, as bearing upon that portion of the indictment, quoted above as paragraph D, and relating to a conspiracy to violate section 145(b) of the Internal Revenue Code, "by furnishing false books and records and making false statements, for the purpose of concealing . . . their share of the unreported income . . . and for the purpose of concealing . . . the true income tax liability" of Seijas and his wife, the court charged the jury as follows: "If you find that the defendant Seijas and Forman conspired to attempt to evade the tax liability of Seijas and his wife and others for the years 1942 to 1945, inclusive, you must find the defendant Forman not guilty unless you are convinced beyond a reasonable doubt that they also conspired to conceal the alleged conspiracy in order to prevent prosecution therefor and that such additional conspiracy was a continuing one. You cannot imply that there was a continuing conspiracy to conceal the offense from the fact that they may have conspired to attempt to evade the tax liability of Seijas and wife. That is to say, the mere fact that they may have conspired to evade the tax liability of Seijas and his wife for the years in question, if it be a fact, does not warrant the conclusion that they also conspired to conceal the commission of the offense. You would have to be convinced beyond a reasonable doubt that they actually conspired to conceal the conspiracy and that they committed an overt act or acts in furtherance of such subsidiary conspiracy. As previ-

ously stated, the understanding or agreement for such conspiracy need not have been entered into by written or formal oral expression, but may be determined from a consideration of the conduct and statements of the parties and all of the evidence as shown by the evidence in the case."[2] It will thus be noted that the jury were told that it was not sufficient merely to prove conspiracy to attempt to evade tax liability of Seijas and wife from 1942 to 1945, inclusive, but that the jury must be convinced beyond a reasonable doubt that they also conspired to conceal the conspiracy to evade the tax liability in order to prevent prosecution thereof and that such additional conspiracy was a continuing one. The court further made this point very clear by concluding its charge in respect to these matters as follows:

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[2] This was followed by the following portion of the charge which contains the part previously quoted: "If you find that the defendants only conspired to attempt to evade the tax liability of defendant Seijas and his wife and did not form the additional conspiracy to conceal the same, then I charge you that the conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax return of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statutes of limitations would run from that time, and if you so find, your verdict would have to be not guilty.

"If you find that there was no subsidiary conspiracy to conceal as I have just outlined it to you, but acts of concealment were thereafter committed as an after-thought and were conceived after the filing of the returns in March, 1946, then, of course, your verdict must be for the defendant Forman."

"Summarizing with respect to the statute of limitations, you must first find that Forman knowingly and wilfully conspired with Seijas to attempt to evade the tax liability of Seijas, Mrs. Seijas and others;

"Second, that part of this conspiracy was to make continuing efforts to avoid detection and prosecution under the condition just referred to;

"Third, that one or more of the alleged conspirators committed an overt act or acts within a period of six years prior to the filing of the indictment therein in furtherance of the conspiracy and during its continuance to accomplish the object of the conspiracy just referred to; namely, attempted evasion of tax liability of Seijas and others.

"If you cannot answer all three of these questions in the affirmative, as shown by the evidence beyond a reasonable doubt, then you must return a verdict of not guilty."

Appellant argues that the court should have granted his motions for judgment of acquittal, contending that there was not sufficient evidence to establish: "(a) a conspiracy between defendant and Seijas to evade Seijas' tax liability; and (b) a subsidiary conspiracy to conceal the aforesaid conspiracy."

As above indicated, we think the proof of the conspiracy to evade Seijas' tax liability was entirely adequate and so strong as to be almost overwhelming. Actually, as their collector testified,

they "stole" from the machines. They were engaged in perpetrating a fraud upon the location operators who were supposed to receive half of the proceeds. They sent false reports to their own bookkeeper as to the partnership gross receipts. This led to the false partnership returns and the evasion of the taxes owing by Seijas.

Clear as this evidence of their guilt of a conspiracy to evade Seijas' taxes is, it is not the important part of this suit in view of the fact that this portion of the conspiracy was consummated, as the court told the jury, on the filing of Seijas' tax returns in March, 1946. As the court's instructions stated, if this is all there was to the conspiracy, the statute of limitations would run from that time and the prosecution would be barred.

As to the contention that there was no evidence to prove that there was a subsidiary conspiracy to conceal, or to prove that the conspiracy itself included the actual conspiracy to accomplish not only the evasion of the taxes but the concealment of that evasion, appellant leans heavily upon the testimony given by defense witnesses that Forman ceased all participation in the pinball machine operations and in his association with Seijas in that business August 8, 1946. At that time Forman sold his one-half interest in the pinball machine partnership business to one Morin and written agreements were executed evidencing the assignment by Forman of 49% of his interest to Morin and 1% to Seijas. At the same time Seijas

and Morin adopted the articles of copartnership formerly executed between Forman and Seijas which recited that Morin was accepted as a partner by Seijas instead of Forman. There was also evidence to indicate that the "hold out" practices previously carried on between Seijas and Forman ceased and terminated about that time.

The Government claimed on the other hand that notwithstanding the execution of these instruments, Forman remained a secret partner in respect to Seijas' interest in the pinball business. Thus it was shown that half of $30,000 received from Morin for sale of Forman's interest to him was paid over to Seijas who testified that it was agreed that Forman was to have a secret one-half interest in Seijas' 51% of the Seijas-Morin partnership.[3] Appellant contends that he has established by "overwhelming" evidence that the payment of the $15,000 was a loan from Forman to Seijas and not a division of the purchase price paid by Morin.

Wholly apart from this dispute as to whether Forman did or did not continue to hold a secret interest in the pinball business, we think there was adequate proof, although circumstantial in character, of the Government's contention that there was an actual subsidiary conspiracy to conceal.

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[3] This testimony was confirmed by a written agreement, dated August 9, 1946, signed by Seijas and Forman, reciting that "W. R. Forman is the owner and partner of the remaining 51% in equal shares with Army Seijas."

The whole common enterprise from beginning to end was marked by efforts of concealment. When the parties first opened up their business in Kitsap County they concealed their part in it by having the licenses to operate the machines issued in the names of other persons. These persons were employed simply to lend their names. The licenses were taken in the names of United Amusement Company and Bremerton Amusement Company, which were the names under which Seijas and Forman were then doing business. During this period Seijas and Forman undertook other enterprises and in connection with those their actual activities were concealed by subterfuge and misrepresentations. They acquired an enterprise known as "Dock Concessions", put friends in charge to operate it with percentage interests to them, and made provisions that Forman was to be a silent partner. At the same time Seijas had a silent one-half interest in Forman's silent one-half interest. Seijas bought out some interests of one Heberling in three other pinball routes and Forman and Seijas had a secret agreement that they each had equal interests in the routes purchased. Seijas divided what he collected with Forman and this continued after September 1, 1946, when the sale to Morin became operative.

In 1950 internal revenue agents began an investigation of Seijas, and between that date and the time when the indictment was returned on November 19, 1953, both Seijas and Forman gave numerous false statements to the agents denying

any unreported income from the 1942-1945 pinball operations. Typical of this sort of thing was the conduct of Forman listed in overt act No. 29 of the indictment as follows:

"On or about September 1, 1948, in Seattle, Washington, William R. Forman concealed from an officer and employee of the Treasury Department of the United States engaged in an official re-examination of his and his wife's personal income tax returns for the year 1945 that during that year he received income from the afore-mentioned partnerships with Armador S. Seijas in addition to the amounts shown on the information returns filed by said partnerships."

In an audit of the February 28, 1947 return, Seijas and Forman gave the internal revenue agent the books and records of the partnership for 1944-1945 representing that they showed all the receipts for those years. They concealed the holdout pinball income. The same thing was done with another investigating agent in 1948 who received the first partnership records. These transactions are listed among the overt acts specified in the indictment. Throughout the periods here mentioned Seijas and Forman occupied the same office space and they were associated together in various theatre enterprises. Up to the time of the indictment and even through the trial Forman and Seijas continued to conceal the interest which Forman had in the Seijas-Morin partnership.

The theory of the Government was plainly that which had been recently accepted and approved in United States v. Grunewald, 2 cir., 233 F. 2d 556, 565. There the court said: "The record contains ample proof of efforts by the conspirators to forestall suspicion and wipe out traces of their operations and these efforts developed later and in 1951 and 1952 into an intensified campaign of concealment." The court then proceeded to distinguish the cases of Krulewitch v. United States, 336 U.S. 440, and Lutwak v. United States, 344 U.S. 604, and concluded: "In the case before us now it was charged in the indictment that one of the terms of the illegal agreement was that continuing efforts would be made 'to avoid detection and prosecution by any governmental body' and much of the proof adduced at the trial was admitted in support of this charge. The jury were instructed that no such term of the agreement could be implied but that they must make a finding based upon the evidence before them, and that if the efforts to conceal were 'no more than an afterthought' they must find defendants not guilty. * * * In Lutwak, despite the fact that the indictment charged an agreement to conceal, there was no evidence to support it. The clear implication is that, if the allegation had been supported by evidence, the court would have arrived at a different conclusion, for it is stated in the opinion, 344 U.S. at page 616, 73 S. Ct. at page 488: 'But there is no statement in the indictment of a single overt act of concealment that was com-

mitted after December 5, 1947, and no substantial evidence of any. Such acts as were set forth and proved were acts that revealed and did not conceal the fraud.' Here the record is replete with evidence of acts of concealment."

Here, also as in the Grunewald case, the record is replete with evidence of acts of concealment, acts participated in by both Forman and Seijas and circumstantial evidence that one of the terms of the illegal agreement was that continuing efforts would be made to avoid detection and prosecution through concealment and false representations to the investigating officers.

As the case was presented to the trial judge, (the trial began July 30, 1956 and the verdict was returned August 15, thereafter), the Grunewald case had but recently been concluded in the court of appeals. The language we have just quoted contains quotations from the Lutwak case which convinced the Second Circuit that the Government's theory was a tenable one. In the Krulewitch case the language of the court would appear to lend color to what the Government contended in the Grunewald case, namely, that in Krulewitch the court was simply refusing to accept a contention that in case of any conspiracy there is an implied agreement and understanding that the conspirators will continue to conceal what they have done. The court said: "We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create auto-

matically a further breach of the general rule against the admissions of hearsay evidence."[4]

However, we possess an advantage here that the trial court did not have. After the court below was required to rule upon these questions, and to frame its instructions to the jury, the decision of the court of appeals in the Grunewald case was reversed in Grunewald v. United States, 353 U.S. 391. There the Supreme Court dealt with two contentions of the Government as to why the Grunewald conviction should be sustained. The second alternative contention, which does not concern us here, was held by the court to present a legal theory which the court found "unexceptional"; but the first of those contentions presented precisely the same theory upon which the present case was submitted to the jury which returned the verdict against Forman. This the Supreme Court rejected, holding that notwithstanding the subsidiary conspiracy may have arisen from an **actual** agreement to conceal, which was established by circumstantial evidence, and not a mere **implied** conspiracy to

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[4] See also the language of Mr. Justice Jackson in his concurring opinion, 336 U.S. p. 455: "I suppose no person planning a crime would accept as a collaborator one on whom he thought he could not rely for help if he were caught, but I doubt that this fact warrants an inference of conspiracy for that purpose. *Of course, if an understanding for continuous aid had been proven, it would be embraced in the conspiracy by evidence and there would be no need to imply such an agreement. Only where there is no convincing evidence of such an understanding is there need for one to be implied.*" (Emphasis supplied)

conceal **implied** from the fact that the main conspiracy was kept secret, yet the period of the statute of limitations was not extended by reason of the agreement to conceal being included as a subsidiary element or part of the original conspiracy. The court set forth this portion of the Government's theory as follows: "First, it urges that even if the main object of the conspiracy was to obtain decision from the Bureau of Internal Revenue not to institute criminal tax prosecutions—decisions obtained in 1948 and 1949—the indictment alleged, and the proofs showed, that the conspiracy also included as a subsidiary element an agreement to conceal the conspiracy to "fix" these tax cases, to the end that the conspirators would escape detection and punishment for their crime. Says the Government, 'from the very nature of the conspiracy . . . there had to be, and was, from the outset a conscious, deliberate, agreement to conceal . . . each and every aspect of the conspiracy. . . .' It is then argued that since the alleged conspiracy to conceal clearly continued long after the main criminal purpose of the conspiracy was accomplished, and since overt acts in furtherance of the agreement to conceal was performed well within the indictment period, the prosecution was timely."

That contention the court rejected. It said: "Sanctioning the Government's theory would for all practical purpose wipe out the statute of limitations in conspiracy cases, as well as extend in-

definitely the time within which hearsay declarations will bind co-conspirators." It met the Government's efforts to distinguish the Krulewitch and Lutwak cases as involving only **implied** conspiracies to conceal, whereas the Grunewald conspiracy was said to be an actual one, by saying: "True, in both Krulewitch and Lutwak there is language in the opinions stressing the fact that only an implied agreement to conceal was relied on. Yet when we look to the facts of the present cases, we see that the evidence from which the Government here asks us to deduce an 'actual' agreement to conceal reveals nothing beyond that adduced in prior cases. . . . * * * We find in all this nothing more than what was involved in Krulewitch, that is, (1) a criminal conspiracy which is carried out in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to cover up after the crime begins to come to light; and so we cannot agree that this case does not fall within the ban of those prior opinions. * * * In effect, the differentiation pressed upon us by the Government is one of words rather than of substance. In Krulewitch it was urged that a continuing agreement to conceal should be implied out of the mere fact of conspiracy, and that acts of concealment should be taken as overt acts in furtherance of that implied agreement to conceal. Today the Government merely rearranges the argument. It states that the very same acts of concealment should be used as circumstantial evidence from

which it can be inferred that there was from the beginning from which it can be inferred that there was from the beginning an 'actual' agreement to conceal. As we see it, the two arguments amount to the same thing: a conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment. There is not a shred of direct evidence in this record to show anything like an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission."

Thus it seems plain that the Supreme Court was developing from considerations of policy a rule which it deemed essential to prevent a wiping out of the statute of limitations altogether in conspiracy cases. In Krulewitch the Government only undertook to argue that in every case of conspiracy, from the very nature of things a conspiracy to conceal was present and implied. In Grunewald, with no more evidence, the Government elaborated its argument by saying that the secrecy and concealment employed shows, circumstantially, that the original agreement between the conspirators actually had, as one of its intended objectives the carrying out of concealment. The policy that blocked the theory stated in Krulewitch blocks this one also. Upon the authority of this decision of the Supreme Court we hold that it was error to permit this case to go to the jury.

The judgment is reversed and the cause remanded with directions to enter judgment for the appellant.

(Endorsed:) Opinion. Filed Sept. 15, 1958.

Paul P. O'Brien, Clerk.

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

William R. Forman, Appellant,	)	
vs.	)	No. 15,324
	)	Oct. 27, 1958
United States of America, Appellee.	)	

Upon Appellee's Petition for a Rehearing
Before HEALY, POPE and FEE, Circuit Judges.
PER CURIAM.

Upon petition for a rehearing the United States asks us to modify our decision by ordering the cause remanded to the district court for a new trial.

We think this suggestion is a proper one. In our opinion we accepted the position taken by the court below in its instructions that the conspiracy charged "was consummated upon the filing of the individual tax returns." We then proceeded, upon the authority of Grunewald v. United States, 353 U.S. 391, to hold that the case had been improperly submitted to the jury with instructions that there might be a conviction if it was a part of the conspiracy "to make continuing efforts to avoid detection and prosecution."

The Government concedes that the case was submitted to the jury on an impermissible theory but says that as in the Grunewald case, the indictment here presented an alternative theory. That

alternative theory, closely paralleling the alternative legal theory in the Grunewald case, which the Supreme Court held "unexceptionable" is based upon the allegations of paragraph "D" of the indictment quoted in our opinion which charges that the conspiracy was one "to violate . . . §145(b) of the Internal Revenue Code . . . by furnishing officers and employees of the Revenue Department false books and records and false financial statements, and by making false statements to such officers and employees, for the purpose of concealing from the Treasury Department their share of the unreported income . . . and for the purpose of concealing . . . the true income tax liability of Amador A. Seijas. . . ." So read the indictment alleges furnishing false books and reports and making false statements in an attempt to evade taxes within the meaning of §145(b) which imposes penalties upon "any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter". Such an attempt may be made by false statements to Treasury representatives. United States v. Beacon Brass Co., 344 U.S. 43.

It now appears to us that the case might have been tried upon this alternative theory, namely, that the conspiracy continued past the filing of the returns for the purpose of protecting the taxpayers from tax prosecution. What was said in the Grunewald case about this alternative aspect of the Government's case sufficiently indicates that certain of the overt acts listed in the indictment and

charged to have occurred in 1948, 1951 and 1952, involving false statements, could well have been in furtherance of and during a conspiracy having as its objective not the concealment of the conspirators' conspiracy but tax evasion. Tax evasion may include attempts not only to block prosecution of the taxpayers but to block collection of the tax. In the case of a false or fraudulent return there is no limtiation of time for collection of tax. Revenue Code 1939, §276(a), Code 1954, §6501(c)(1). The distinction between the acts of concealment which were referred to in the court's instructions upon the first trial and the acts of concealment to which we now refer, was stated by Judge Frank in his dissent when the Grunewald case was in the Court of Appeals, (United States v. Grunewald, 233 F. 2d at p. 593), with which dissent the Supreme Court agreed. As Judge Frank put it: the distinction is between "(1) acts of concealment intended (at least in part) to block prosecution of the taxpayers for tax evasion, and (2) acts of concealment intended solely to block prosecution of the conspirators for conspiracy, ..."

We now think that the record does not require a conclusion that the conspiracy here was consummated by the filing of the individual tax returns.

The last paragraph of our opinion is modified so as to provide that the judgment is reversed and the cause remanded for a new trial.

(Endorsed:) Per Curiam Opinion on Petition for Rehearing. Filed Oct. 27, 1958.

Paul P. O'Brien, Clerk.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

William R. Forman, Appellant,	)	
vs.	)	No. 15,324
	)	Feb. 26, 1959
United States of America, Appellee.	)	

Upon Appellant's Petition for Rehearing

Before POPE, HEALY and FEE, Circuit Judges

PER CURIAM.

On September 15, 1958 we handed down our decision herein reversing the judgment with directions to enter judgment for the appellant. On October 27, 1958, upon petition for rehearing filed by appellee, we modified our decision so as to provide that the judgment was reversed and the cause remanded for a new trial. This action was followed by a petition for further rehearing filed on behalf of the appellant in which the latter asserts that this court is without power to order a new trial.

Appellant's principal reliance is upon the case of Sapir v. United States, 348 U.S. 373, where the court summarily reversed the action of a court of appeals which modified an earlier opinion ordering an indictment dismissed so as to order a new trial.

In a concurring opinion Mr. Justice Douglas explained his view of that case as follows:

"The granting of a new trial after a judgment of acquittal for lack of evidence violates the command of the Fifth Amendment that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'

"The correct rule was stated in Kepner v. United States, 195 U.S. 100 at 130, 'It is, then the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered. . . .' If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen. If, as in the Kepner case, the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would prevent a new trial of the old offense. I see no difference when the appellant court orders a judgment of acquittal for lack of evidence."

We think the case before us presents an entirely different situation. In the Sapir case the Court of Appeals held that the evidence "did not establish an essential element of the offense charged" and that the trial court should have entered a judgment of acquittal. Sapir v. United States, 10 Cir. 216 F.2d 722. Thus, in the words of Mr. Justice Douglas, the appellant court ordered "a judgment of acquittal for lack of evidence."

But in the case before us we did no such thing. We held that the case was submitted to the jury on an impermissible theory. The jury was simply not properly instructed. But as we noted in our

modifying opinion, the indictment was sufficent here to present an alternative theory. Furthermore the record contains evidence which would tend to sustain proof of overt acts listed in the indictment which took place as late as 1948, 1951 and 1952.

Under this permissible alternative theory, while prosecution could be supported by proof of the filing of the false returns, the conspiracy was by no means consummated then. Under this theory the conspiracy continued past the filing of the returns for the purpose of evading collection of the tax.

Since the indictment permitted prosecution on that theory, since there was evidence to support it, this was not a reversal on the basis of lack of evidence; it was for error in the instructions, a ground of error, in the words of Mr. Justice Douglas, "that infected the trial".

Appellant renews his objection to the venue. We agree with the Government's contention that since some earlier overt acts were committed in the Southern Division while the later acts took place in the Northern Division, venue requirements were satisfied, notwithstanding only the later acts satisfy the requirements of the statute of limitations.

Appellant's petition for rehearing is denied.

(Endorsed:) Per Curiam Opinion on Petition for Rehearing. Filed Feb. 26, 1959.

Paul P. O'Brien, Clerk.

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No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM R. FORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	12
Appendix	13

CITATIONS

Cases:

Grunewald v. *United States*, 353 U. S. 391	7, 8, 9, 11
Sapir v. *United States*, 348 U. S. 373	10
United States v. *Beacon Brass Co.*, 344 U. S. 43	9

Statute:

18 U.S.C. 1001	2, 9
26 U.S.C. (1952 ed.):	
Sec. 145(b)	2, 3, 4
3748(a)(3)	7
28 U.S.C. 2106	3, 11

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 779

WILLIAM R. FORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 47-70) is reported at 259 F. 2d 128, and modified at 261 F. 2d 181.

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1958 (Pet. 47) and modified on October 27, 1958 (Pet. 65). A petition for rehearing was denied on February 26, 1959 (Pet. 68), and the petition for a writ of certiorari was filed on March 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, having concluded that the case was submitted to the jury on an impermissible "subsidiary conspiracy" theory relating to the statute of limitations, was required to remand the case for entry of judgment for the petitioner rather than for a new trial.

2. Whether the District Court sitting in one division of a district had jurisdiction under an indictment charging a continuing conspiracy where those overt acts alleged to have been committed within the particular division were beyond the statute of limitations and the remaining overt acts within the statute of limitations were alleged to have been committed in another division of the district.

STATUTES INVOLVED

Section 1001 of the Criminal Code (18 U.S.C. 1001) provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 145(b) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed. 145(b)) provides:

> Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Section 2106 of the Judicial Code (28 U.S.C. 2106) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT

On November 19, 1953, the petitioner and one Seijas were indicted in the United States District Court for the Western District of Washington, Southern Division, for conspiring, continuously from February, 1942, to April 15, 1953, to violate Section 145(b) of the Internal Revenue Code of 1939 by attempting to evade the individual income taxes of Seijas and his wife for the years 1942 through 1945 and to violate the false reports section of the Crim-

inal Code, as well as Section 145(b) of the Internal Revenue Code by "furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of [Seijas' and petitioner's] partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife * * *." (R. 1-6.)[1] Thirty-three overt acts were alleged. (R. 6-19.) Seijas pleaded guilty (R. 829) and testified as a witness for the Government.

The evidence may be summarized briefly as follows:

In 1941, the petitioner and one Seijas, an attorney, formed a partnership to engage in the business of operating pinball machines in Kitsap County, Washington. (R. 353-354, 357, 666-667.) The number of machines placed in locations by the firm quickly increased from six to between 150 and 200 (R. 360) and early in 1942 the petitioner and Seijas organized two new pinball partnerships (R. 361). After emptying each machine of coins the partnership was supposed to make appropriate deductions for "payouts" and state taxes, and to divide the balance evenly between the partnership and the location owner.

[1] The indictment as originally drawn alleged other related crimes against the revenue (R. 1-5), but those were withdrawn from the jury's consideration (Pet. 11). Seijas alone was charged in the fourteen substantive counts, none of which are before this Court. (R. 3.)

(R. 358-359, 380, 1061.) Beginning in mid-1942, and continuing until December, 1945, the partnership followed the practice of extracting "hold-out" money from the collections at some of the more profitable locations. (R. 426, 1070, 1079.) The "hold-out" money was not reported on the regular receipt forms but was placed in separate sealed envelopes with lists of the pertinent locations and turned over twice each week to the petitioner. (R. 1069-1070, 1072.) The "hold-out" money was received mostly in currency, and over the pertinent years Seijas' share (50%) totalled $86,200. (R. 401-402, 415-416, 461, 463-464, 475-476.) None of the "hold-out" money was reported on the partnership returns or by Seijas on his individual income tax returns. (R. 426, 467-475.) During the pertinent years the petitioner was always furnished with carbon copies of Seijas' tax returns. (R. 467, 475.) Seijas maintained diaries in which he recorded the amounts and precise sources of the "hold-out" money. (R. 266, 268-270, 426, 404-435.)

In July, 1951, at a time when Treasury agents were investigating his income for the years 1941 through 1949, Seijas retained an accountant to prepare a net worth statement for him for those years, in order to ascertain whether it appeared that he had received any unreported income. (R. 243-245.) The accountant concluded that, based on an estimated $50,432.57 cash on hand as of the end of 1945, Seijas had unreported income of some $165,000 for the years 1946 through 1948. (R. 249, 255-

256.)[2] The accountant asked Seijas many times for an explanation of this $165,000, but did not get it, at least until 1953. (R. 251, 262-264.) On April 15, 1953, at the request of Seijas, a conference took place between him and his representatives and officials of the Internal Revenue Service. (R. 306.) He was advised that there had been a recommendation for criminal prosecution against him, based upon excessive increases in his net worth for the years 1946 through 1948 of some $204,000. (R. 307.) In attempting to account for these funds, Seijas and his representatives told the officials that $86,000 had come from the pinball machine routes, and explained in detail how that amount had been "creamed off from the collections" during the years 1942 through 1945, and how the petitioner had received the same amount in the same manner. (R. 310-315.)[3] To substantiate his contention relating to the $86,000, Seijas produced four of his diaries (*supra*), containing many entries in the handwriting of the petitioner. (R. 315-318, 428-429, 431-433.) Seijas did so "for

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[2] On December 29, 1951, Seijas submitted to the Internal Revenue Service this false net worth statement which omitted additional cash on hand of about $150,000, including the $86,200 of unreported profits from the pin-ball partnerships. (R. 217-218, 656-659.) On January 11, 1952, Seijas falsely stated to the Treasury agents that he believed his income for the years 1942 through 1945 had been correctly reported on the returns. (R. 18, 1551-1552.)

[3] Seijas and his representatives explained that Seijas had kept the money in safe deposit boxes in Portland, Seattle and San Francisco, and that instead of having only about $50,000 of cash on hand at the end of 1945, he had had more than $200,000. (R. 256, 318.)

the purpose of trying to eliminate criminal prosecution" (R. 275) for the years 1946-1948, believing that the diaries showing unreported income in the earlier years "were going to put him beyond the Statute of Limitations" (R. 265).

The trial court submitted the case to the jury with instructions that in order that the offense not be barred by the six-year statute of limitations[4] the jury must find an actual, not implied, agreement to continue to conceal the attempted evasion of the tax liability, an act it held was completed in March, 1946. The petitioner was found guilty (R. 99-100) and was sentenced to three years in prison and fined $10,000 (R. 104-105). The court below reversed the conviction on the authority of *Grunewald* v. *United States*, 353 U.S. 391, holding that while the evidence of guilt was "so strong as to be almost overwhelming" (Pet. 53), the prosecution was barred by the six-year statute of limitations since the case had been submitted to the jury on an impermissible theory with respect to a subsidiary conspiracy. (Pet. 63.) The court initially ordered the cause remanded "with directions to enter judgment for the appellant" (Pet. 64), but on the Government's petition for rehearing it modified its opinion so as to remand for a new trial (Pet. 67). It then denied the petitioner's petition for further rehearing with a second supplementary opinion (Pet. 68). It is the order pursuant to this opinion that the petitioner now attacks, contending that he is entitled to an acquittal.

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[4] 26 U.S.C. 1952 ed. 3748 (a) (3).

ARGUMENT

1. The petitioner's principal contention (Pet. 17-35), that the Court of Appeals erred in remanding the case for a new trial rather than an acquittal, is based upon the misconception that the conviction was reversed for insufficiency of evidence rather than considerations relating to the statute of limitations. The petitioner's argument relies so heavily upon this hypothesis that he repeats no less than seven times the misstatement that the conviction was reversed for insufficient proof of a "subsidiary conspiracy" to conceal the primary conspiracy. (Pet. 4, 14, 16, 21-22, 24, 35.) The fact is that the Court of Appeals found the evidence of the petitioner's guilt "so strong as to be almost overwhelming" (Pet. 53), and stated further, "we think there was adequate proof, although circumstantial in character, of the Government's contention that there was an actual subsidiary conspiracy to conceal." (Pet. 55). The court then quoting at length (Pet. 61-63) from *Grunewald* v. *United States*, 353 U.S. 391, held that proof of the existence of such a subsidiary conspiracy within six years of the indictment's return is not sufficient to prevent the running of the statute of limitations (Pet. 63), and ordered the cause reversed and remanded "with directions to enter judgment for the appellant" (Pet. 64).

In the Government's petition for rehearing (which is reproduced in the Appendix, *infra*, pp. 13-19) it was pointed out that the court had overlooked the fact that the central objective of the conspiracy, alleged in the indictment and proved to

exist by the evidence, was not completed in 1946 at the time the tax returns were filed, but continued thereafter so long as the defendants continued to attempt to evade the tax by making false statements and reports to the Government. The overt acts performed in furtherance of this conspiracy were alleged and proved to have taken place as late as 1951 and 1952, well within the term of the statute.[5] The Government called attention to the case of *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46, where it was held that a willful attempt to evade taxes by making false oral statements to Treasury representatives violates Section 145(b) of the Internal Revenue Code of 1939. (*Infra*, p. 16.) It was conceded, however, that the trial judge had not submitted the case to the jury in accordance with this theory, that his instructions were infected with exactly the same "subsidiary conspiracy" error that had caused the reversal in *Grunewald v. United States*, 353 U.S. 391, and that the petitioner should have a new trial. (*Infra*, pp. 17-18.)

The Court of Appeals recognized its error in "accept[ing] the position taken by the court below in its instructions that the conspiracy charged 'was consummated upon the filing of the individual tax returns'" (Pet. 65), and stated "We now think that the record does not require" that conclusion (Pet.

[5] In addition to tax evasion, the indictment charged a conspiracy to make false statements and reports in violation of 18 U.S.C. 1001, *supra*, p. 2. Some of these misstatements were alleged to have been made as late as 1952, well within the three-year limitation applicable to that charge.

67). The court modified its opinion so as to provide for a new trial. (Pet. 67.) Thereafter, in denying a Petition for Rehearing filed by the petitioner, the court distinguished *Sapir* v. *United States*, 348 U.S. 373 (the case upon which the petitioner now places primary reliance—Pet. 17-19, 20, 22, 23, 24), by pointing out that in that case the Court of Appeals had ordered a judgment of acquittal for lack of evidence, and went on to say (Pet. 69-70):

> But in the case before us we did no such thing. We held that the case was submitted to the jury on an impermissible theory. The jury was simply not properly instructed. But as we noted in our modifying opinion, the indictment was sufficient here to present an alternative theory. Furthermore the record contains evidence which would tend to sustain proof of overt acts listed in the indictment which took place as late as 1948, 1951 and 1952.

Clearly, the court was correct in this conclusion.[*] There is no lack of proof in this record. The sole

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[*] The only possible ground for the petitioner's assertion that the court found that there was insufficient evidence is the court's statement "It now appears to us that the case might have been tried upon this alternative theory, namely, that the conspiracy continued past the filing of the returns for the purpose of protecting the taxpayers from tax prosecution." (Pet. 66.) This statement, taken by itself, might possibly be interpreted to mean that the Government did not introduce evidence to support the alternative theory, though it could have done so under the indictment. However, this was not the court's intention since the evidence as to misstatements and false reports clearly supported the alternative theory (*supra*, p. 6, fn. 2; p. 8).

defect here lies in the erroneous "subsidiary conspiracy" instructions given by the trial judge. (Pet. 51-52; R. 1807-1808.) Against this background the petitioner's present contentions are seen to be wholly without substance. There is no double jeopardy here (see Pet. 17-26), any more than there was in *Grunewald*. The remand for a new trial is "just" and "appropriate" under 28 U.S.C. 2106, *supra*, p. 3 (see Pet. 26-35) for exactly the same reasons which required the new trial ordered by this Court in *Grunewald*, where precisely the same relief was ordered.

2. The petitioner contends, finally (Pet. 35-41), that the United States District Court for the Western District of Washington, Southern Division, was without jurisdiction of the offense because each of the seven overt acts alleged to have been committed within six years of the return of the indictment is alleged to have taken place in the Northern Division of the District. In effect, the petitioner argues that a statute of limitations bars consideration of the earlier acts in a continuing violation for purposes of venue. There is no authority for this proposition, and we submit that the statute has no such effect. Here, the earlier overt acts in furtherance of the continuing conspiracy to attempt to evade taxes (the filing of false returns) satisfied venue requirements; the later overt acts in furtherance of the same continuing conspiracy (the making of false statements to Treasury officials) satisfied statute of limitations requirements.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

APRIL, 1959.

APPENDIX

In the United States Court of Appeals for the Ninth Circuit

No. 15324

WILLIAM R. FORMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

APPELLEE'S PETITION FOR A REHEARING

To the Honorable WILLIAM HEALY, WALTER L. POPE and JAMES ALGER FEE, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Appellee hereby respectfully petitions for a rehearing of the above cause, decided on September 15, 1958, on the grounds that the opinion of this Court (1) conflicts with *United States* v. *Beacon Brass Co.*, 344 U.S. 43, insofar as it is premised on the conclusion that the type of attempted tax evasion here involved was consummated upon the filing of fraudulent returns, and (2) fails, in view of such erroneous premise, to recognize the applicability to this case of the second alternative contention advanced by the Government and approved by the Supreme Court in *Grunewald* v. *United States*, 353 U.S. 391.

GROUNDS FOR REHEARING

Prosecution is not barred by the statute of limitations. The indictment alleges, and the evidence proves, a continuing conspiracy, which was alive at least until January, 1952, to attempt to evade Seijas' taxes. Accordingly, in view of the erroneous instructions, justice requires a new trial rather than entry of judgment of acquittal

This Court has found that "the proof of the conspiracy to evade Seijas' tax liability was * * * so strong as to be almost overwhelming" (op., p. 5), but has reversed the conviction on authority of the *Grunewald* case, *supra*, holding that the main objective of the conspiracy, the evasion of Seijas' taxes, was consummated when the false returns were filed in 1946; that the six-year statute of limitations began to run at that time; and that the period of limitations could not be extended merely because it was shown that there were subsequent acts of concealment to cover up the crime. We believe that the Court has misconstrued the indictment and the proof, and has failed to recognize that there was alleged and proved a *continuing* conspiracy to evade Seijas' taxes, a conspiracy which did not terminate with the filing of the false returns in the years 1943 through 1946, but which embraced fresh attempts to evade those taxes in the years 1947 through 1952. These later attempts, which included the presentation of false books and records and the making of false oral statements to the investigating agents, were not mere efforts to conceal the fact that crimes had been committed by filing false returns, but were overt acts in furtherance of the conspiracy's main objective—tax evasion. These attempts at evasion were successful until April 15, 1953, when Seijas disclosed the $172,400 of unreported partnership income earned in the years 1942-1945, in order to ac-

count for excess assets in his possession in later years. Until Seijas made these disclosures in 1953, the conspirators could not know whether they would finally succeed or fail in their primary purpose—tax evasion.[1]

The filing of the false returns in the earlier years, far from being a consummation of the conspiracy's main objective, constituted only some of the initial steps in the conspiracy's operation. These acts are not even alleged as means of evasion in the indictment, but are relegated to the category of overt acts. The means of evasion alleged in the charging part of the indictment are (op., p. 2):

> by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive.

Although this Court has found (op., pp. 7-8) that the commission of these acts by both Seijas and appellant were proved, it treats them as nothing more than attempts to conceal the falsity of the returns, i.e., intended solely to cover up overt acts previously

---

[1] Under Section 276 of the Internal Revenue Code of 1939, 26 U. S. C. 276, assessment and collection of the tax do not become barred by any statute of limitations in the case of a false or fraudulent return with intent to evade tax. The jury in reaching their verdict in accordance with the instructions given them in this case, necessarily found false or fraudulent returns with intent to evade taxes.

committed, and having no tax evasion motivation. We think the Court erred in so regarding these acts. In *United States* v. *Beacon Brass Co.*, 344 U.S. 43, the Supreme Court expressly held that a willful attempt to evade taxes by making false statements to Treasury representatives violates Section 145(b) of the Internal Revenue Code of 1939, stating (344 U.S. at 45-46):

> The language of § 145(b) which outlaws willful attempts to evade taxes "in any manner" is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income.

If such conduct constitutes a felony of attempted tax evasion, *a fortiori* it has sufficient substance to constitute an overt act in furtherance of the main objective of a tax evasion conspiracy. It necessarily follows that the conspiracy in the instant case was shown to have been in existence during the years 1947 through 1951, and at least until January 11, 1952, when Seijas falsely stated to the Treasury agents that he believed his income for the years 1942 through 1945 had been correctly reported on the returns. (R. 18, 1551-1552.) Put another way, the object of this conspiracy was alleged to be the attempted evasion of income taxes. There is proof (op., pp. 7-8) that in the years 1947 through 1952 the conspirators were doing exactly that. Can it be doubted that in January, 1952, the conspiracy was still very much alive, and that it may have remained so until April, 1953, when it finally failed of its purpose? We respectfully submit that the answer must be in the negative, and that, insofar as the opinion in the instant case holds that the conspirators' false statements to the Treasury agents were

not means of attempted tax evasion, it is in conflict with *United States* v. *Beacon Brass Co., supra.*

That portion of the opinion in *Grunewald* relied upon by this Court (op., pp. 10-11) has, we believe no proper application to the proven facts (as distinguished from the instructions given) in this case. Under the state of facts assumed in the Government's first alternative contention in *Grunewald*, the central criminal purpose of the conspiracy had been accomplished beyond the period of limitations, and the Government, to avoid the bar of limitations, was seeking to establish a subsidiary conspiracy designed to cover up the conspirators' tracks in order to avoid detection and punishment. In rejecting that argument, the Court observed (353 U.S. at 405):

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

In the instant case, we submit, the acts in question were done in furtherance of the main criminal objective of the conspiracy—tax evasion—and were not done after that objective was attained. There is no need here for the Government to rely upon a subsidiary conspiracy, either implied or actual, to conceal the main conspiracy.

It must be conceded that the case was not submitted to the jury in accordance with the theory outlined above. As this Court has pointed out (op., pp. 8-9), at the time this case was tried the Court of Appeals for the Second Circuit had recently held in

United States v. *Grunewald*, 233 F. 2d 556, that the kind of "subsidiary conspiracy" instructions given to the jury in the instant case (op., pp. 3-4) were proper. Neither the trial judge nor the Government then had the advantage of the principles later established by the Supreme Court in reversing the conviction in *Grunewald*. Accordingly, the Government made no objection to the trial court's instructions.

Inasmuch as the case was submitted to the jury on a theory which now appears to have been impermissible, and in view of the fact that this error can be corrected upon a new trial, we respectfully petition this Court to modify its opinion of September 15, 1958, in order (1) to correct the statement (op., pp. 5-6) that the conspiracy to evade taxes "was consummated * * * on the filing of Seijas' tax returns in March, 1946", and (2) to remand the cause to the District Court for a new trial rather than entry of a judgment of acquittal.

Dated: Washington, D. C., October 14, 1958.

Respectfully submitted.

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

CHARLES P. MORIARTY,
United States Attorney,

J. S. OBENOUR,
Assistant United States Attorney,
Of Counsel.

CERTIFICATE OF COUNSEL

I, CHARLES K. RICE, one of the attorneys for the appellee, certify that this petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

Dated: Washington, D. C., October 14, 1958.

CHARLES K. RICE.

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In the Supreme Court

of the United States

October Term, 1958

No. 43

WILLIAM R. FORMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD,
Of Counsel,
Public Service Building,
Portland, Oregon.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-59

In the Supreme Court

of the United States

October Term, 1958

No. 779

WILLIAM R. FORMAN,
Petitioner,
vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

I.

The Government's Brief does not correctly present the questions involved (P. 2). The Court of Appeals did not determine that the case was submitted on an

"impermissible subsidiary conspiracy theory."

The Opinion of October 27, 1958 (App. 65), modifying the original Opinion, did not hold that the original Opinion was erroneous insofar as it determined that there was no evidence of the existence of a subsidiary conspiracy and that judgment

of acquittal should have been entered on that ground. The Court merely held

> "that the case **might have been tried** upon this alternative theory, namely, that the conspiracy continued past the filing of the returns for the purpose of protecting the taxpayers from tax prosecution." (Pet. App. p. 66) (Emphasis added)

The true question is, whether the Court of Appeals, after having determined that there was no evidence of the existence of a subsidiary conspiracy, as defined in the **Grunewald and Krulewitch cases,** and that judgment of acquittal should be entered on that ground, could, thereafter, send the case back for re-trial and submission to the Jury upon an "alternative theory" when the Government did not, in the District Court, object or except to the instructions as given or request submission of the case upon the purported "alternative theory." Does the modification deprive defendant of the constitutional protection against double jeopardy for the same offense under these circumstances?

In the District Court, the Government acquiesced in that submission. It did not object or except to the instructions as given and did not request any instruction embodying the so-called "alternative theory."

In the Court of Appeals, the Government did not in its brief or oral argument challenge the accuracy of the instructions so far as they were

given. It was not until the Government filed its petition for modification that it asserted that the case might have been submitted on the purported "alternative theory."

The legal effect of the Government's contention is that it can seek a conviction on one legal theory and seek affirmance of that conviction upon that theory, but when the Appellate Court reverses for lack of evidence sufficient for submission to the Jury, it can then seek another trial of the defendant upon another or "alternative theory." We submit that this constitutes a violation of the defendant's constitutional protection against double jeopardy.

In the original Opinion of September 15, 1958, which reversed the conviction with directions for the entry of a judgment of acquittal, the Court of Appeals held that

> "it was error to permit this case to go to the jury" (App. 63)

because there was no evidence in the record of the kind contemplated by the **Krulewitch and Grunewald cases** which require evidence of the existence of

> "an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission." (App. 63).

This was the kind of agreement that had to be established to prolong the operation of the statute

of limitations. The Court of Appeals held that there was no evidence of such an agreement.

The Court of Appeals did not depart from this conclusion in its Opinion of October 27, 1958 (App. 65),.or in the Opinion on Re-Hearing of February 26, 1959 (App. 68). It did not reverse itself in this respect. It merely held that under the indictment and evidence, the case "might" have been submitted on an "alternative theory" embracing the Government's contention that no subsidiary conspiracy was needed and that the conspiracy was a continuing one from the beginning. The Court did not hold that there was any error in the instructions so far as they were given. The Government now wants to go back and have the case re-tried and re-submitted on its "alternative theory."

II.

The ruling that there was lack of evidence sufficient for submission to the Jury on the issue of the operation of the statute of limitations was not upon an error "infecting" the trial (which would warrant direction of a new trial). It was a determination that the District Court should have, in the first instance, entered judgment of acquittal on Defendant's motion. That determination required the Court of Appeals, as a matter of law, to direct the District Court to enter a judgment of acquittal as it did in its first Opinion.

This is a criminal case in which the law denies to the Government the right to move for a new trial for any reason after judgment of acquittal and denies the Government the right of appeal from a judgment of acquittal. The policy of the law which deprived the Government of these rights, likewise precludes the direction of a new trial by the Appellate Court so that the Defendant could be tried on another or "alternative" legal theory even though the Government acquiesced in the theory on which the case was submitted and did not seek submission of the case on such other or "alternative theory" in the District Court.

The Government sought affirmance of the conviction on the instructions as given with respect to the operation of the statute of limitations. It cannot, after reversal and direction of a judgment of acquittal, become an appellant, assign error (failure to submit an alternative theory) and seek a new trial on an "alternative theory."

Whatever may be the rule in **civil cases** as to the power of the Court on reversal to remand for a new trial, the constitutional guaranty of protection against double jeopardy precludes the granting of a new trial upon reversal of a conviction in cases where the defendant was entitled as a matter of law, to a judgment of acquittal in the District Court by reason of the insufficiency of the evidence for submission to the Jury upon an issue essential to the conviction. It is only where the reversal is on

the ground of error "infecting" the trial that a new trial may be ordered.

Sapir v. U. S., 348 U.S. 373;
Karn v. U. S., 158 F.2d 568 (9th Cir.).

The Government attempts to avoid the application of the **Sapir and Karn cases** by urging that

> "The petitioner's principal contention . . . is based upon a misconception that the conviction was reversed for insufficiency of evidence rather than considerations relating to the statute of limitations."

There is no misconception of the Court's original Opinion. The Court reversed on the ground that the prosecution was barred by the statute of limitations. It did so because there was no evidence of

> "an express original agreement among the conspirators to continue to act in concert in order to cover up for their own protection traces of the crime after its commission."

Under the instructions of the Court, there could be no conviction unless such an agreement was established and the Court determined that there was no evidence of such an agreement sufficient for submission to the Jury. The existence of such an agreement was essential to conviction and the Court's determination that there was no evidence of such an agreement, is a determination based upon "insufficiency of evidence" which entitles a defendant to a judgment of acquittal as a matter of law.

If the Government had requested the District Court to submit to the jury an instruction embody-

ing the purported "alternative theory" and the request was denied, the Government could not have moved for a new trial on that ground in the District Court after acquittal and it could not, as **Appellee,** assign the refusal as error upon Defendant's appeal from the conviction and seek a new trial by reason thereof. The Government in legal effect, became an appellant in a criminal case when the law denies to the Government the right to move for a new trial or to become an appellant in a criminal case.

Section 2106 of Title 28 U.S.C.A., insofar as it authorizes the Appellate Court to

> "remand a cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances,"

must be construed in connection with and limited by the Fifth Amendment which provides that

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

It can never be "just" to deprive a citizen of the protection guaranteed by the Fifth Amendment. When the defendant has been tried and there has "accrued" to the defendant the right, as a matter of law, to a judgment of acquittal and the Court of Appeals has determined that he was erroneously denied that right, a defendant is placed in double jeopardy if the Court of Appeals remands for a new trial instead of directing the entry of a judgment of acquittal as should have been done by the District Court.

III.

The Government's Brief does not fully present the question involving the jurisdiction of the Court in its statement of "Questions Presented," (P. 2).

The Petitioner challenged the jurisdiction of the Court on two grounds:

(a) that jurisdiction cannot be predicated on allegation of overt acts barred by the statute of limitations; and

(b) jurisdiction cannot be predicated upon the allegation of overt acts which are not relevant to the specific object of the conspiracy.

As pointed out in the Petition for the Writ of Certiorari, the Government has now definitely disavowed the contention that the attempted evasion was to be accomplished **by the filing of false returns** and now insists that the attempted evasion was to be accomplished **by making false statements** and submitting false books to a Government employee (Government's Petition for Modification, P. 15, and discussion in Petition for Writ, pp. 39 to 42). We there demonstrated that the filing of the returns are not overt acts relevant to the objective of the conspiracy now relied on to attempt to evade by making false statements and submitting false records. Irrelevant acts cannot be overt acts committed pursuant to and in furtherance of a conspiracy to accomplish the specific objective alleged in the indictment **(Yates v. U. S.,**

352 U.S. 298). Allegation of such acts is "surplusage" **(Bridges v. U. S., 346 U.S. 209)** and is "innocuous and may be ignored" **(Ford v. U. S., 273 U.S. 593).** Allegation of surplusage and innocuous allegations cannot support the jurisdiction of the Court.

The Government's Brief does not comment on this contention.

IV.

Under the statement of "Statutes Involved," the Government quotes the provisions of **18 U.S.C.A. 1001,** which defines the offense of making false statements to a Government Agency. This statute is not involved in this case.

In paragraph B of the indictment (Tr. 5), it charged conspiracy to violate that statute, but that charge was withdrawn by the Court from consideration of the Jury (Tr. 1806). The Court instructed:

> "The offense stated in A and B as alleged objectives of the conspiracy are wholly withdrawn from your consideration as objectives of the conspiracy charged. Accordingly, now you may only consider one question, did William R. Forman conspire with Armador A. Seijas to avoid the taxes of Armador A. Seijas, Betty Seijas and other, and so violate Section 145(b) of the Internal Revenue Code?"

V.

The Government seeks to reinstate the intolerable conditions that were clearly and definitely condemned by this Court in the **Lutwak, Krulewitch and Grunewald cases.**

The purported "alternative theory" seeks to reintroduce into the law, applicable to the statute of limitations in conspiracy cases, the rejected "implied" conspiracy thereof condemned in those cases. It was definitely established in those cases that the implied conspiracy theory would, in effect, wipe out the statute of limitations in conspiracy cases. The cases stand for the proposition that the statute of limitations cannot be extended in the absence of

> "an express original agreement among the conspirators to continue to act in concert in order to cover up for their own self protection traces of the crime after its commission."

This Court held in those cases that this express original agreement cannot be established by allegation and proof of overt acts. There must be evidence of the conspiracy as distinguished from overt acts in furtherance of a conspiracy.

"An overt act is something apart from the conspiracy."

Marino v. U. S., 91 F.2d 691 (9th Cir.).

Evidence of the commission of overt acts do not establish comspiracy.

Weniger v. U. S., 47 F.2d 692 (9th Cir).

In the **Krulewitch case,** this Court said that

"The very same acts of concealment"

cannot

> "be used as circumstantial evidence from which can be inferred that there was **from the beginning an 'actual' agreement to conceal . . . .** conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment." (Emphasis added)

In **Fiswick v. U. S., 329 U.S. 211,** this Court held that the overt acts in furtherance of the primary conspiracy cannot be made to serve the "double duty"

(a) to establish a subsidiary conspiracy; and

(b) commission of acts in furtherance thereof.

In the case at bar, the purported "alternative theory" is predicated on the allegation that defendants conspired to attempt to evade the tax by making false statements and submitting false books for the purpose of concealing the tax liability and upon evidence which the Government claims supports this allegation. But this is the very heart of the "primary" conspiracy. It is not like the allegation of the "subsidiary" conspiracy in the **Grunewald case** which expressly alleged:

> "It was part of the conspiracy that the defendants and co-conspirators would make **continuing efforts to avoid detection and prosecution** by an governmental body . . . of tax frauds perpetrated by the defendants
>
> . . . . . .

> 'It was further a part of the conspiracy that the defendants and co-conspirators at all times would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy.' " (Emphasis added)

This was the distinct allegation of the subsidiary conspiracy which would prolong the statute of limitations. It was the agreement **to act in concert to prevent detection and prosecution** that is the subject matter of the subsidiary conspiracy and not the same acts of concealment which are inherent in all conspiracy cases.

In the case at bar, the Government again attempts to do what was condemned in those cases, namely, to imply the subsidiary conspiracy **from the same circumstances and overt acts by which it supports its claim of primary conspiracy.** The acts alleged, in the case at bar, do not warrant the submission of the case to another Jury upon the purported "alternative theory." The acts alleged do not, as a matter of law, operate to extend the statute of limitations.

The fact that the Government is seeking in the case at bar to resort to the theory rejected in the **Krulewitch and Grunewald cases** is demonstrated by the following observations of this Court in the **Grunewald case:**

> "Says the Government, 'from the very nature of the conspiracy . . . . there had to be, and was, from the outset a conscious, deliberate, agreement to conceal . . . . each and every

aspect of the conspiracy . . . . It is then argued that since the alleged conspiracy to conceal clearly continued long after the main criminal purpose of the conspiracy was accomplished, and since overt acts in furtherance of the agreement to conceal was performed well within the indictment period, the prosecution was timely.'

. . . . . .

'Sanctioning the Government's theory would for all practical purpose wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind conspirators."

. . . . . .

'True, in both Krulewitch and Lutwak there is language in the opinions stressing the fact that only an implied agreement to conceal was relied on. Yet when we look to the facts of the present cases, we see that the evidence from which the Government here asks us to deduce an 'actual' agreement to conceal reveals nothing beyond that adduced in prior cases.

. . . . . .

We find in all this nothing more than what was involved in Krulewitch, that is, (1) a criminal conspiracy which is carried out in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to cover up after the crime begins to come to light; and so we cannot agree that this case does not fall within the ban of those prior opinions. . . .

. . . . . .

Today the Government merely rearranges the argument. It states that the very same acts of concealment should be used as circumstantial evidence from which it can be inferred that there was from the beginning an 'actual' agreement to conceal.' "

This was clearly a determination that an agreement from the beginning to conceal the conspiracy and to avoid detection and prosecution cannot be inferred from the mere fact that the defendants conspired to commit an offense and committed acts of concealment of the offense.

In the case at bar, the Government's "alternative theory" is the same as the theory rejected in the **Grunewald case.**

To permit the Opinions of October 27, 1958, and February 26, 1959, to stand, would operate to dissipate the definite rules of law applicable to the statute of limitations in conspiracy cases as established in the **Krulewitch and Grunewald cases.**

The Original Opinion of September 15, 1958, correctly determined the issues as they were presented and made a proper and lawful disposition of the case when it directed the entry of a judgment of acquittal.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD
Of Counsel
Public Service Building,
Portland, Oregon.

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In the Supreme Court
of the United States

October Term, 1959

No. 43

WILLIAM R. FORMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF ON BEHALF OF THE PETITIONER

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD,
Of Counsel,
Public Service Building,
Portland, Oregon.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

INDEX

	Page
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Questions Presented for Review	4
Statement of the Case	7
Summary of the Argument	16
Argument:	
I—The Modification Opinion Directing a New Trial Instead of Judgment of Acquittal, Violates the Constitutional Prohibition Against Double Jeopardy under the Circumstances of This Case	20
Preliminary Statement	20
a. Decisions Bearing on Questions of Double Jeopardy	23
b. The Petition for Modification Was, in Legal Effect, an Original Proceeding in the Court of Appeals for a New Trial Which It Had No Jurisdiction to Entertain	31
c. Re: Alleged Alternative Theory Parallel to Grunewald Case	36
d. The Modification Directing a New Trial Was Not a "Just" or "Appropriate" Judgment Under the Circumstances of This Case Within the Purview of Title 28, Section 2106	37

INDEX (Cont.)

Page

II—The Original Decision Was Correct. The Alleged "Alternative Theory," Projected in the Modification Opinion.

(a) Is Contrary to and Dissipates the Principles Established in the Grunewald case; and

(b) Is Not Supported by Evidence 41

a. Re: Legal Effect of "Alternative Theory" 41

b. There Is No Evidence of Any Conspiracy Between Seijas and Forman That They Would Make False Statements and Submit False Records to Treasury Employees to Conceal Seijas' Tax Liability 49

c. Re: Evidence to Support Overt Act 52

Re: Overt Act 24 52

Re: Overt Acts 26 and 29 54

Re: Overt Act 30 55

Re: Overt Acts 31, 32 and 33 55

The Net Worth Statement, Referred to in Overt Act 31, Was Not a False Statement 59

Re: Oral Statements Made on January 11, 1952 62

Conclusion 69

TABLE OF CONSTITUTIONAL PROVISIONS STATUTES, AND RULES

	Page
Fifth Amendment to the Constitution of the United States	3
Title 18, U.S.C.A., Section 371	3
Title 26, U.S.C.A., Section 6531	3
7201 (145b)	3
Title 28, U.S.C.A., Section 2106	3, 37

CASES CITED

Abbate v. U. S., — U.S. —, 79 S. Ct. 666	27
Bateman v. U. S., 212 F. 2d 61	34
Bartkus v. People of State of Illinois, — U.S. —, 79 S. Ct. 676	28
Canton v. U. S., 226 F. 2d 313	42
Carroll v. U. S., 354 U.S. 394	32
Conrad v. U. S., 255 F. 2d 247	63
Ex Parte U. S., 101 F. 2d 870	32
Green v. U. S., 355 U.S. 184	29, 34
Grunewald v. U. S., 353 U.S. 391	42, 47
Hayes v. U. S., 227 F. 2d 540	42
Herzog v. U. S., 235 F. 2d 664	42
Independent Wireless Telegraph Co. v. Radio Corporation of America, 270 U.S. 84	35
Johnson v. New York, N. H. & H. R. Co., 344 U.S. 48	39
Karn v. U. S., 158 F. 2d 568	26
Kepner v. U. S., 194 U.S. 100	29

CASES CITED (Cont.)

	Page
Krulewitch v. U. S., 336 U.S. 440	50
Langer v. U. S., 76 F. 2d 817	67
Lutwak v. U. S., 344 U.S. 604	51
Marino v. U. S., 91 F. 2d 691	52
National Ass'n v. Alabama ex rel John Patterson, — U.S. —, 79.S. Ct. 1001	35
Palko v. State of Connecticut, 302 U.S. 319	23
Pollard v. U. S., 352 U.S. 354	40
Reidy v. Myntti, 116 F. 2d 725	34
Sapir v. U. S., 348 U.S. 373	23
Spies v. U. S., 317 U.S. 492	44
Tingle v. U. S., 38 F. 2d 573	68
Umbriaco v. U. S., 258 F. 2d 625	32
U. S. v. Achilli, 234 F. 2d 797, aff'd 353 U.S. 373	35
U. S. v. Beacon Brass Co., 344 U.S. 43	46
U. S. v. Croessant, 178 F. 2d 96	42
U. S. v. Davey, 155 F. Supp. 175	64
U. S. v. DeLucia, 262 F. 2d 610	63
U. S. v. Hoth, 207 F. 2d 386	33
U. S. v. Kuzma, 249 F. 2d 619	49
U. S. v. Raub, 177 F. 2d 312	42
U. S. v. Rosenblum, 176 F. 2d 321	42
U. S. v. Yeoman-Henderson, Inc., 193 F. 2d 867	42
Weinstock v. U. S., 231 F. 2d 699	58
Weniger v. U. S., 47 F. 2d 692	52
Yates v. U. S., 354 U.S. 324	49

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OPINIONS BELOW

There was no Opinion in the United States District Court.

The Opinions of the Court of Appeals for the Ninth Circuit are reported in:

259 F. 2d 128 (R. 1923 to 1934).
261 F. 2d 181 (R. 1936 to 1938).
264 F. 2d 955 (R. 1941 to 1943).

STATEMENT OF JURISDICTION

On September 15, 1958, the United States Court of Appeals for the Ninth Circuit rendered a judgment reversing the judgment of conviction entered in the United States District Court for the Western District of Washington, Southern Division, and remanded the cause *with directions to enter judgment for the Appellant*, Petitioner herein (R. 1923).

On October 27, 1958, on petition of the Government, the Court below entered an Order modifying the aforesaid judgment by *remanding the cause for a new trial* instead of a judgment of acquittal (R. 1936).

On February 26, 1959, the Court below denied Appellant's (Petitioner's) Petition for Re-hearing (R. 1939).

On March 18, 1959, the Petition for Writ of Certiorari was filed in this Court.

On May 4, 1949, Petition for Writ of Certiorari was granted (R. 2023).

Petitioner seeks a review of the decisions rendered October 27, 1958 and February 26, 1959, *only insofar as they amended the judgment of September 15, 1958, by remanding for a new trial instead of a judgment of acquittal.*

Jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States, insofar as it provides:

> " * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

Section 371, Title: 18 U.S.C.A., provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . ."

Section 7201, Title: 26 U.S.C.A., (Sec. 145(b), Internal Revenue Act), provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony . . ."

Section 6531, Title: 26 U.S.C.A., provides:

> ". . . the period of limitation shall be 6 years—
>
> . . . . . .
>
> "(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof."

Section 2106, Title: 28 U.S.C.A. provides:

> "§ 2106. *Determination*
>
> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order

of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

QUESTIONS PRESENTED FOR REVIEW

1. Where the United States District Court submitted the case to the Jury on peremptory instruction that prosecution for the primary conspiracy to attempt to evade the tax was barred by the statute of limitations unless the Jury found that a subsidiary conspiracy was entered into (of the character described in *Krulewitch v. U. S.*, 336 U.S. 440, and *Grunewald v. U. S.*, 353 U.S. 391), which would prolong the life of the primary conspiracy, and the United States Court of Appeals determined that such a subsidiary conspiracy was not established and by reason thereof, it was

"error to permit the case to go to the Jury,"

and directed the entry of a judgment of acquittal, can the United States Court of Appeals thereafter direct a new trial because

"the case might have been tried" on an "alternative theory"?

2. Does the judgment and order directing a new trial, instead of a judgment of acquittal, subject Petitioner to double jeopardy and constitute violation of the Fifth Amendment to the Constitution of the United States under the conditions prevailing in this case?

3. Does the judgment, ordering a new trial instead of directing the entry of a judgment of acquittal, con-

stitute an "appropriate judgment" and is it "just under the circumstances" of this case?

4. Is the direction for a new trial justified where the Petitioner was entitled, as a matter of law, to the entry of a judgment of acquittal in the United States District Court at the close of the entire case on the ground that the prosecution was barred by the statute of limitations and the United States Court of Appeals so determined?

5. Can the Court below, after reversing the conviction because "it was error to permit this case to go to the jury", remand the case for a new trial because "the case might have been tried" on an "alternative theory" different from the theory upon which the case was tried and submitted to the jury where the Government:

(a) did not in the Trial Court object or take exception to the instructions embodying the theory on which the case was submitted;

(b) did not request that the case be submitted upon the alleged "alternative theory" or any other theory;

(c) did not comply with Rule 30 of the Federal Rules of Criminal Procedure;

(d) did not in its brief in the United States Court of Appeals assign, as error or contend, that the case was submitted on an erroneous theory or that it could have been submitted on an anternative theory;

(e) did not in oral argument make such contention; and

(f) raised the question, for the first time, by petition to modify the decision after the Court rendered its decision reversing the conviction

with direction for the entry of a judgment of acquittal?

6. Can the Government, Appellee, *in a criminal case*, who cannot cross-appeal, assert error, if any there be, with respect to the instructions and seek a new trial by reason thereof?

7. Has the Court below so far departed from the accepted and usual course of judicial proceedings resulting in denial to the Petitioner of the constitutional guarantee against double jeopardy as to call for the exercise of this Court's power of supervision?

8. Did the Court below err in its Modification Opinion in holding that

> "the case might have been tried upon this alternative theory, namely, that the conspiracy continued past the filing of the returns for the purpose of protecting the taxpayers from tax prosecution." (R. 1937).

STATEMENT OF THE CASE

In the tax years 1942 to 1945, Petitioner Forman and one, Armador A. Seijas, were partners doing business under four specifically named Partnerships operating pin ball machines. These machines were located in various establishments, such as restaurants, taverns, drug stores, etc. under an arrangement with the owners of the location by which the income from the machines was to be divided equally between the Partnerships and the owners of the locations. The maintenance of four Partnerships was made necessary by the fact that there were limitations upon the number of machines that could be operated by any one licensee under municipal and county licenses.

During that period and subsequent thereto, Forman and Seijas were partners in other ventures, to-wit, theater operations, real estate, concessions, etc. The case does not involve any income derived from these other partnership operations.

Count XV of the indictment (the only count here involved) charges that Forman and Seijas conspired to attempt to evade *Seijas'* income tax on a portion of the income derived from the pin ball machine business, which is described as "*hold-out*" income, during the years *1942 to 1945* inclusive conducted in the *four* pin ball *partnership* names. The contention is that when collections were made from the machines, a portion of the money collected was withheld from the owners of the locations and the balance only was divided with the

location owners (referred to throughout the trial as "hold-out" income); that the part withheld was divided equally between Forman and Seijas; that they did not report this particular income in the partnership information returns for said years; that Seijas did not report his share of the "hold-out" income in his individual tax return (Indictment, 3 to 6).

The alleged "hold-out" income derived by the four pin ball partnerships in the tax years 1942 to 1945 is the only income involved under the indictment.

The indictment only charges conspiracy to attempt to evade *Seijas' tax liability*. It does not charge conspiracy to attempt to evade Forman's (Petitioner's) tax liability.

The indictment divided the conspiracy into four parts, paragraphs A, B, C and D (R. 4, 5).

Paragraph A charged conspiracy to violate Section 54 of the Internal Revenue Code by keeping false records and paragraph B charged conspiracy to violate Section 1001 of the Criminal Code by causing to be filed false partnership information returns.

These two paragraphs were withdrawn from the consideration of the Jury and are not now involved in the case (R. 1806).

Paragraph C (R. 5) charged conspiracy to violate Section 145(b) of the Internal Revenue Code by attempting to evade a part of Seijas' income tax on the aforesaid income, but does not specify or describe any means by which the attempt was to be accomplished.

Paragraph D (R. 5) charges that they conspired to

violate Section 1001 of the Criminal Code and Section 145(b) of the Internal Revenue Code (jointly) by furnishing Officers of the Treasury Department false books and records and false financial statements and by making false statements,

> "for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability *of Armador A. Seijas and his wife*, Betty L. Seijas, for the yars 1942 to 1945, inclusive."

The conspiracy, charged in paragraph D, *does not charge conspiracy to attempt to evade Forman's* (Petitioner's) *tax liability*. The composite charge of conspiracy to violate Section 1001 of the Criminal Code and Section 145(b) of the Internal Revenue Code is subject to different statute of limitations. The former is subject to a *three year statute of limitations* (Sec. 3282, Title 18 U.S.C.A., prior to 1954 Amend.), while the latter is subject to a six year statute of limitations (Sec. 6531, Title 26 U.S.C.A.).

The Government's case established affirmatively and beyond question that the so-called "hold-out" practice was ended December 27, 1945 (R. 1079-1080); that in November, 1945, the Partnership sold part of its business to one Schneiderman (R. 1297) and on August 8, 1946, Forman sold his one-half interest in the remaining Partnership's business (less 1%) to one Henry T. Morin and transferred his remaining 1% interest to Seijas to be effective as of September 1, 1946 (R. 1310 and 1311). Thereafter, the pin ball business was continued by the

Partnership composed of Seijas and Morin. New books of account were set up for the new Partnership (R. 1237) and thereafter, the partnership information returns were filed by the new Partnership (Pl. Exs. 17, 18, 19, 20 and 21, R. 152).

After Forman sold his interest in the Partnership to Morin in August 1946, he ceased to have anything to do with the management or operation of the pin ball machine business (R. 1258) and immediately and continuously thereafter engaged in the business of acquiring and operating moving picture theaters in Washington, Oregon and California, and the bookkeeper got all instructions from Seijas and Morin (R. 1252, 1258).

After Forman sold his one-half interest to Morin, he entered into an agreement with Seijas by which Forman was to have a secret one-half interest in Seijas' 51% interest in the pin ball business of the new Partnership of Seijas and Morin. Forman contends, and there is a great deal of documentary evidence to support him, that that transaction was abandoned and that he loaned to Seijas one-half of the money he received from Morin for the sale of his one-half interest. There is an issue of fact upon that matter, but the issue is irrelevant to any question with which the Court is presently concerned.

Renstrom, the bookeeper, testified that after the sale to Morin, all instructions were given to him by Seijas and Morin; that the profit and loss and balance sheets were then given to Seijas and Morin; that he gave no information to Forman; that he did not give Forman any copies of Partnership Information Returns

(R. 1252); no checks were issued to Forman from the pin ball partnership (R. 1253) and the books did not show that Foreman had any interest in the Partnership (R. 1237).

Meyers, the one who made the collection of "hold-out" income, testified that the "hold-out" practice was discontinued before Forman sold out to Morin (R. 1080-1081); that Forman had no further interest in the business to his knowledge (R. 1081); that he had no further connection with Forman (R. 1089) and he thereafter took his instructions from Seijas and Morin (R. 1089).

Forman did not participate in the management or operation of the business of the new Partnership and the income from the new Partnership is in no way involved in the case at bar.

Partnership returns for the pin ball machine operations for the tax years 1942 to 1945 were filed each year. The last one, for the year 1945, was filed in March 1946, and the partners Seijas and Forman filed their individual returns for said years. The Seijas' individual return for 1945 was filed March 15, 1946 (Pl. Exs. 2 and 3) (R. 152, 1808).

Each Partner had his own individual tax returns prepared by his own accountant. Seijas' returns were prepared by his accountant and by himself in *Seattle, Washington*, and Forman's returns were prepared by his accountant in *Portland, Oregon*, who handled Forman's accounts for his own enterprises.

The first thirteen counts of the indictment charged Seijas only with the substantive offense of attempted tax evasion. Counts I to VIII inclusive involved the tax years *1942 to 1945* and Counts IX to XIII involved the tax years *1946 to 1948*.

Count XIV charged Seijas only with the substantive offense of violation of Section 1001 of the Criminal Code by making false statements and submitting false records to Internal Revenue Agents.

Petitioner Forman was not charged with any substantive offense.

Prior to the trial on Count XV, Seijas was tried and convicted on Counts IX to XIII inclusive involving tax years 1946 to 1948.

Prior to the commencement of the trial on Count XV (conspiracy), Seijas pleaded guilty to that count and on motion of the Government, the remaining substantive counts were dismissed. Thereafter, the trial on Count XV (conspiracy) was continued against Forman alone and Seijas became the Government's principal witness.

Prior to trial, Petitioner Forman moved to dismiss Count XV of the indictment on the ground, among others, that prosecution was barred by the statute of limitations (R. 21). The motion was denied (R. 66, 67).

At the close of the Government's case, Petitioner moved for a judgment of acquittal on the ground, among others, that prosecution was barred by the statute of limitations (R. 95, 96, 1654). The motion was denied (R. 1655).

At the close of the entire case, Petitioner moved for a judgment of acquittal on the ground, among others, that the prosecution was barred by the statute of limitations (R. 1762). The motion was denied.

After judgment of conviction was entered, Petitioner renewed the motion for judgment of acquittal on the ground, among others, that the prosecution was barred by the statute of limitations (R. 101). The motion was denied (R. 103).

In submitting the case to the Jury, the District Court charged (with respect to the statute of limitations) as follows (R. 1807-8):

> "'If you find that the defendants Seijas and Forman conspired to attempt to evade the tax liability of Seijas and his wife and others for the years 1942 to 1945, inclusive, you must find the defendant Forman' *not guilty unless you are convinced beyond a reasonable doubt that they also conspired to conceal the alleged conspiracy in order to prevent prosecution therefor and that such additional conspiracy was a continuing one.* You cannot imply that there was a continuing conspiracy to conceal the offense from the fact that they may have conspired to attempt to evade the tax liability of Seijas and wife. That is to say, the mere fact that they may have conspired to evade the tax liability of Seijas and his wife for the years in question, if it be a fact, does not warrant the conclusion that they also conspired to *conceal* the commission of the offense. You would have to be convinced beyond a reasonable doubt that they *actually conspired to conceal the conspiracy and that they committed an overt act or acts in furtherance of such subsidiary conspiracy.*
>
> "*If you find that the defendants* only conspired

to attempt to evade the tax liability of defendant Seijas and his wife and *did not form the additional conspiracy* to conceal the same, then I charge you that the conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, *was consummated upon the filing of the individual tax returns of Seijas and his wife for the year 1945 which was filed in March, 1946*, and the statute of limitations would run from that time, and if you so find, your verdict would have to be not guilty.

"If you find that there was no subsidiary conspiracy to conceal, as I have just outlined it to you, but acts of concealment were thereafter *committed as an afterthought* and were *conceived after the filing of the returns in March, 1946*, then, of course, your verdict must be for the defendant Forman."

In this connection, the Court also charged (R. 1803):

"*Mere acts of concealment* of a prior concluded conspiracy, which did not include a specific and distinct agreement to conceal, *occurring subsequent to final termination of the conspiracy* as to a particular defendant, *do not constitute overt acts* chargeable to such defendant and *are not to be considered in applying the statute of limitations* to prosecution of such defendant."

On appeal to the United States Court of Appeals for the Ninth Circuit, the judgment of conviction was reversed and remanded

"with directions to enter judgment for the Appellant." (R. 1935) (259 F. 2d 128).

The reversal was on the ground that prosecution was *barred by the statute of limitations*. The Court determined that there was no evidence of an

"express original agreement among the conspirators

> to continue to act in concert in order to cover up, for their own protection, traces of the crime after its commission"

of the character deemed necessary in the *Krulewitch* and *Grunewald cases*. Upon that theory, the Court of Appeals held:

> "It was error to permit this case to go to the Jury."

The Government filed a petition for modification of the decision of the United States Court of Appeals by remanding for a new trial instead of remanding with directions for the entry of a judgment of acquittal.

On October 27, 1958, the United States Court of Appeals rendered a Per Curiam Opinion in which it modified the Opinion formerly rendered

> "so as to provide that the judgment is reversed and the cause remanded for a new trial." (R. 1938) (261 F. 2d 181).

On February 26, 1959, the United States Court of Appeals denied Appellant's (Petitioner's) petition for a re-hearing (R. 1939 to 1940) (264 F. 2d 955).

The modification was based on the contention adopted by the Court that ". . . *the case might have been tried on this alternative theory* . . ." (R. 1937) although the Government did not object to the theory on which the case was submitted; did not request submission on the alleged alternative theory; did not comply with Rule 30 of the Federal Rules of Criminal Procedure; did not raise the question in the brief or oral argument in the Court below and presented the alleged alternative theory for the first time by its petition for a new trial.

The Court below did not, in its Modification Opinion, and or the Opinion on re-hearing, reverse itself in respect to any issue decided in its original Opinion. In effect, it merely decided that the Government should be given "another go at this citizen" so that he could be tried again on the alleged "alternative theory."

The primary question is, does the Modification Opinion subject Petitioner to double jeopardy under these circumstances?

SUMMARY OF THE ARGUMENT

I.

(a) Granting a new trial on the Government's motion after the Court of Appeals rendered a judgment reversing the judgment of conviction and directing the entry of a judgment of acquittal because there was no evidence warranting submission of the case to the Jury, constitutes a violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution.

(b) The Government's petition for a new trial constituted, in legal effect, an original proceeding for a new trial in the Court of Appeals which the Court had no jurisdiction to entertain. The Court of Appeals is a Court of review and not a Court of original jurisdiction.

(c) After the Court of Appeals rendered a judgment reversing the judgment of conviction with direction to enter a judgment of acquittal, it was not "just" or "appropriate" to modify the decision and direct a new trial

on the sole ground that the case "might have been tried upon this alternative theory" when the Government did not, in the District Court, request submission of the case on the alleged "alternative theory": did not object or except to the theory embraced in the instructions as given and did not, in its brief in the Court of Appeals or in oral argument, contend that the case might have been tried on such alternative theory, but advanced the contention, for the first time, in the petition for a new trial.

(d) Section 2106, Title 28, U.S.C.A., must *in criminal cases* be construed with and limited by the Double Jeopardy Clause of the Fifth Amendment and as so construed and limited, does not confer discretionary power on the Court of Appeals to direct a new trial *in a criminal case* after it has adjudged that the defendant was entitled to a judgment of acquittal as a matter of law for lack of evidence sufficient for submission of the case to the Jury.

Construing the statute so as to confer discretionary power to direct a new trial in a criminal case under these circumstances, would render Section 2106 unconstitutional for violation of the Double Jeopardy Clause of the Fifth Amendment.

(e) The Constitutional protection against double jeopardy, the denial of the right to the Government to move for a new trial in a criminal case either in the District Court or in the Appellate Court, and the denial to the Government of the right of appeal in criminal cases, make it mandatory that the Government should

in the first instance, try the defendant on all available theories which could have been lawfully submitted to the Jury and precludes the Government from seeking a new trial after it has acquiesced in the theory upon which the case was submitted and sought affirmance in the Court of Appeals upon that theory.

(f) The fortuitous circumstance that the District Court erroneously failed to render judgment of acquittal under the circumstances in this case, should not deprive a defendant of the constitutional protection against a second trial for the same offense.

(g) The Court below erred in the Modification Opinion when it directed the new trial on the authority of the *Grunewald case* because:

1. In *Grunewald*, the defendant, as appellant, (not the Government) sought the new trial. In the case at bar, the Government is seeking a new trial although denied that right by law.

2. In *Grunewald*, the alternative theory was in fact submitted to the Jury. The Court only found that the instructions did not adequately separate the two theories in the instructions. In the case at bar, the Government did not request submission of the alleged "alternative theory."

3. In *Grunewald*, the defendant raised the issue by appropriate exceptions in the District Court and by assignment of error in the Court of Appeals. In the case at bar, the Government did neither.

4. In *Grunewald*, the defendant, as Appellant, had

the right, as a matter of law, to raise the issues in the District Court, in the Court of Appeals and in the Supreme Court, whereas, the Government has no such rights.

II.

(a) The original Opinion was correct. It was in accordance with the principles laid down in the *Grunewald case*, and gave effect thereto.

(b) The Modification Opinion, insofar as it projects the alleged alternative theory, dissipates the principles established in *Grunewald* in which the Court held that acts of concealment, after an offense has been committed, cannot postpone the operation of the statute of limitations and that evidence of commission of overt acts does not constitute evidence of the conspiracy to conceal.

(c) There is no evidence in the record to sustain the alleged alternative theory.

(d) The Court below predicated the alleged alternative theory on the alleged commission of overt acts which would prevent the commencement of the running of the statute of limitations, although there was no evidence in the record that the said acts were committed pursuant to an antecedent conspiracy to make false statements and submit false records.

(e) There is no evidence to establish the commission of the alleged overt acts.

ARGUMENT

I

The Modification Opinion Directing a New Trial Instead of Judgment of Acquittal, Violates the Constitutional Prohibition Against Double Jeopardy under the Circumstances of This Case.

PRELIMINARY STATEMENT

The decision of the United States Court of Appeals for the Ninth Circuit, rendered September 15, 1958 (R. 1924) (259 F. 2d 128), reversed the judgment of conviction and remanded with directions for the entry of a judgment for the Appellant (R. 1935). The decision was based primarily on the ground that the prosecution was barred by the statute of limitations. The District Court submitted the case to the Jury on instructions that the statute of limitations commenced to run when Seijas' last individual tax return was filed, to-wit, March 15, 1946, which was more than six years prior to the return of the indictment and prosecution was barred *unless* the Jury found that there was a subsidiary agreement of the character described in the *Krulewitch* and *Grunewald* cases, to-wit:

> "an express original agreement among the conspirators to continue to act in concert in order to cover up for their own protection, traces of the crime after its commission." (R. 1334).

Pertinent quotation from the instructions are printed at pages 13-14 of this brief.

The Court of Appeals determined that there was no

evidence in the record of such a subsidiary agreement and that it was error to submit the case to the jury. It reversed on that ground and remanded with directions to enter judgment of acquittal (R. 1923-1935) (259 F. 2d 128).

The Government petitioned for modification of the judgment to remand for a new trial instead of a judgment of acquittal on the ground that the case *might have been submitted on an "alternative theory"* which would have extended the operation of the statute of limitations, to-wit, that the conspiracy contemplated the commission of acts of concealment—making false statements and submitting false records to Treasury Agent—after the filing of false returns.

The Court of Appeals granted the petition for modification because:

> "the case might have been tried upon this alternative theory." (R. 1936 to 1938) (261 F. 2d 181).

The Government did not, in the District Court, object or take exception to the theory on which the case was submitted to the Jury and *did not request any instructions for the submission of the case to the Jury on the alleged "alternative theory,"* and did not comply with Rule 30 of the Federal Rules of Criminal Procedure.

The Government did not, in its brief or in the oral argument in the Court of Appeals, make any contention that the case should, or might have been submitted on the alleged "alternative theory" or that any error was committed in the instructions *as given.*

The contention that the case might have been submitted on the alleged "alternative theory" was advanced, for the first time, in the Government's petition to the Court of Appeals for the modification of the Opinion by remanding for a new trial instead of for the entry of a judgment of acquittal.

In the Modification Opinion Decision, the Court did not determine that it was in error in any respect in its former decision and, in particular, it did not determine that it erred in determining that there was no evidence that warranted submission of the case to the Jury on the issue whether there was "an express agreement to act in concert" which would have prolonged the operation of the statute of limitations. The Court of Appeals did not reverse itself in any respect upon any issue determinative of the ultimate disposition of the case *upon the instructions as given.* It merely determined that the case should be tried again on the alleged "alternative theory" (then advanced for the first time), and for that reason alone, remanded for a new trial.

We submit that the petition for a new trial was, under these circumstances, in legal effect, *an original proceeding in the Court of Appeals for a new trial after the Court adjudged the Petitioner was entitled, as a matter of law, to judgment of acquittal* and the Modification Opinion, granting the new trial, subjected Petitioner to double jeopardy in violation of the Fifth Amendment.

a.

Decisions Bearing on Questions of Double Jeopardy.

In *Palko v. State of Connecticut*, 302 U.S. 319, 58 S. Ct. 149, Justice Cardozo said:

> "It (Fifth Amendment) forbade jeopardy in the same case if the new trial was *at the instance of the government* and not upon defendant's motion." (Emphasis supplied).

In *Sapir v. U. S.*, 348 U.S. 373, the Court of Appeals reversed the conviction with directions to dismiss the indictment because the evidence did not warrant submission of the case to the Jury (216 F. 2d 722). The Government then petitioned to modify the judgment by directing a new trial instead of a dismissal of the indictment as in the case at bar. The Court of Appeals granted the Government's petition *and this Court granted a writ of certiorari.*

This Court, in a Per Curiam Opinion, held:

> " 'The petition for writ of certiorari is granted.
>
> " 'We believe that the judgment of the Court of Appeals of October 20, 1954, 216 F. 2d, 722, reversing and *remanding* this cause *with instructions to dismiss* the indictment *was correct.* It is not necessary for us to pass on the question presented under its subsequent judgment of November 17, 1954, directing a new trial. We vacate the latter judgment, which directed the new trial, and we reinstate the former one which instructed the trial court to dismiss the indictment.' "

Mr. Justice Douglas, in a concurring Opinion, said:

> " 'The granting of a new trial after a judgment of acquittal *for lack of evidence* violates the com-

mand of the Fifth Amendment that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'"

"The correct rule was stated in Kepner v. United States, 195 U.S. 100, at page 130, 24 S. Ct. 797, at page 130, 24 S. Ct., 797, at page 805, 49 L. Ed. 114, 'It is, then, the settled law of this court that former jeopardy includes 'one who has been *acquitted*, by a verdict duly rendered * * * .' *If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen.* If, as in the Kepner case, the trial *judge had rendered a verdict of acquittal*, the guarantee against *double jeopardy would prevent a new trial* of the old offense. I *see no difference when the appellate court orders a judgment of acquittal for lack of evidence.*

. . . . . .

"'But an acquittal *on the basis of lack of evidence* concludes the controversy, as the Kepner case holds, and puts it at rest under the protection of the Double Jeopardy Clause, absent a motion by the defendant for a new trial.'" (Emphasis supplied).

In its Opinion, denying Appellant's (Petitioner's Petition for Re-Hearing (R. 1940) (264 F. 2d 955), the Court of Appeals attempted to distinguish the case at bar from the *Sapir case*. It said:

"In the Sapir case the Court of Appeals held that the evidence 'did not establish an essential element of the offense charged' and that the trial court should have entered a judgment of acquittal.

. . . . . .

"Thus, in the words of Mr. Justice Douglas, the appellate court ordered 'a judgment of acquittal for lack of evidence.'

"But in the case before us we did no such thing. We held that the case was submitted to the

> jury on an impermissible theory. The jury was simply not properly instructed."

This was an erroneous construction and interpretation of the Court's original and modification Opinions.

The Court below did not determine in either Opinion that the instructions, as given, were erroneous. It held that there was no evidence warranting submission of the case to the Jury *on the instructions as given*. The Modification Opinion only decided that additional instructions "*might*" have been given that would have submitted the case on the alleged "*alternative theory*." The Court never departed from its original determination that under the *theory embraced in the instructions as given*. Petitioner was entitled to an acquittal.

The error was not in the instruction. The error was in submission of the case to the Jury at all because of the lack of evidence under the instructions as given.

The ruling that the case "might have been tried upon this alternative theory," does not establish that the Jury was not properly instructed. The original Opinion establishes that there was no error in the instructions upon the theory on which the case was tried and submitted to the Jury. The Court said, in effect, that the case might have been tried and submitted on an alternative theory *if the Government had requested submission on that theory*. The Court did not, and could not, rule that the District Court erred in the failure to submit that theory (if, in fact, there was a failure) because no such request was made and no exception taken to the instruction as given.

The Petitioner did not, by his appeal, seek a new trial in connection with the contention that he was entitled to a judgment of acquittal for lack of evidence to go to the Jury on an issue determinative of the case. He sought only a reversal with directions for the entry of judgment of acquittal in that connection. Petitioner did not invite a new trial on this issue.

In *Karn v. United States*, 158 F. 2d 568 (9th Cir.) the Court held:

> "When the motion for a directed verdict was made, the trial judge, as a matter of law, should have instructed the jury to render a verdict of acquittal. *The right of appellant to a verdict of acquittal fully matured when he made his motion.* To remand the case with directions to grant a new trial would, in our judgment, be a *serious invasion of rights which accrued to him* in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind.
>
> . . . . . .
>
> "The judgment of the district court is reversed and the cause remanded to the district court with directions to vacate the judgment of sentence herein and to enter a judgment of acquittal of the appellant."

In Footnote 2, the Court held:

> ". . . The power of an appellate court *to direct the lower court to do what in law it should have done* was admitted in the early case of Ballew v. United States, 160 U.S. 187, . . . the trial judge, when faced with a motion for a directed verdict, . . . must decide a *question of law*. . . . The erroneous decision of a trial judge cannot convert that question of law into a question of fact. It remains a question of law properly to be decided by the appellate court,

and when so decided (as it is here) *there remains nothing to be done by the district court save enter a judgment of acquittal*. For a particularly enlightening discussion see (citing many cases)." (Emphasis supplied).

The original Opinion of the Court of Appeals merely directed the District Court to do that which it should have done in the first instance as a matter of law.

The Modification Opinion subjects Petitioner to a second trial for the same offense notwithstanding the fact that he was entitled, as a matter of law, to a judgment of acquittal in the District Court at the conclusion of the case.

Petitioner should not be stripped of the constitutional protection against double jeopardy by the fortuitous circumstance that the District Court erroneously failed to do what it should have done in the first instance as a matter of law.

The Defendant's right to judgment of acquittal "matured" at that time (*Karn v. United States, supra*) and became a vested right. When the Court of Appeals held that the District Court committed error in submitting the case to the Jury and in not granting a judgment of acquittal, it established the vested right of Petitioner *as of the time he moved for a judgment of acquittal in the Court below*.

In *Abbate v. United States*, — U.S. —, 79 S. Ct. 666, Justice Brennan (in the separate Opinion rejecting the Government's alternative theory) said:

"The basis of the Fifth Amendment protection

against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts. 'The underlying idea * * * is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity * * *.' Green v. United States, 355 U.S. 184, 187, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199. In short, 'the *prohibition is not against being twice punished, but against being twice put in jeopardy* * * *' United States v. Ball, 163 U.S. 662, 16 S. Ct. 1192, 1194, 41 L. Ed. 300.

. . . . . .

"Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection.

. . . . . .

"The prime consideration is the protection of the accused from the harassment of successive prosecutions, and not the justification for or policy behind the statutes violated by the accused." (Emphasis supplied).

In *Bartkus v. People of State of Illinois*, — U.S. —, 79 S. Ct. 676-701, Justice Black, in the dissenting Opinion, concurred in by Chief Justice Warren and Justice Douglas, said in the footnote:

"The Federal Bill of Rights did not, of course, differentiate between *re-trials after acquittal and retrials after conviction;* it banned both."

and in the body of the Opinion he said:

"The test, I submit, must be fashioned to secure the fundamental protection of the Fifth Amend-

ment "that the (Federal Government) with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity * * * .'"

In *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, the Court held:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . .
>
> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> . . . . . .
>
> "Thus it is one of the elemental principles of our criminal law that the *Government cannot secure a new trial* by means of an appeal *even though an acquittal may appear to be erroneous.*" (Emphasis supplied).

In *Kepner v. United States*, 194 U.S. 100, the Court held:

> "*The protection is not*, as the court below held, *against the peril of second punishment, but against being again tried for the same offense.*
>
> . . . . . .
>
> "So in the case of *People v. Webb*, 38 Cal 467, . . .

in the course of a well-considered opinion it was said: . . . 'No case has been called to our attention . . . *where a retrial has been ordered or sanctioned by an appellate court at the instance of the prosecution, after the defendant had been once put upon his trial for an alleged felony, upon a valid indictment before a competent court and jury,* . . .' (Emphasis supplied).

The Modification Opinion violates the letter and the spirit of the Double Jeopardy Clause of the Fifth Amendment and ignores the purpose of the Amendment as expressed in the Opinions just referred to. The Government is to have "another go at this citizen" because the District Court erroneously failed to grant him the judgment of acquittal which "accrued" to him at that time.

The legal effect of the Government's contention, and the Modification Opinion, is that the Government can seek a conviction on one legal theory, seek affirmance of that conviction upon that theory in the Appellate Court, and when the Appellate Court reverses *for lack of evidence sufficent for submission to the Jury,* and determines that the Defendant was entitled to acquittal, it can then seek another trial of the Defendant upon another or "alternative theory." We submit that this constitutes a violation of the Defendant's constitutional protection against double jeopardy.

The whole scheme of criminal procedure is geared to the Double Jeopardy Clause of the Fifth Amendment. Thus the Government is denied the right to move for a new trial in a criminal case even though the judgment of acquittal may be erroneous. It is denied the right

to appeal from a judgment of acquittal. It is denied the right to cross-appeal when the Defendant appeals from a judgment of conviction and cannot assign errors on such appeal.

The constitutional protection against double jeopardy and the denial to the Government of the aforesaid rights, compels the conclusion that the Government must try its case in the District Court and seek submission of the case to the Jury *on all available theories*. The theory as embraced in the instructions, as given, is as to the Government, the law of the case.

The Government cannot under the Double Jeopardy Clause acquiesce in the trial of Defendant on one theory and when defeated in the District Court or Court of Appeals try him on another theory.

The Double Jeopardy Clause and the denial of the aforesaid rights to the Government, is inconsistent with, and precludes, the right of the Government to apply to the Court of Appeals for a new trial on an "alternative theory" when it has failed to advance and seek submission of that theory in the District Court and has sought to sustain the conviction on the theory on which the case was tried and submitted.

b.

The Petition for Modification Was, in Legal Effect, an Original Proceeding in the Court of Appeals for a New Trial Which It Had No Jurisdiction to Entertain.

Courts of Appeals are Courts of limited jurisdiction. They have only appellate, as distinguished from original, jurisdiction. Title 28 USC 1291. The Government's peti-

tion to amend the judgment so as to direct a new trial in essence was a motion in the Court of Appeals for a new trial on "another theory."

Rule 33 of the Federal Rules of Criminal Procedure provides:

> "The court may grant a new trial to a defendant . . ."

There is no provision authorizing the Government to move for a new trial, nor is there any statute or rule of Court granting the Government the right of appeal from a judgment of acquittal, whether entered on a motion or upon verdict of the jury, and the Government has no right to assign error upon an appeal by the defendant upon a judgment of conviction. (18 U.S.C.A. 3731); *Carroll v. United States*, 354 U.S. 394; *Umbriaco v. United States*, 258 F. 2d 625 (9th Cir.).

The Court of Appeals had no jurisdiction to entertain the petition for a new trial on an "alternative theory" after it had decided that Petitioner was entitled to judgment of acquittal. It is not a Court of original jurisdiction.

In *Ex Parte United States*, 101 F. 2d 870 (7th Cir.) the District Court granted judgment of acquittal for lack of evidence after a verdict of guilty pursuant to reservation of decision on the motion for judgment of acquittal made at the close of the entire case. The Government *moved to modify* the Order *by directing a new trial instead of judgment of acquittal.* The Court denied the petition and the Government sought a writ of mandamus in the Court of Appeals to compel the entry of such Order. The Court held:

> "To agree with petitioner that the prosecution is entitled to a new trial as a matter of right, after the issues have been fully tried in a trial by judge and jury and after the government has failed to prove its case against the defendants, is *a monstrous penalty to impose upon the defendants.* To grant the prosecution a new trial, after a judgment of dismissal has been rendered pursuant to its reservation of the power to wrest the case from the jury if the case turned on a purely legal question, *is to create a right that never before existed.* The creation of such a right in this case would come very close to violating the ancient doctrine codified in our Constitution that the accused shall not twice be put in jeopardy of life and limb for the same offense." (Emphasis supplied).

When the Goverment petitioned for a new trial after the judgment of conviction was reversed, and remanded for judgment of acquittal, *it initiated, in legal effect, an original proceeding* in the Court of Appeals without legal authority.

This is particularly true in the case at bar because the Government had not, at any time, until it filed its petition for a new trial, asserted error by reason of the failure to submit the alleged alternative theory to the Jury. It was an entirely new concept, presented at that time and at that stage of the case, in violation of *Rule 30 of the Federal Rules of Criminal Procedure,* which provides that

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

In *United States v. Hoth,* 207 F. 2d 386 (9th Cir.) the Court held:

> "The United States is not entitled any more than the ordinary litigant, to raise questions on the appeal not presented or suggested below."

In *Bateman v. United States*, 212 F. 2d 61 (9th Cir.) the Court held:

> "Under Rule 30 of the Federal Rules of Criminal Proceure, 18 U.S.C.A., failure to except to an instruction on the ground urged on appeal *forecloses review* of the question."

In *Reidy v. Myntti*, 116 F. 2d 725 (9th Cir.) the Court held:

> "This theory of the case, accepted by both parties at the trial, *cannot be questioned for the first time on appeal.* New York, L. E. & W. R. Co. v. Estill, 147 U.S. 591, 13 S. Ct. 444, 37 L. Ed. 292." (Emphasis supplied).

In *Green v. United States*, 355 U.S. 184, the Court held:

> "Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous." (Citing cases).

The policy of the law, which deprives the Government of the right to move for a new trial in the District Court and the right to appeal, likewise, precludes the Court of Appeals from entertaining a petition for a new trial after it has adjudicated that the defendant was entitled to judgment of acquittal as a matter of law.

In *Grunewald v. United States*, 353 U.S. at 406, the Government sought to sustain the conviction upon a "*further theory*" that the conspiracy contemplated continuous engagement in the business of tax fixing. The

Court *refused to entertain that contention because "the theory was never submitted to the jury."*

In the case at bar, the alleged "alternative theory" was not submitted to the Jury and the Court below should not have entertained the petition on that ground.

It is also well settled that a new contention cannot be presented for the first time, by a petition for rehearing.

> Independent Wireless Telegraph Co. v. Radio Corporation of America, 270 U.S. 84;
> United States v. Achilli, 234 F. 2d 797 (7th Cir.), affirmed 353 U.S. 373.

If the Court of Appeals had affirmed the conviction, Petitioner could not have petitioned the Court of Appeals to send the case back for a new trial *upon another theory of defense which it could have, but did not, urge in the District Court*. There is no apparent reason why the Government should be granted this extraordinary right, particularly in a criminal case in which a defendant is entitled to the constitutional protection against double jeopardy and the Government is denied the right to move for a new trial in the District Court or the right of appeal from a judgment of acquittal.

In *National Association v. Alabama, ex rel. John Patterson*, — U.S. —, 79 S. Ct. 1001, the respondent State opposed the petition for writ of certiorari and attempt to sustain the action of the Court below on grounds which were not urged by Respondent in the Court below. This Court held:

> "The State is bound by its previously taken position, namely, that decision of the sole question re-

garding the membership lists is dispositive of the whole case."

c.

Re: Alleged Alternative Theory Parallel to Grunewald Case.

The Modification Opinion was based on the ground that the case "might" have been submitted on an "alternative theory"

> "closely paralleling the alternative theory in the Grunewald case . . ."

In the *Grunewald case*, the *defendant* was the appelland and *he* sought a new trial not the Government.

In the case at bar, the *Government* is *seeking a new trial* notwithstanding the fact that the law denies the Government a right to move for a new trial or to appeal.

In *Grunewald*, defendant requested submission of the alternative theory to the Jury in the District Court and that theory was, in fact, submitted. The only contention made on appeal was that the instruction did not adequately enable the Jury to separate the two theories and it was impossible to determine whether the verdict was based on one or the other. In the case at bar, the Government did not request submission of the alleged alternative theory and took no exception to the theory on which the case was submitted.

In *Grunewald*, defendant raised the issue of the sufficiency of the instruction submitting the alternative theory in the Court of Appeals. In the case at bar, the

Government did not present to the Court of Appeals the issue of submission of an alternative theory.

In *Grunewald*, the *defendant* had the right, as a matter of law, to raise the issue in the District Court, in the Court of Appeals and in the Supreme Court and to seek a new trial by reason thereof.

In the case at bar, the *Government* seeks a new trial when the law denies it the right to do so and predicates the application for a new trial on an issue which it never raised or submitted to the District Court or in the Court of Appeals until its petition for a new trial was filed. These distinctions clearly makes the *Grunewald case* inapplicable insofar as it is claimed to present a parallel alternative theory.

d.

The Modification Directing a New Trial Was Not a "Just" or "Appropriate" Judgment Under the Circumstances of This Case Within the Purview of Title 28, Section 2106.

Section 2106 of Title 28 U.S.C.A., insofar as it authorizes the Appellate Court to

> "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances"

must *in criminal cases* be construed in connection with and limited by the Double Jeopardy Clause of the Fifth Amendment.

There are important and controlling reasons why the term "just" and "appropriate," as used in that statute,

must receive a construction *in criminal cases* different from civil cases. This follows from the impact of constitutional protection against double jeopardy in criminal cases and from the denial to the Government of the right to move for a new trial or to appeal in criminal cases except to the limited extent authorized by Title 18, U.S.C.A., Section 3731.

When a defendant in a criminal case becomes entitled, as a matter of law, to a judgment of acquittal and the right has accrued, it is not "just" or "appropriate" to subject him to another trial so that he can be prosecuted on another theory, especially so when that theory was never advanced in the Trial Court or even in the Court of Appeals on Defendant's appeal.

The fortuitous circumstance that the Trial Court erroneously denied the Defendant the judgment of acquittal to which he was entitled as a matter of law, cannot, and should not, affect his right to acquittal by direction of the Court of Appeals. On the contrary, it is "just" and "appropriate" that the Court of Appeals should direct the Trial Court *to do that which it should have done as a matter of law*. It is the only determination consistent with the constitutional protection against double jeopardy and denial to the Government of the right to a new trial and right of appeal in criminal cases.

Assuming that under Section 2106, Title 28 U.S.C.A., the Court of Appeals had discretion in determining the disposition to be made of the case, after it determined that the District Court erred in submitting the case to the Jury, it would still have to be a legal discretion or,

as Justice Minton said in *Johnson v. New York, N. H. & H. R. Co.*, 344 U.S. 48 (Dissenting Opinion), the discretion should be exercised so as to dispose of the case "according to law" and "on the record already made."

"According to Law." Petitioner was entitled to a judgment of acquittal in the District Court. It was, therefore, "just" and "appropriate" that the Court of Appeals should direct an acquittal when it determined that the District Court erred when it refused to acquit. The Court of Appeals was required to dispose of the case "on the record already made." There was no legal justification for sending the case back for a new trial so that a new record could be made.

In the *Johnson case*, this Court held the defendant to literal compliance with Rule 50(b) of the Federal Rules of Civil Procedure. It refused to relieve the defendant from its failure to make a motion for judgment notwithstanding the verdict although, under the Rule, there was an automatic reservation of decision on defendant's motion for a directed verdict.

There is no apparent reason why the Government, in this case, should be relieved from its failure to comply with Rule 30 of the Federal Rules of Criminal Procedure which required the Government to seek submission in the District Court on any theory it deemed appropriate.

The Government was content to go to the Jury on the theory on which the case was submitted and in the Court of Appeals it insisted upon affirmance of the judgment of conviction on the record as made and the in-

structions as given. It was only after the Court of Appeals reversed the conviction and directed a judgment of acquittal that the Government sought a new trial so that the case might be tried on an alternative theory. This course of procedure obviously lacks any element of justice or fairness.

We submit that this is a proper case for the exercise of this Court's supervisory powers so that adherence to the Federal Rules of Criminal Procedure by the Government will be made mandatory as it is upon the defendant. The Government's failure to proceed according to law should not be condoned, especially when the violation, if condoned, would result in depriving the defendant of the constitutional protection against double jeopardy.

In *Pollard v. United States*, 352 U.S. 354, in the dissenting opinion of Chief Justice Warren, concurred in by Justices Black, Douglas and Brennan, he said:

> "The conclusion that the condonation of this succession of procedural shortcomings represents a restriction of petitioner's rights is inescapable. This Court has often said that such departures from accepted standards should not be permitted—that to do so encourages looseness in many ways."

Section 2106 cannot constitutionally be construed as granting to the Appellate Court discretion whether to direct a new trial or a judgment of acquittal upon reversal of a judgment of conviction in a criminal case when the reversal is based on the ground that it was error to submit the case to the Jury for want of sufficient evidence.

II

The Original Decision Was Correct. The Alleged "Alternative Theory," Projected in the Modification Opinion,

(a) Is Contrary to and Dissipates the Principles Established in the Grunewald Case; and

(b) Is Not Supported by Evidence.

a.

Re: Legal Effect of "Alternative Theory."

The Court below held, in the Modification Opinion, that prosecution would not be barred by the statute of limitations under the alleged "alternative theory."

That "theory" is predicated on the allegations in paragraph D of the Indictment (R. 5) and on overt acts 24, 26, 29, 30, 31, 32 and 33 (R. 15 to 18) (Mod. Op., R. 1937).

The *sole objective of the conspiracy*, as therein alleged, was to make false statements and submit false records to employees of the Treasury Department to conceal SEIJAS' "attempt" to evade his tax.

The Government disclaimed, in its petition for modification, any conspiracy to attempt to evade by filing false income tax returns. It said, in its petition (Page 15, Appendix to Government's Brief in Opposition to Petition for Writ of Certiorari):

> "These acts (filing false returns) are not even alleged as means of evasion in the indictment, but are relegated to the category of overt acts. *The*

means of evasion alleged in the charging part of the indictment are . . . . .

> by furnishing officers and employees of the Treasury Department false books and records, and false financial statements . . . . for the purpose of concealing . . ."

The filing of a false return has been adjudged, in many cases, to be the "completion" of the substantive offense of "attempt" to evade the tax.

In the *Grunewald case*, 353 U.S. at page 407, the Court said:

> "The tax evasion cases were governed by a six-year statute of limitations . . . . *which began to run when the last return, pertaining to the year 1946, was filed by the taxpayers.*"

In *Herzog v. United States*, 235 F. 2d 664-667 (9th Cir.), the Court held:

> " 'the filing of the income tax return itself is a completed offense under the statute.' "

Other cases, so holding, are:

Canton v. U. S., 226 F. 2d 313 (8th Cir.);
Hayes v. U. S., 227 F. 2d 540 (10th Cir.);
U. S. v. Rosenblum, 176 F. 2d 321 (7th Cir.);
U. S. v. Raub, 177 F, 2d 312 (7th Cir.);
U. S. v. Yeoman-Henderson, Inc., 193 F. 2d 867 (7th Cir.);
U. S. v. Croessant, 178 F. 2d 96 (3rd Cir.).

The Government now seeks to avoid the effect of that "attempt" by labeling it an "overt act." This is obviously a "tour de force" in another effort to undermine the policy which this Court established in the *Grunewald and Krulewitch* cases that the statute of

limitations cannot be prolonged by alleging the commission of acts of concealment after an offense has been committed.

The Modification Opinion has important and far reaching effects beyond the question whether Petitioner is to be subjected to double jeopardy. It involves the impact on the "policy" and principles this Court established in the *Grunewald and Krulewitch cases* concerning the application of the statute of limitations in conspiracy cases.

If the Modification Opinion is allowed to stand, it will sanction and restore the "implied" subsidiary conspiracy theory, rejected by the Court, and the consequent evils sought to be avoided. It says, in effect, that acts of concealment of the commission of an offense, prolong indefinitely the operation of the statute of limitation without an "express original agreement to act in concert" to conceal.

The original Decision of September 15, 1958, was correct. It was in harmony with and gave effect to the policy established in *Grunewald*.

The alleged "alternative theory" (based on the commissions of acts of concealment, after the substantive offense of "attempt" to evade the tax was committed by the filing of a willfully false return)

> "would extend the life of the conspiracy indefinitely"

and

> "would for all practical purposes wipe out the statute of limitations in conspiracy cases." (*Grunewald*, page 402).

There is no substantive offense of tax evasion defined by statute. Only "attempt" to evade is defined as the offense. *Spies v. United States*, 317 U.S. at 499. Consequenly, when the willfully false return is filed, the object of the conspiracy to "attempt" to evade is completed and the subsequent acts of concealment "after the crime begins to come to light" do not prolong the operation of the statute of limitations in the absence of the "express original agreement" to "continue to act in concert to cover up . . ." described in *Grunewald*.

In *Spies v. United States*, 317 U.S. 492, the Court said, at pages 498-499:

> "This (attempt to evade) is an independent crime, complete in its most serious form when the attempt is complete and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder."

Subsequent acts of concealment may subject the actors to prosecution for many offenses defined in the Internal Revenue Code and in the Criminal Code, but are not effective to prolong the statute of limitations applicable to conspiracy cases.

In the case at bar, when the false return was filed, the "attempt" was complete and the conspiracy consummated whether the Government calls the act of filing the false return an "attempt" or an "overt act." Nothing is added to its criminality by the subsequent acts of concealment. The statute of limitations as to the conspiracy to "attempt" commenced to run when the false return was filed in the absence of the "express original agreement" described in *Grunewald*.

The alleged false statements and submission of false records (if made) are relevant only insofar as they tend to conceal the "attempt" already made by the filing of false returns. They were made in relation to and during investigation of the falsity of the returns. *They are not independent "attempts" to evade*, dissociated from the returns already filed. Paragraph D of the indictment, and the overt acts relied on, themselves show that the alleged false statements and false records were made with respect to the returns already filed.

In Paragraph D of the Indictment (R. 5), it is specifically alleged that the false statements and false records were made

> "for the purpose of concealing from the Treasury Department their share of the *unreported* income . . ."

In Act No. 24 (R. 15), it is alleged that the false records were submitted in connection with the

> "official re-examination of the information returns."

The allegations in Acts Nos. 26, 29, 30, 31, 32 and 33 (R. 16 to 18) similarly relate the alleged false statements and false records to the income "unreported" in the filed returns.

It is obvious from all of these allegations, singly or collectively, that the making of the alleged false statements are not *independent "attempts" to evade*, but are acts of concealment of the "attempt" already made by the filing of the returns.

We cannot ignore the fact that the false returns

were filed before the alleged false statements were made, and treat the case as though no returns were filed and the attempt to evade is predicated solely on the false statements as in the *Beacon Brass* case (344 U.S. 43) where the decision involved the sufficiency of the indictment which *alleged the false statements only* as an attempt and no reference to the filing of returns was made in the indictment.

This Court was asked in the *Beacon Brass case* to pass upon the effect of the filing of a false return on the application of the statute of limitations, but the Court declined to pass on the question because it was not presented by the indictment which did not allege that a false return was filed prior to the making of the false statements.

In the case at bar, the question is properly before the Court. The case is before the Court on a record which establishes that an "attempt" was made to evade by filing a false return and subsequently alleged false statements were made to a Treasury employee to conceal the attempt already made.

The acts of concealment (overt acts 24, 26, 29, 30, 31, 32 and 33) by which the Government seeks to extend the operation of the statute of limitations are of the same character as the acts of concealment (paragraphs 7 to 13 and others) in the *Grunewald case*.

In the case at bar, the Court below could not lawfully have instructed the Jury (had the Government so requested) that the acts of concealment by making false statements, would extend the operation of the

statute of limitations *in the absence of an express original agreement of the kind described in the Grunewald case.*

In *Grunewald,* the Court rejected the contention

> "that the very same acts of concealment should be used as circumstantial evidence (although there was no express original agreement to act in concert, etc.) from which it can be inferred that there was from the beginning an 'actual' agreement to conceal"

and that

> "a conspiracy to conceal is being (can be) implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment." (Matters in parenthesis added).

The petition for a new trial presents another adroit attempt to "extend the life of a conspiracy indefinitely," notwithstanding the fact that this Court has warned that

> ". . . we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." (*Grunewald case*).

In support of the alleged "alternative theory," the Court below, in the Modification Opinion, approved the Government's contention that the conspiracy to evade the tax continues as long as the tax remains unpaid because (R. 1937)

> "In the case of a false or fraudulent return there is no limitation of time for collection of tax."

The statute of limitations applicable to criminal conspiracy to evade the tax contains no exception similar to

the exception contained in the statute of limitations applicable to the enforcement of civil tax liability.

The Modification Opinion, in effect, amends the criminal statute of limitations by importing the exception contained in the civil statute of limitations into the criminal statute of limitations. The Court below says, in effect, *after a taxpayer has paid his tax liability*. he can have the benefit of the criminal statute of limitations, but *if he has not paid* the tax liability, he is to be deprived of the benefit of the statute of limitations and remain subject to prosecution indefinitely.

In summary, the allegations in paragraph D and the allegations of overt acts 24, 26, 29, 30, 31, 32 and 33, even if supported by evidence, do not warrant submission of the case to a Jury on the alleged "alternative theory" because the theory precludes the necessity of the

> "express original agreement . . . to act in concert . . . to cover up . . ."

Thus far, we have discussed the effect of paragraph D and the overt acts numbered 24, 26, 29, 30, 31, 32 and 33 as though there was evidence to sustain the commission of these acts.

We will now demonstrate the utter lack of evidence to support these allegations.

b.

There Is No Evidence of Any Conspiracy Between Seijas and Forman That They Would Make False Statements and Submit False Records to Treasury Employees to Conceal Seijas' Tax Liability.

Since the making of false statements and submission of false records to Treasury employees was the sole objective of the conspiracy and the sole means by which it was to be accomplished, "we must put aside" all evidence relating to all other acts which might constitute "attempts" within the meaning of Section 145(b) and all "evidence must be channeled" into the objective of making false statements and submitting false records. (*Yates v. U. S.*, 354 U.S. at 324-328). *"All evidence, relating to objectives barred by the statute of limitations, "must be excluded."* (*Yates v. U. S.*, supra: *U. S. v. Kuzma*, 249 F. 2d 619-621 (3rd Cir.).

There certainly is no direct evidence of such an agreement or "original" conspiracy. Neither the Government nor the Court below even suggested the existence of such evidence.

Neither is there any evidence from which such an original agreement or conspiracy can be inferred beyond a reasonable doubt.

The Court below only pointed to alleged *overt acts* in 1948, 1951 and 1952 in support of the alternative theory.

The Court of Appeals, in its Modification Opinion, (R. 1937) said that

> "Certain of the *overt acts* listed in the indictment and charged to have occurred in 1948, 1951 and 1952, involving false statements, could well have been in furtherance of and during a conspiracy having as its objective not the concealment of the conspirators' conspiracy but tax evasion."

The acts, referred to by the Court, are the alleged overt acts numbered 24, 26, 29, 30, 31, 32 and 33 (R. 15 to 18). They are the only ones that alleged interviews between Defendants and Treasury employees.

Assuming, without admitting, that there is evidence that the alleged acts were committed, they are, as a matter of law, insufficient to establish that Defendants conspired to commit said acts. On the face thereof, they merely alleged that each Defendant made false statements when interviewed by a Treasury employee. But there is a total absence of any evidence that either one of the Defendants did so pursuant to any antecedent agreement or conspiracy that they would make false statements, etc. if interviewed by Treasury employees.

The commission of those specific acts might tend to prove the commission of the *substantive offense* of "attempt" to evade Seijas' tax. But it does not follow (in the absence of an express agreement of the kind described in the *Grunewald case*) that the alleged false statements were made pursuant to a pre-existing conspiracy that they should do so. To make the alleged "alternative theory" available to the Government, there had to be evidence of the existence of an

> "express original agreement among the conspirators to continue to act in concert in order to cover

> up, for their own self-protection, traces of the crime after its commission." (*Grunewald case*).

(*Grunewald case*, quoted in the original Opinion, R. 1934).

It is now well settled, by the decisions of this Court in the *Lutwak, Krulewitch and Grunewald cases*, and in many Court of Appeals cases, that *evidence of overt acts* does not constitute evidence of *conspiracy* to commit the acts contemplated by the objective of the conspiracy.

Evidence of the commission of acts by either or both Defendants, tending to prove a substantive offense, does not establish that they did so pursuant to an antecedent conspiracy to commit the acts. There must be independent evidence of the conspiracy to accomplish the specific objective.

For example: In the *Lutwak case*, 344 U.S. 604-616, 73 S. Ct. 481-488, the Court held:

> "There was a statement of Munio Knoll in the record to one witness Haberman that indicated Munio's purpose to cover up and conceal the conspiracy. *This is not evidence that the conspiracy included the further agreement to conceal.* It is in the nature of an after-thought by the conspirator for the purpose of covering up." (Emphasis supplied).

In the *Grunewald case*, 353 U.S. at p. 404, this Court rejected the contentions that

> "The very same acts of concealment"

can

> "be used as circumstantial evidence from which it

> can be inferred that there was *from the beginning an 'actual' agreement to conceal* . . . conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment." (Emphasis added).

In *Weniger v. United States*, 47 F. 2d 692 (9th Cir.) the Court held:

> "Neither will the commission of an overt act though unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified."

In *Marino v. United States*, 91 F. 2d 691 (9th Cir.) the Court held:

> "An overt act is something apart from the conspiracy."

c.

Re: Evidence to Support Overt Act.

Re: Overt Act 24

Overt Act 24 alleged that on or about December 1, 1948, Seijas presented to a Treasury employee in connection with his "official examination" of the partnership returns, books and records which understated the partnership income. There is no evidence by any Treasury employee:

(a) that he was engaged in an "official reexamination" of any partnership returns *on or about said date;*

(b) that he had any interview with Seijas *on or about that date.*

There is evidence in the record of a report by a Revenue Agent Clodfelter (Pl. Ex. 42, R. 661, 1960 to 1963) dated December 9, 1948, relating to Seijas' return, but it shows on its face that it is *unrelated to overt act number 24*. It involved "reclassifying a portion of the long-term capital gains into short-term capital gains" (R. 1963). The report did not involve any "official re-examination" of the operating "hold-out" income which is the subject matter of the alleged conspiracy. Revenue Agent Clodfelter testified with respect to this report and examination that he did not ask for all of the records of the Amusement Company and that *he did not make any inquiry into the income* (R. 1343). He testified that the question of the treatment of the sale as a long-term or short-term capital gain arose from the question whether or not any part of the purchase price was paid "for an agreement not to compete."

The inquiry whether any consideration was paid for the "agreement not to compete" in the sale of the capital asset (pin ball route) was entirely foreign to the question whether the books correctly reported the operating "hold-out" income. He also testified that he made no inquiry as to "whether or not all of the revenue was reported" because he was "there to investigate only the things (that you) described" (long-term or short-term capital gain, referred to above). The investigation was "limited to that subject matter" (R. 1348).

This Act is not relevant to the specific objective of the conspiracy alleged in the indictment or in furtherance thereof.

Re: Overt Acts 26 and 29.

Acts 26 and 29 are in fact the same except that *26* relates to the tax years 1944 and 1945 and *29* relates to 1945 alone. Both involve the *same interview on the same date* and *the same alleged Act*. They allege (R. 16-17) that on or about *September 1, 1948*, while a Treasury employee was

> "engaged in an official examination of his (*Forman*) and his wife's income tax returns,"

Forman "concealed" that *he* (not Seijas) received income from the Partnerships in addition to that shown on the information returns.

(a) There is no evidence in the record of any interview between Forman and any Treasury employee *on or about September 1, 1948*.

(b) Even if Forman had committed the act described therein, it would not be an overt act in furtherance of the conspiracy objective described in paragraph D of the indictment which charged an attempt to conceal *Seijas' tax only*. Any misstatement that Forman may have made in an interview *concerning his own tax liability*, could not, as a matter of law, be an act in furtherance of a conspiracy to conceal *Seijas' tax liability*. The interview involved "an official examination" of *Forman's tax liability* and not that of *Seijas' tax liability* and it is so alleged (R. 16 and 17).

(c) There is no evidence that the statements made at the interview were pursuant to an antecedent conspiracy to make false statements, etc.

The allegations in Acts 26 and 29 merely purport to show that Forman individually "concealed," (does not say how) at that interview, *his own* tax liability and *not Seijas'* tax liability.

Re: Overt Act 30.

Overt Act 30 alleges that on *September 1, 1948*, Seijas "concealed" from a Treasury employee engaged in an *official re-examination* of his returns; that he received income from the pin ball Partnerships in addition to the amount shown by the Partnership returns.

There is no evidence of any interview between Seijas and any Treasury employee *on or about Stepember 1, 1948*.

Thre is no evidence that any Treasury employee was engaged in an "*official re-examination*" of Seijas' return *on or about September 1, 1948*.

There is no Revenue Agent's Report showing any interview with Seijas *on or about September 1, 1948*.

Re: Overt Acts 31, 32 and 33.

The Acts Described in Acts Numbers 31, 32 and 33 Are Not Relevant to or in Furtherance of the Conspiracy to Make False Statements Concerning Seijas' Tax Liability for the Years *1942 to 1945*.

Acts 31, 32 and 33 may be considered together. They involve substantially one act.

The tax years involved are *1942 to 1945* inclusive. (Ind. R. 5).

The net worth statement involved in Act 31 was submitted and the alleged false statements, referred to in Acts 32 and 33, were made to Treasury employees while engaged in an "official examination" of Seijas' returns for the years *1946, 1947 and 1948.*

Act relating to the tax years *1946, 1947 and 1948* cannot, as a matter of law, be deemed to be in furtherance of a conspiracy involving the tax years *1942 to 1945.*

While Revenue Agents Oftedal and O'Leary were investigating Seijas' tax returns for the tax years *1946 to 1948,* they requested Seijas to submit a net worth statement. Seijas' accountant Whittle prepared the net worth statement (Pl. Ex. 74, R. 247, 1976).

On December 29, 1951 (Act 31), Revenue Agent Oftedal obtained the net worth statement together with the letter of transmittal attached therteo from the accountant. The net worth statement disclosed unreported income for the tax years *1946 to 1948* as follows:

1946	$ 35,632.56	
1947	22,682.43	
1948	107,321.39	
Total	$165,636.37	(R. 1981).

They subsequently "invited" Seijas and the accountant Whittle to discuss the statement (R. 1472).

Revenue Agent Oftedal testified (R. 1472):

"Q. And what was the subject of that interview?

A. They was basically to find out the sources of income which had apparently been unreported by Mr. Seijas for the period *'46, '7 and '8* as reflected by his net worth statement.

. . . . . .

(at R. 1508)

Q. Now, the purpose of this meeting was to discuss an apparent unreported income or tax liability for the years *1946, '7, and '8*, was it not, sir?

A. Yes, sir.

Q. And the liability of Seijas was focused on those years?

A. Yes, sir.

Q. Is that right?

A. That's right.

Q. And the *purpose* of the meeting was *to attempt to secure*, if possible, an *explanation* for this *unreported income as shown by the Whittle statement?*

A. Yes.

(at R. 1510)

A. Ours was a more general type of discussion attempting to find out why there was a $165,000 of unreported income *in the three year period* (1946 to 1948).

Revenue Agent O'Leary testified (R. 1591):

"Q. Now, if you were making a routine investigation in April of 1950 of Mr. Seijas' returns, what particular years were you investigating, sir?

A. Well, I began the investigation—I had his tax return for the year *1948*, and I believe also *1947*, and I expanded it after that.

Q. 1948 and 1947 were the ones that you were making a routine check on, is that right?

A. I didn't consider the investigation routine, but at the time I first called on him, I had his 1948 returns and I believe it was his '47 returns, and that was what he was so informed. *They were the ones that were under investigation.*"

The net worth statement was not submitted and the interview of January 11, 1952, was not held in connection with any "official examination" or investigation of

Seijas' tax liability *for the tax years 1942 to 1945, the years involved in this case.*

Plaintiff's Exhibit 139-A (R. 1990) is a transcript of the interview. It discloses that the Revenue Agents were endeavoring to get Seijas to admit that he had unreported income in the sum of $165,636.39 in the years *1946 to 1948* as shown in the net worth statement and the entire interview was directed to that end.

Paragraph D of the Indictment (R. 5) charges a composite conspiracy to violate Section 1001, Title 18, Criminal Code, and Section 145(b) of the Internal Revenue Code.

Under Section 1001 of the Criminal Code, the false statement must be a "matter within the jurisdiction of" the Agent to whom the statement is made and the false statement must, in any event, be material to the subject matter under investigation.

In *Weinstock v. U. S.*, 231 F. 2d 699 (U.S.C.A., D. of C.) the Court held:

> "The first clause of the foregoing statute requires that the statement of the accused be false as to 'a material fact', and we held in Freidus v. United States, 223 F. 2d 598, in respect to the whole section, that 'this highly penal statute must be construed as requiring a material falsification.'"

We submit that the net worth statement submitted and the alleged false statements made in connection with the investigation of Seijas' unreported income for the years *1946 to 1948* are not, as a matter of law, relevant to and in furtherance of a conspiracy involving Seijas' tax liability for the tax years *1942 to 1945*. Since

the years 1942 to 1945 were not under investigation, any incidental statement made relating to those years cannot be said to be in furtherance of a conspiracy to make false statements concerning Seijas' tax liability for the year *1942 to 1945*.

The Net Worth Statement, Referred to in Overt Act 31, Was Not a False Statement.

The essence of Overt Act 31 is that the net worth statement

> "concealed the fact that he (Seijas) had on hand on December 31, 1945, a very large amount of currency representing his share of the diverted and unreported receipts of the aforementioned pin ball operations." (R. 18).

The net worth statement was not false in that respect. It actually shows that Seijas had "cash on hand on December 31, 1945" the sum of $50,432.57 in addition to the several bank accounts shown in the forepart of the "Comparative Net Worth Statement" (Pl. Ex. 74, R. 1980, 1981). In the interview, he stated, "there is a possibility" that he could have had

> "more than $50,000.00 in cash on hand, in the banks at the end of 1945." (R. 1995).

Throughout the interview, he insisted that the unreported income, appearing as *1946 to 1948* income, was in fact *1942 to 1945 income*.

The net worth statement was accompanied by a letter of transmittal which was attached to the statement (R. 1976). The letter cautions that the net worth state-

ment was not to be taken as an accurate statement of the income for any one of the years included in the statement. *The letter states that the statement is inaccurate* insofar as it allocates all of the unreported income to the tax years *1946 to 1948* and that the statement is correct only insofar as it discloses a *total* of the unreported income for the entire nine year period. The letter also explains that the income, allocated to the years 1946 to 1948, must in whole or in part be allocated to the earlier period 1942 to 1945 so that while the net worth statement, on its face, shows no unreported income for the 1942 to 1945 period, the letter demonstrates that there was in fact unreported income in the 1942 to 1945 period involved in the case at bar.

The allocation to the tax years *1946 to 1948* were made because certain assets were purchased in those years and it was *assumed* that the funds, with which the assets were acquired, were earned in those years for the purpose of making the net worth statement. But it is made clear in the letter and in the accountant's testimony that it was not intended to establish that the funds with which the assets were acquired were earned in those years and they clearly demonstrate that the funds must have been earned in the earlier period 1942 to 1945. The letter says:

> "The net worth statement . . . is therefore *not sound* without giving effect to what additional cash could be correctly shown as at the close of each of the years . . ." (R. 1977).

It goes on to say (R. 1977):

> "It is quite obvious, by reference to the net

worth statement, that the assets owned during the period from 1941 to 1945 inclusive could produce more cash than that shown, while assets acquired in 1948 in an amount in excess of $100,000.00 over that of year 1947 could not have produced such an income to acquire such an increase in assets.

. . . . . .

"It is utterly *impossible for us or the taxpayer to state* that the *first four years 1942 to 1945*, inclusive, *are correct* because by the end of 1945, taxpayer was out of the pin-ball machine business, and it is likewise impossible to state that the last four years 1946 to 1949, inclusive, are correct since no such money could be earned from those assets as was used to acquire assets.

. . . . . .

"It is our opinion that the net worth at December 31, 1941 and December 1, 1949, . . . is approximately correct, *but the years in between the aforesaid two dates could be subject to adjustment.*" (R. 1979).

Examination of the transcript of the interview (R. 1990) discloses that it was directed entirely to inquiry concerning the 1946 to 1948 period.

The net worth statement cannot be divorced from the letter of explanation which accompanied it and when considered together, demonstrate clearly that it was not submitted as a true statement of the income for the years 1942 to 1945.

When read together, they *amount to an admission* that Seijas had unreported income in the period *1942 to 1945* and is not a false statement to the effect that he had no unreported income in that period.

Re: Oral Statements Made on January 11, 1952.

It was agreed that "this (interview of January 11, 1952) was going to be *an informal discussion*" and that the statements made at the interview were *not to be under oath* (R. 1990, Pl. Ex. 139-A).

Revenue Agent Oftedal described it as

> "a more general type discussion attempting to find out why there was a $165,000 of unreported income in the three year (1946 to 1948) period." (R. 1510).

In the opening of the interview, Mr. Oftedal made the statement,

> "When your statement is completed it will be typed and you will be given an opportunity to read it and make any necessary corrections and you will be given a copy. Should you so desire, we will gladly allow you a subsequent opportunity to present any information or oral testimony that you desire on any points which may not be fully covered on this occasion." (R. 1990).

These precautionary measures clearly demonstrate that it was not the intention that anything Seijas might say at the interview should be treated as a *representation* or *statement of fact* upon which action or non-action would be predicated. It was to be an exploratory discussion in an attempt to determine the allocation of the unreported income shown on the net worth statement to particular years.

Consequently, anything that was said by Seijas at that interview, even if incorrect, *cannot be treated as false statements and as overt acts in furtherance of a conspiracy to conceal*. At most, they can be regarded

only as inaccuracies due to lack of knowledge, recollection, or understanding of the facts. There is, of course, a vast distinction between inaccurate statements and false and fraudulent statements within the purview of Section 1001 of the Criminal Code and Section 145(b) of the Internal Revenue Code.

The interview as reported in the Exhibit shows that it was in reality a four-party conversation between Revenue Agents Oftedal and O'Leary, Seijas and Whittle, in which all asked questions and "opinions" and conclusions were sought and expressed.

In *United States v. DeLucia*, 262 F. 2d 610 (7th Cir.), the Court described a similar interview with Internal Revenue Agents as follows:

> "Actually this meeting amounted to a little more than verbal fencing between DeLucia's attorneys and the Internal Revenue Agents."

The question whether the phrases, referred to in the overt acts, constituted statements of fact and the question of falsity, cannot be determined by extracting a phrase out of context of the sentence in which it is used or the context of the entire interview. That must be determined from consideration of the entire interview. *Conrad v. U. S.*, 255 F. 2d 247 (5th Cir.). The Court said in that case:

> "the last line of his statement and the last syllable of his testimony was as important as the first. For until all was heard and considered, one could not determine whether such testimony or such statement 'in substance and effect' affirmed or denied these critical facts."

In *U. S. v. Davey*, 155 F. Supp. 175, the Court held that an answer "No" to a question propounded by an FBI Agent when defendant was "interviewed informally" and *not under oath*, did not constitute a false statement within the meaning of Section 1001, Title 18, Criminal Code.

The transcript of that interview (R. 1990) demonstrates clearly that the Revenue Agents were endeavoring to have Seijas admit that the unreported income shown on the net worth statement was earned in the years *1946 to 1948* (the years they were investigating), while Seijas and Whittle were constantly insisting that it could not be allocated to those years; that he did not and could not have earned any such money in those years and that it must be allocated to the earlier period 1942 to 1945.

Instead of denying that he had unreported income in the years in question, 1942 to 1945, the interview, in effect, was *an admission* that he had unreported income in those years and consequently the oral statements, described in Overt Acts 32 and 33, cannot be deemed to be false and are not acts in furtherance of a conspiracy to conceal the income for the years 1942 to 1945.

The record also establishes that, consistent with Seijas' admission at that interview that he had unreported income in the earlier period 1942 to 1945, he later made a complete disclosure thereof to Woolvin Patten, Enforcement Counsel of the Internal Revenue Bureau, and the indictment in the case at bar is a direct result

of those admissions (Patten's testimony, R. 1690 to 1705).

Taking the net worth statement, the accompanying letter and transcript of the interview all together, it is clear that (a) Overt Acts 31, 32 and 33 are not acts in furtherance of a conspiracy to conceal Seijas' tax liability for the *years 1942 to 1945* and are irrelevant thereto; and (b) there is no evidence of falsity of the net worth statement or the oral statements made at the interview and consequently do not constitute overt acts in furtherance of the conspiracy alleged in paragraph D of the Indictment.

Seijas had a distinct purpose in admitting that the unreported income for the years 1946 to 1948, as shown in the net worth statement, was in reality 1942 to 1945 income. As the net worth statement stood, he was guilty of tax evasion for the years 1946 to 1948, the period then under investigation, and constituted an admission of his guilt for that period. He had already been informed that prosecution was contemplated for those years. But by allocating the income to the 1942 to 1945 period, he thought he would avoid prosecution because those years were barred by the statute of limitations. He consequently admitted tax evasion in the earlier 1942 to 1945 period and denied tax evasion in the later 1946 to 1948 period. He admitted this in his interviews with the Regional Counsel and in his testimony in this case.

An admission of tax liability and evasion in the 1942 to 1945 period cannot be converted into a false statement that would conceal tax evasion in those years.

As was said by the Court in *Lutwak v. U. S.*, 344 U.S. 604,

"This is not concealment. It is disclosure."

The essence of Overt Act 32 is that at the January 11, 1952, interview, Seijas stated

"he sincerely believed his income for the years 1942 to 1945, inclusive, had been correctly reported . . ."

The transcript of the interview shows that this phrase was taken out of context and divorced from the explanations he made throughout the interview. Here, also, the statement must be read in its entirety. *Conrad v. U.S.*, supra.

He was asked (R. 1991):

"Is it your sincere belief that you had properly reported it for income tax purposes up to 1945?"

and he answered:

"Yes, it is my belief, and that I paid the tax on it, and wherever there was a mistake the Internal Revenue Department corrected it." (R. 1991).

At most, this was a opinion and not a statement of fact.

But this statement must be read together with the additional statements he made at the interview in which he insisted that the purported 1946 to 1948 income was, in reality, 1942 to 1945 income.

The essence of Overt Act 33 is that Seijas stated at the January 11, 1952, interview that

". . . he had no knowledge concerning the source of a large amount of unexplained assets and funds which were discovered in his possession, . . ."

The transcript of the interview (R. 1990) does not disclose that he made any such statement. He was not asked to state the source of his assets and funds and he did not state that he had no knowledge thereof.

The transcript of the interview and the net worth statement *disclose in great detail all of the assets acquired and the time of acquisition* (R. 1980 to 1991). He merely stated that he could not state in what particular year he earned the income with which a particular assets was purchased. But he was quite certain that it was not earned in the years 1946 to 1948 and that it was earned in the earlier period.

Consequently, there is no evidence of falsity of the statement attributed to him in Overt Act 33.

Seijas, who was the Government's principal witness, testified on direct examination:

> "Q. Had you prepared then or caused to be prepared this net worth statement as a true statement of its contents?
>
> A. No.
>
> Q. Did you present it as misrepresenting its contents?
>
> A. No.
>
> Q. How, sir, did you present this or cause to be presented this net worth statement to the agents?
>
> A. We presented that as a *preliminary statement only in which Mr. Whittle had made a statement in the form of a letter which he explained that the proposed net worth statement was not in keeping with his thinking or his deductions in the preparation of that statement.*"

In *Langer v. United States*, 76 F. 2d 817 (8th Cir.) the Court held:

"'Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein, with knowledge of the agreement.'" (Cases).

In *Tingle v. United States*, 38 F. 2d 573 (8th Cir.) the Court held:

> "It is apparent from the record before us, and was, in effect, assumed at the hearing, that appellant was guilty of a substantive violation of the National Prohibition Act (27 USCA). That, however, standing alone furnishes no support to a conspiracy charge."

No evidence, other than the said overt acts referred to above, was pointed out by the Government or the Court below to sustain a finding beyond a reasonable doubt that the acts were committed pursuant to an antecedent conspiracy or agreement "to act in concert", etc, and since evidence of the commission of overt acts themselves do not constitute evidence of conspiracy, there is a total failure of proof of any conspiracy that would prolong the statute of limitations.

In summary:

(a) There is no evidence of an agreement between Seijas and Forman to act in concert to make false statements and submit false records to conceal Seijas' tax evasion.

(b) None of the seven alleged overt acts were relevant to or in furtherance of the alleged conspiracy to conceal Seijas' tax liability;

(c) There is a failure of proof to establish the alleged acts beyond a reasonable doubt; and

(d) No overt acts were established that prevented the statute of limitations from beginning to run on March 15, 1946.

CONCLUSION

The decision of the Court below, rendered October 27, 1958, modifying its decision rendered September 15, 1958, by directing a new trial instead of directing the entry of a judgment of acquittal, and the decision of the Court below, rendered February 26, 1959, denying Petitioner's Petition for a Re-Hearing, should be reversed with directions to reinstate the decision of September 15, 1958, and directing the entry of a judgment of acquittal.

SOLOMON J. BISCHOFF
Counsel for Petitioner
Cascade Building
Portland, Oregon

GEORGE W. MEAD
Of Counsel
Public Service Building
Portland, Oregon

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No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIAM R. FORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MEYER ROTHWACKS,
RICHARD R. BUHLMAN,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and rules involved	2
Statement	2
Summary of argument	18
Argument:	
The Court of Appeals was correct in holding that prosecution is not barred by limitations and that, in view of the erroneous instructions to the jury, justice requires a new trial rather than entry of judgment of acquittal for petitioner	20
A. Introductory	20
B. The indictment alleged, and the evidence proved, a continuing conspiracy to attempt to evade Seijas' taxes, which persisted at least until January, 1952	23
C. The remand for a new trial was a "just" and "appropriate" disposition of the appeal	32
Conclusion	41
Appendix	42

CITATIONS

Cases:	
Abrams v. *United States*, 250 U.S. 616	30
Braverman v. *United States*, 317 U.S. 49	27
Brown v. *Elliott*, 225 U.S. 392	26, 31
Bryan v. *United States*, 338 U.S. 552	37, 40
Citizens Bank v. *Opperman*, 249 U.S. 448	38
Comm'r v. *Estate of Bedford*, 325 U.S. 283	38
Dept. of Banking v. *Pink*, 317 U.S. 264	38–39
Fiswick v. *United States*, 329 U.S. 211	26, 31
Frohwerk v. *United States*, 249 U.S. 204	29
Glasser v. *United States*, 315 U.S. 60	30
Green v. *United States*, 355 U.S. 184	37

527373—59——1

Cases—Continued

	Page
Grunewald v. *United States*, 353 U.S. 391	8, 19, 21, 22, 23, 26, 28, 32–35, 36
Hyde v. *United States*, 225 U.S. 347	31
Krulewitch v. *United States*, 336 U.S. 440	22
Mortensen v. *United States*, 322 U.S. 369	30
Pinkerton v. *United States*, 328 U.S. 640	31
Sapir v. *United States*, 348 U.S. 373	39–40
United States v. *Ball*, 163 U.S. 662	37
United States v. *Beacon Brass Co.*, 344 U.S. 43	21, 22, 27, 28
United States v. *Grunewald*, 233 F. 2d 556	32
United States v. *Kissel*, 218 U.S. 601	26
United States v. *Shotwell Mfg. Co.*, 355 U.S. 233	37
Statutes:	
Internal Revenue Code of 1939:	
Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145(b))	2, 3, 24, 27, 42–43
Sec. 3748(a) (26 U.S.C. 1952 ed., Sec. 3748(a))	3, 10, 26, 43
18 U.S.C.:	
Sec. 371	42
Sec. 1001	24, 42
28 U.S.C.:	
Sec. 46	38
Sec. 2106	19, 32, 38, 44
Miscellaneous:	
Rules of the United States Court of Appeals for the Ninth Circuit (Rev. 1955):	
Rule 23	8, 38, 44
Rule 26	38, 44

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 43

WILLIAM R. FORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The Court of Appeals' initial opinion (R. 1923–1935) is reported at 259 F. 2d 128. The court's first supplemental opinion (R. 1936–1938) is reported at 261 F. 2d 181, and its second supplemental opinion (R. 1939–1940), at 264 F. 2d 955.

JURISDICTION

The first judgment of the Court of Appeals was entered on September 15, 1959. (R. 1923.) The judgment was modified on October 27, 1958, on a petition for rehearing which the Government had filed on October 15, 1958. (R. 1936.) Petitioner's petition for further rehearing was denied on Feb-

nuary 26, 1959. (R. 1938–1940.) The petition for certiorari, filed on March 18, 1959, was granted on May 4, 1959. (R. 2023; 359 U.S. 982.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED[1]

Whether, in the circumstances of this case, the Court of Appeals, having found that the case was submitted to the jury on incorrect instructions, erred in remanding the case for a new trial rather than for entry of a judgment of acquittal, where it also found that the indictment and evidence would have supported a verdict of guilty had the jury been correctly instructed.

STATUTES AND RULES INVOLVED

Sections 371 and 1001, 18 U.S.C.; Sections 145(b) and 3748(a), Internal Revenue Code of 1939; Section 2106, 28 U.S.C.; and Rules 23 and 26, Rules of the United States Court of Appeals for the Ninth Circuit, are set out in the Appendix, *infra,* pp. 42–45.

STATEMENT

On November 19, 1953, petitioner and one Armador A. Seijas were indicted, *inter alia,* for conspiring, continuously from February, 1942, to April 15, 1953, to violate Section 145(b) of the Internal Revenue Code of 1939 by attempting to evade the individual income taxes of Seijas and his wife for the years 1942 through 1945, and for conspiring to violate the false statements

[1] The petition for certiorari (pp. 6–7, 35–45) presented an additional question relating to the jurisdiction of the trial court, which has been abandoned in petitioner's brief on the merits (Br. 2).

provision of the Criminal Code (18 U.S.C., Sec. 1001), as well as Section 145(b) of the Internal Revenue Code, by "furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of [Seijas' and petitioner's] partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife * * *." (R. 1–6.)[2] Thirty-three overt acts, over a period extending from February 1, 1942, to January 11, 1952, were alleged. (R. 6–19.) Seijas pleaded guilty (R. 829) and testified as a witness for the Government. Petitioner did not testify.

The issues before this Court arise from the defense contention that the prosecution was barred by the applicable six-year statute of limitations. (26 U.S.C. 3748(a), Appendix, *infra*, p. 43.)

THE INSTRUCTIONS TO THE JURY

After testimony had been taken for twelve days, the case was submitted to the jury with specific instructions relating to the statute of limitations issue. The trial judge charged the jury that in order to convict it must find not only that petitioner and Seijas had agreed to wilfully and knowingly attempt to

[2] The indictment as originally drawn alleged other related crimes against the revenue (R. 4–5), but those were withdrawn from the jury's consideration (R. 1805–1806). Seijas alone was charged in the fourteen substantive counts, none of which is before this Court. (R. 3.)

evade Seijas' taxes but that one or more of the overt acts alleged in the indictment was committed within six years prior to the return of the indictment *for the purpose of evading Seijas' taxes.* (R. 1785, 1793–1794, 1801, 1803–1804, 1807, 1809.[3]) The trial judge also charged, however, as follows (R. 1807–1808):

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[3] "In my judgment, the basic fact questions for you to decide in this case are in general, three; first, whether the defendant William R. Forman within the period of time alleged in the indictment knowingly and wilfully entered into an agreement or understanding with one or more other persons to commit the offense against the United States of wilfully and knowingly attempting to evade income taxes as charged in the indictment.

Secondly, whether in pursuance of and following such an understanding or agreement, one or more of the overt acts charged in the indictment intended and tending toward furtherance and accomplishment of the agreement were in fact done by or at the instance of any one or more of the parties to the agreement.

If you find an affirmative answer to the general questions one and two within all the limitations and qualifications that I will explain to you further, then you may find the defendant Forman a party to and a participant in a completed conspiracy. *Now, if you so find, then you must determine the third general and basic question, whether the defendant Forman is subject to prosecution on account of conspiracy under the statute of limitations.*" (R. 1785.)

* * * * *

"* * * The *object of the alleged conspiracy is that of violation* of Section 145(b) of Title 26, by *evading the tax* of Armador A. Seijas and his wife, Betty L. Seijas, and others for the years 1942 to 1945, inclusive, upon their share of the unreported income of the partnerships. * * *" (R. 1801.)

* * * * *

"To determine whether certain alleged overt acts were committed in order to promote the object of the conspiracy, and the applicability of the statute of ilmitations [sic] with respect thereto, you must first determine the duration of the conspiracy. Did it end at some particular time or was there also

> If you find that the defendant Seijas and Forman conspired to attempt to evade the tax liability of Seijas and his wife and others for the years 1942 to 1945, inclusive, you must find the defendant Forman not guilty unless you are convinced beyond a reasonable doubt that *they also conspired to conceal the alleged conspiracy in order to prevent prosecution*

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an agreement between Mr. Seijas and Mr. Forman to continue concealment after 1945 of their activities relating to the amusement company earnings during the years 1941 through 1945 *for the purpose of evading the income tax liability of Seijas, Mrs. Seijas and others?* * * *" (R. 1803–1804.)

* * * * *

"*A conspiracy to commit the alleged offense* referred to in paragraph C of the indictment, *namely, attempted evasion of income tax* owing by Seijas and wife and others for 1942 to 1945, inclusive, and the offense in paragraph D of the indictment, namely, furnishing false books and making false statements to Treasury agents *for the purpose of evading the tax liability of Seijas and wife*, are subject to a six year period of limitation and prosecution of a charge of conspiracy to commit such offenses, if for the purpose of evading income tax liability, must be commenced by return and filing of an indictment within six years of the last overt act *in furtherance of such conspiracy.*" (R. 1807.)

* * * * *

"Summarizing with respect to the statute of limitations, you must * * * find * * *

* * * * *

"Third, that one or more of the alleged conspirators committed an overt act or acts within a period of six years prior to the filing of the indictment herein in furtherance of the conspiracy and during its continuance to accomplish the object of the conspiracy just referred to; namely, *attempted evasion of tax liability of Seijas, Mrs. Seijas and others.*

"If you cannot answer all three of these questions in the affirmative, as shown by the evidence beyond a reasonable doubt, then you must return a verdict of not guilty." (R. 1809—emphasis added.)

therefor and that such additional conspiracy was a continuing one. You cannot imply that there was a continuing conspiracy to conceal the offense from the fact that they may have conspired to attempt to evade the tax liability of Seijas and wife. That is to say, the mere fact that they may have conspired to evade the tax liability of Seijas and his wife for the years in question, if it be a fact, does not warrant the conclusion that they also *conspired to conceal* the commission of the offense. You would have to be convinced beyond a reasonable doubt that *they actually conspired to conceal the conspiracy* and that they committed an overt act or acts in furtherance of *such subsidiary conspiracy.* As previously stated, the understanding or agreement for such conspiracy need not have been entered into by written or formal oral expression, but may be determined from a consideration of the conduct and statements of the parties and all of the evidence as shown by the evidence in the case.

If you find that the defendants only conspired to attempt to evade the tax liability of defendant Seijas and his wife and did not form the additional conspiracy to conceal the same, then *I charge you that the conspiracy to evade the tax liability* of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax *returns of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statute of limitations would run from that time, and if you so find, your verdict would have to be not guilty.*

If you find that *there was no subsidiary conspiracy to conceal* as I have just outlined it to

> you, but acts of concealment were thereafter committed as an after-thought and were conceived after the filing of the returns in March, 1946, then, of course, your verdict must be for the defendant Forman. [Emphasis added.]

This latter "subsidiary conspiracy to conceal" instruction—which the Court of Appeals held to be erroneous, and which both petitioner and the Government agree in this Court was incorrect because it had no place in the case—was given by the trial judge at petitioner's request and without objection by Government counsel.[4]

Petitioner was found guilty (R. 99–100) and was sentenced to three years in prison and fined $10,000 (R. 104–105).

PROCEEDINGS IN THE COURT OF APPEALS

On appeal, petitioner contended, *inter alia*, that the tax evasion conspiracy alleged in the indictment was concluded in March, 1956, when Seijas' 1945 tax return was filed; that the "subsidiary conspiracy" theory—having been neither pleaded nor proved—should not have been submitted to the jury; and that prosecution

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[4] This instruction follows almost verbatim Defendant's Requested Instructed #27. (R. 89–91; Br. 13–14.) It does not appear to have been submitted to the trial judge as a part of the main group of instructions requested by petitioner on August 2, 1956 (R. 91), but as a separate request on August 13, 1956, or on the day testimony was concluded, August 14, 1956 (R. 1536–1539, 1760–1763). The "modification" of the requested instruction (R. 1763) was apparently the addition of the requirement that the overt acts be designed to accomplish the objective of tax evasion (R. 1761, 1763; compare R. 90–91 with R. 1809).

was therefore barred by limitations. The Court of Appeals found that "the proof of the conspiracy to evade Seijas' tax liability was entirely adequate and so strong as to be almost overwhelming" (R. 1928), and that "there was adequate proof * * * that there was an actual subsidiary conspiracy to conceal" (R. 1929). It reversed the conviction, however, on the ground that the prosecution was barred by the statute of limitations.

Quoting extensively from the "subsidiary conspiracy" instruction, the Court of Appeals held that the tax evasion conspiracy was consummated "on the filing of Seijas' tax returns in March, 1946" (R. 1928); that, under *Grunewald* v. *United States*, 353 U.S. 391, the statute of limitations could not be extended on any theory of a "subsidiary conspiracy" to conceal the tax evasion conspiracy (R. 1932–1934); and that "it was error to permit this case to go to the jury" (R. 1935). Accordingly, on September 15, 1958, the court entered judgment remanding the cause to the district court "with directions to enter judgment for the appellant." (R. 1935.)

On October 15, 1958, within the 30-day period provided by Rule 23 of the Ninth Circuit (Appendix, *infra*, p. 44), the Government filed a petition for rehearing,[5] contending that the indictment alleged and the evidence proved a continuing conspiracy to evade Seijas' taxes which was alive at least until January,

[5] The petition for rehearing is reproduced at pages 13–19 of our brief in opposition to certiorari.

1952 (22 months before the return of the indictment); that such conspiracy did not terminate with the filing of the false returns in the years 1943 through 1946, but embraced the fresh attempts, enumerated in the indictment, to evade those taxes in the years 1947 through 1952; that the only flaw in the record was the erroneous "subsidiary conspiracy" instruction;[6] and that since this error could be corrected on a new trial the interests of justice would be best served by remanding the cause for a new trial rather than entry of judgment of acquittal for petitioner.

The Court of Appeals agreed, modified that part of its opinion which held that the tax evasion conspiracy was consummated in 1946, when the last of the tax returns was filed, and ordered the case remanded for a new trial. (R. 1938.) The court stated that "certain of the overt acts listed in the indictment and charged to have occurred in 1948, 1951 and 1952, involving false statements, could well have been in furtherance of and during a conspiracy having as its objective not the concealment of the conspirators' conspiracy but tax evasion." (R. 1937, 261 F. 2d at 183.) Petitioner thereafter filed a petition for further rehearing, which the court denied with a second supplementary opinion. (R. 1939–1940.)

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[6] The fact, disclosed by the record, that the erroneous "subsidiary conspiracy" instruction was initially requested by the petitioner, was not pointed out to the Court of Appeals or to this Court when certiorari was sought, and escaped our attention until the record was fully studied in connection with the preparation of the present brief.

EVIDENCE TO SUPPORT THE VERDICT

To establish its case, the Government offered evidence (1) that petitioner and Seijas conspired continuously from 1942 until 1953 to attempt to evade Seijas' income taxes for the years 1942 through 1945; (2) that during those four years, and in pursuance of their unlawful agreement, the conspirators caused large sums of cash—earned from the operation of their pinball machine partnerships—to be divided equally between them, and to be unrecorded on the books of those enterprises and unreported on the partnership and individual income tax returns; (3) that in 1944, 1947 and 1948, when Treasury agents came to examine the correctness of the returns, the conspirators caused the false partnership books to be turned over to the agents with the representation that they were true; (4) that these representations were relied upon by the Internal Revenue Service, with the result that the Government never learned of the unreported income until 1953; and (5) that as late as 1951 and 1952 Seijas was submitting false written and oral statements to the Internal Revenue Service in pursuance of the objective of the conspiracy, *viz.*, the attempted evasion of his income taxes for the years 1942 through 1945.

The indictment was returned on November 19, 1953 (R. 19), and—inasmuch as the statutory period of limitations applicable here is six years[7]—it was necessary for the Government to prove that one of the

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[7] Sec. 3748(a) of the Internal Revenue Code of 1939, Appendix, *infra*, p. 13.

conspirators committed an overt act in pursuance of the central purpose of the conspiracy after November 19, 1947. The details of the proof may be conveniently summarized in two categories: (1) the conspiracy before November 19, 1947; and (2) the conspiracy after that date.

1. *The Conspiracy Before November 19, 1947.*—In November, 1941, petitioner and Seijas—an attorney—formed a partnership, called the United Amusement Co., to engage in the business of operating pinball machines in Kitsap County, Washington. (R. 348–349, 353–354, 357, 360–361.) Early in 1942 they organized three new pinball partnerships.[8] (R. 361, 373–374.) Petitioner and Seijas had equal interests in the partnerships. (Govt. Exs. 2, 31; R. 143–144, 158, 353, 595, 602, 1238, 1643–1644, 1943, 1948.)

Proceeds of the machines were to be disposed of as follows: After emptying the machines and making appropriate deductions for "pay-outs" and state taxes, the partnerships were to divide the balances evenly between themselves and the location owners. (R. 358–359, 380, 1061.) Early in 1942 petitioner hired one Meyers to do the collecting for the partnerships. (R. 377–378, 1053.) Beginning in mid-1942, and continuing until December, 1945, Meyers, pursuant to petitioner's instructions, followed the practice of extracting "hold-out" money from the collections at some of the more profitable locations. (R. 377–378, 401, 426,

[8] The United Amusement Co. of Bremerton, the American Amusement Co., and the Bremerton Amusement Co. (R. 361, 373–374, 675–676.) These four partnerships are referred to hereinafter as "the partnerships".

1070–1071, 1079.) The "hold-out" money was not reported on the regular receipt forms but was placed in separate sealed envelopes which, along with lists of the pertinent locations, Meyers turned over twice each week to petitioner. (R. 1069–1070, 1072.) If petitioner was away, Meyers would give Seijas the sealed envelopes with petitioner's name written thereon, and Seijas would later turn them over, unopened, to petitioner. (R. 729–730.) After opening the envelopes, petitioner would show Seijas the record of the hold-out money for the current period and would give Seijas his 50% share in currency. (R. 400–402.)

Seijas maintained diaries in which he recorded the amounts and precise sources of the "hold-out" money received by him. (R. 266, 268–270, 403–433.) Seijas testified at the trial that petitioner did not tell him anything about the disposition of his (petitioner's) share, and that he (Seijas) accepted his own 50% share and asked no questions. (R. 402–403.) Before the trial, Seijas had told a Treasury agent and an official of the Internal Revenue Service that petitioner had received 50% of the hold-out money. (R. 303, 315, 1494–1496, 1696.)[9]

Seijas' share of the "hold-out" money, which was received in currency, totalled $86,200 over the period

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[9] The tax deficiencies of petitioner and his wife for the year 1945 alone, resulting from the failure to report the "hold-out" money, was in excess of $21,000. (Govt. Exs. 2, 31; R. 143–144, 158, 1587, 1643–1644, 1943, 1948.) The jury was permitted to use evidence of petitioner's attempts to evade the taxes due on his own distributive share of partnership income "only insofar as it may bear upon the charge against the defendant of conspiracy." (R. 1801; see fn. 15, *infra*, p. 25.)

1942 through 1945. (R. 401–402, 415–416, 461, 463–464, 475–476.) None of the "hold-out" money was recorded on the books or reported on the partnership returns, nor was any of it reported by Seijas or petitioner on their individual income tax returns. (Govt. Exs. 2, 31; R. 143–144, 158, 426, 467–475, 859–860, 1250, 1328, 1353–1354, 1447, 1454–1455, 1643–1644, 1943, 1948.)

On December 27, 1945, the practice of holding out unreported income ceased. (R. 426.) In August, 1946, petitioner ostensibly sold out his remaining interests in the pinball partnerships. (Br. 9–10.) Seijas and petitioner remained partners in other ventures, however, and they continued to occupy the same office until 1953. (R. 554–556.) One Renstrom was (as to all of their common enterprises) their bookkeeper from late 1943 until early 1949. (R. 438, 1238.) In 1944, and again in February, 1947, Treasury agents came to the office to examine the books and records of the pinball machine partnerships. Either petitioner or Seijas referred them to Renstrom who, not knowing that the books were false, turned them over to the agents with the representation that they accurately reflected the income of the partnerships. (Govt. Ex. 43; R. 189, 650–656, 1238, 1250, 1268–1271, 1327–1329, 1350–1353, 1643–1644, 1967.)

2. *The Conspiracy After November 19, 1947.*—During the first half of the conspiracy's life, as has been shown, its central criminal purpose was furthered mainly by three methods: (1) the filing of false tax returns; (2) the maintenance of false books; and (3) the presentation of those false books to Treas-

ury agents assigned to examine the correctness of the tax returns. In the last half of its life, the conspiracy was furthered by (a) the presentation of the same false books to Treasury agents; (b) the submission of a false net worth statement by Seijas to the Internal Revenue Service; and (c) the making of false oral statements by Seijas to Treasury agents.

(a) In the latter part of 1948 a Treasury agent named Clodfelter came to the office of petitioner and Seijas to check into the capital gain realized by them on the sale of the United Amusement Co. in 1945.[10] He talked to both petitioner and Seijas. The same procedure that was followed in 1944 and 1947 was followed in 1948. Clodfelter asked Seijas for the books, including the cash receipts and disbursements book of the United Amusement Co., and Seijas referred him to Renstrom, who, supplying them, represented that they accurately reflected the income of the partnerships. (Govt. Exs. 31, 41; R. 158, 189, 1271, 1342–1344, 1643–1644, 1949, 1952.) Clodfelter

[10] On November 10, 1945, petitioner and Seijas sold the United Amusement Co. (one of the pinball routes) for $44,000, dividing the proceeds equally. (Govt. Ex. 41; R. 189, 595, 601–602, 1643–1644, 1944, 1949.)

The record does not show the exact dates in 1948 on which Clodfelter talked to petitioner and Seijas. Clodfelter testified, however, that after his original report was submitted on April 12, 1948, it was returned to him for reexamination of the capital gain realized by the partners on the sale of the United Amusement Co. route. His subsequent report on that matter was dated December 9, 1948. (Govt. Ex. 41; R. 189, 1340, 1643–1644, 1951.) There was evidence tending to show that such reports were usually written up within a week or ten days after the completion of an examination. (R. 1327, 1331–1332, 1351.)

also examined the copy of the partnership return retained by petitioner. (R. 1341–1342.) Unaware of the fact that the partnership's books did not reflect all receipts, and on the assumption that they did, Clodfelter made only minor adjustments in the tax liability of Seijas and petitioner, which he discussed with both of them.[11] (Govt. Exs. 41, 42; R. 189, 1344, 1348–1349, 1643–1644, 1951–1965.) Clodfelter testified that if he "had known there was unreported income, [he] certainly would have taken an interest in it and investigated much more thoroughly." (R. 1349.)

(b) In July 1951, at a time when Treasury agents were investigating his income for the years 1942 through 1949, Seijas retained one Whittle, an accountant, to prepare a net worth statement for those years, as requested by the agents. (R. 243–245, 285, 702.) Whittle prepared the statement—from records and information submitted to him by Seijas—for the purpose of showing the Government what Seijas' correct tax liability was for the years 1942 through 1949. The statement disclosed no unreported income for the years 1942 through 1945. Based, in part, upon an estimated $50,432.57 of undeposited cash on hand as of December 31, 1945, it did, however, indicate that Seijas had received unreported income of approximately $165,000 during the years 1946 through 1948. (Govt.

[11] Clodfelter disallowed a portion of the long-term capital gain claimed on the sale of the United Amusement Co., holding that it should have been treated as a short-term capital gain. The result of this adjustment was to increase the taxable income of Seijas and petitioner by $1,967.64 each. (Govt. Exs. 41, 42; R. 189, 1643–1644, 1956–1957, 1963.)

Ex. 74; R. 245–249, 256–258, 287–288, 298, 722, 1643–1644, 1980–1981.) On or about December 28, 1951, Whittle submitted the net worth statement to Seijas, and it was then turned over to the Internal Revenue Service. (R. 247–248.)

(c) On January 11, 1952, Seijas, interviewed by the agents, stated that he believed that he had properly reported his income up to the year 1945 (R. 1551–1552), and that he had "no recollection and no way of knowing where" (R. 1474) the $165,000 in excess assets had come from.[12] Whittle then engaged in a series of conferences with representatives of the Internal Revenue Service during the first half of 1952, in an attempt to settle Seijas' case on a civil basis. (R. 706–708.) During 1952, on several occasions when the Treasury agents came to see Seijas and were shown to his private office, petitioner departed; Seijas advised the agents that petitioner was out of town, and talked to the agents himself. (R. 860.) Whittle asked Seijas on many occasions where the $165,000 had come from, but received no explanation until 1953. (R. 251, 262–263, 709–712.)

Early in 1953, after the agents had recommended criminal prosecution against Seijas, Seijas showed Whittle his diaries for 1942 through 1945 which listed

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[12] Petitioner has printed as a part of the record in this Court (R. 1990–2007) Government's Exhibit No. 139–A for identification—the transcript of the interview between Seijas and the agents on January 11, 1952—and relies upon portions of it (Br. 58, 59, 62–67). The trial record discloses, however, that this exhibit was never admitted in evidence, having been excluded on the objection of defense counsel. (R. 1530, 1546–1551, 1650–1651.)

his share of the "hold-out" money from the partnerships. (*Supra*, pp. 11–13.)[13] Seijas retained an attorney, on Whittle's advice, and the three discussed the advisability of disclosing the diaries to the Government, concluding that they had better (R. 275) "produce these diaries for the purpose of trying to eliminate criminal prosecution" (R. 263–274, 296).

At a conference arranged with officials of the Internal Revenue Service, Seijas was advised, on April 15, 1953, that his case had been referred to the Department of Justice with a recommendation that he be prosecuted for evasion of income taxes for 1946, 1947 and 1948. (R. 274–275, 306–307.) Seijas then contended that he had not evaded his taxes for those years; that he had had a large amount of cash on hand at the end of 1945; that approximately $100,000 had been accumulated from businesses other than the pinball partnerships and from transactions with members of his family; that $86,000 had been accumulated from his share of the "hold-out" money from the pinball partnerships during the years 1942 through 1945, and that petitioner had also received $86,000 from the same source. (R. 309–315.) Further with respect to the $86,000, Seijas produced four diaries (*supra*, p. 12), containing many "hold-out" slips showing, in petitioner's handwriting, computations of the 50–50 split (R. 315–318, 428–433). Seijas further stated that instead of approximately $50,000 of cash on hand at the end of 1945—as indicated in the net worth statement submitted at the close of 1951—the correct

[13] A total of $86,427.42, according to Whittle's later computation. (R. 266–270.)

amount was more than $200,000, and that it had been kept in safe deposit boxes in Portland, Seattle and San Francisco. (R. 256, 318.)

Shortly before the April 15, 1953, conference, petitioner knew that Seijas intended to disclose his diaries to the Internal Revenue Service, and objected that it was not "a good policy." (R. 853, 859.) Seijas replied, however, that it was all right because the statute of limitations barred petitioner's prosecution. Petitioner replied that he could understand the position in which Seijas found himself. (R. 858–859.)

SUMMARY OF ARGUMENT

The indictment here alleged that petitioner and Seijas engaged in a continuing conspiracy—beginning in 1942 and ending in 1953—to attempt to evade the taxes owed by Seijas on his share of the unreported income from the partnerships "by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees." The proof clearly establishes that there was such a conspiracy. The two conspirators received, and divided equally between themselves, $172,000 of unreported income from the partnerships during the years 1942 through 1945, none of which was recorded on the books or reported on the tax returns. In the course of three audits by Treasury agents the false books of the partnerships were presented by the conspirators—and accepted by the agents—as accurately reflecting the income of the partnerships. At least five overt acts were committed within six years of the return of the indictment, in furtherance of the conspiracy to evade.

The Court of Appeals' remand for a new trial was "just" and "appropriate" under Section 2106 of the Judicial Code because the error below, deriving solely from the "subsidiary conspiracy" instruction requested by petitioner, can be corrected on a new trial. *Grunewald* v. *United States*, 353 U.S. 391, 406–415. Here, as in *Grunewald*, the proof would have supported a jury finding, under proper instructions, that the overt acts committed within the period of limitations were for the purpose of furthering the objective of the conspiracy alleged in the indictment, namely, to evade taxes.

The Court of Appeals initially remanded "with directions to enter judgment for the appellant", based on its erroneous conclusion that prosecution was barred by limitations. But its subsequent order remanding the case for a new trial, made after the Government filed a timely petition for rehearing, did not violate petitioner's constitutional protection against double jeopardy. Petitioner, who had requested the erroneous "subsidiary conspiracy" instruction, waived any objection to a new trial by moving for a new trial in the District Court, and by appealing his conviction. Moreover, the original judgment of the Court of Appeals directing remand for entry of a judgment of acquittal was not a final order, but was subject to further review on rehearing. The court below did not exceed its powers in modifying its original opinion and order—so as to correct the major error of law resulting in the order for acquittal (i.e., that the conspiracy to evade terminated in 1946)—and in ordering a new trial. The filing of

the petition for rehearing suspended the finality of the Court of Appeals' judgment.

ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT PROSECUTION IS NOT BARRED BY LIMITATIONS AND THAT, IN VIEW OF THE ERRONEOUS INSTRUCTIONS TO THE JURY, JUSTICE REQUIRES A NEW TRIAL RATHER THAN ENTRY OF JUDGMENT OF ACQUITTAL FOR PETITIONER

A. INTRODUCTORY

The essentials of this case are as follows: The indictment was returned on November 19, 1953, charging (as to petitioner) participation in a criminal conspiracy extending from 1942 to 1953 with respect to evasion of income tax for the years 1942 to 1945. In view of the applicable six-year statute of limitations, the prosecution was barred unless the conspiracy continued at least until November 19, 1947. Thus, if the conspiracy came to an end in March, 1946, when the last tax returns involved were filed, the prosecution could not be maintained. If, however, the indictment alleged, and the proof showed, a conspiracy which extended beyond November 19, 1947, the prosecution was not barred. The Government could, conceivably, have sought to meet this burden by proceeding on one or both of two independent theories as to the nature of the conspiracy:

(1) That a principal object of the conspiracy was to consummate the attempted tax evasion, not merely by filing false returns, but also by thereafter making false statements to the revenue agents or engaging in other like acts. This theory of the offense may, for shorthand purposes, be called the *Beacon Brass* theory

(cf. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46).

(2) That a subsidiary but essential part of the conspiracy was an agreement to conceal its existence after its main purpose was accomplished. This may be referred to as the *Grunewald* theory (cf. *Grunewald* v. *United States*, 353 U.S. 391). In that case this Court held that such a "subsidiary conspiracy" may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. (353 U.S. at 399–402.)

In the instant case, as we shall show, the indictment was drawn on the *Beacon Brass*, and not the *Grunewald*, theory of a continuing conspiracy extending after November 19, 1947. Moreover, as we shall also show, the Government's evidence at the trial showed overt acts after that date from which the jury could find a continuing conspiracy of attempted tax evasion, and the Government presented the case to the jury on that theory. (R. 124–126, 1700, 1765, 1770, 1774, 1779–1780, 1781.) As appears in the Statement, *supra*, pp. 4–5, fn. 3, the charge to the jury contained an adequate *Beacon Brass* instruction. Thus, if nothing more were involved, the case would present no difficulties with respect to the statute of limitations point. Unfortunately, however, at petitioner's instance, the *Grunewald* theory—which, as the Court of Appeals correctly held and both parties here agree, has no place whatsoever in this case—was injected into the trial by the addition to the charge of a "subsidiary conspiracy to conceal the

main conspiracy" instruction.[14] At that point, Government trial counsel should have objected, but he did not do so. The trial judge was thus led by both sides into the error, which has complicated this case, of giving the *Grunewald* instruction in addition to the one correctly given by the court, over petitioner's objection, based on the *Beacon Brass* theory. Since the conviction came after such an erroneous and confusing charge, the Government accepts the decision of the Court of Appeals setting aside the conviction and ordering a new trial. Review in this Court is thus limited to the questions presented by petitioner's contention that the Court of Appeals erred in not going further and ordering that the case be remanded to the District Court with directions to order a judgment of acquittal.

The Government submits that if, as we believe to be clear, the indictment and the evidence would support a conviction under the *Beacon Brass* theory, petitioner is not entitled to a judgment of acquittal because of the erroneous instruction for which he was, initially at least, responsible. This conclusion

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[14] The requested "subsidiary conspiracy" instruction (R. 89–91; Br. 13–14) was given to the jury in almost the precise language drawn by petitioner (R. 1807–1808). Petitioner cited, as his "sole authority for the instruction, *United States* v. *Grunewald*, 233 F. 2d 556 (C.A. 2d). The pertinent holding in that case was reversed by this Court while the case at bar was pending in the Ninth Circuit. *Grunewald* v. *United States*, 353 U.S. 391. But, as petitioner pointed out to the Court of Appeals in a brief filed before the reversal in *Grunewald* (citing *Krulewitch* v. *United States*, 336 U.S. 440), the "subsidiary conspiracy" theory has no place in the case at bar because the indictment alleges no such conspiracy, nor any overt act in furtherance thereof.

is supported by the *Grunewald* case itself in which a not dissimilar situation was presented. There also, the case was submitted to the jury on an erroneous theory when it could properly have been submitted on a correct theory which had been sufficiently alleged in the indictment and substantiated by the evidence at the trial. The relief ordered by this Court was a new trial, not a judgment of acquittal. The same disposition is indicated here. Moreover, no problem of double jeopardy is presented. Petitioner, by moving for a new trial and by appealing from the judgment of conviction, thereby opened the whole record for such disposition as justice may require. He was not acquitted by the jury; and the order of the Court of Appeals directing a new trial was no less a valid and proper exercise of its appellate powers because it came after a timely petition for rehearing rather than upon the original hearing of the appeal. Even in a criminal case, the jurisdiction of an appellate court to dispose of the case is not affected or reduced because its action comes after rehearing.

B. THE INDICTMENT ALLEGED, AND THE EVIDENCE PROVED, A CONTINUING CONSPIRACY TO ATTEMPT TO EVADE SEIJAS' TAXES, WHICH PERSISTED AT LEAST UNTIL JANUARY, 1952

The indictment alleged a continuing conspiracy beginning in February, 1942, and ending on or about April 15, 1953, between Seijas and petitioner to defraud the United States by (1) attempting to evade a large portion of the income taxes owed by Seijas and his wife for the years 1942 to 1945, inclusive, upon their share of the unreported income of the

partnerships, in violation of Section 145(b) of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 42–43); and (2) to violate the same provision, as well as Section 1001 of the Criminal Code (18 U.S.C. 1001), by (R. 5–6):

> furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive.

The indictment specified thirty-three overt acts which, in substance, alleged that the conspiracy, in its early years, was effected principally by maintaining false books and records, and filing false partnership and individual income tax returns (R. 6–14); and, in its later years (*i.e.*, between 1947 and 1952), by presenting false books and records to officials of the Treasury Department, and making false oral statements to them (R. 15–19).

The evidence, which the court below found to be "almost overwhelming" (*supra*, p. 8), fully established the existence of this continuing conspiracy to attempt to evade taxes. There was proof that from mid-1942 until December, 1945, the collector on the pin-ball routes, acting on petitioner's instructions, systematically withheld substantial gross receipts from the amounts reported to the bookkeeper as in-

come; that such "hold-out" money was turned over to petitioner (occasionally to Seijas) semi-weekly by the collector; that petitioner, who was a 50% partner with Seijas in all four partnerships, retained his half of the "hold-out" money [15] and turned the other half over to Seijas as it was received; and that the total thus received by the conspirators was approximately $172,000. (*Supra*, pp. 11–13.) It was also shown that the conspirators caused false sets of books to be maintained wherein none of this $172,000 was recorded as income; that the partnership returns were in agreement with these false books; that neither Seijas nor petitioner reported any of the $172,000 as income on their individual tax returns; and that the conspirators followed the invariable practice—when agents of the Internal Revenue Service would come to examine the correctness of those returns—of referring them to the bookkeeper, who, in turn, would present the false books to them, representing that they accurately reflected the income of the partnerships. (*Supra*, pp. 13–15.) [16] The evidence further proved that when Sei-

[15] On the evidence bearing on petitioner's own tax liability, the trial court charged the jury as follows (R. 1801–1802): "The defendant Forman is not charged with tax evasion of his own taxes, and, accordingly, you can consider such evidence only insofar as it may bear upon the charge against the defendant of conspiracy. * * * An act by defendant Forman to evade the tax due upon his distributive share of such income, if such there was, could be considered by you in determining if it resulted from an agreement between the partners Forman and Seijas along with all other evidence in the case bearing on that matter."

[16] The result was that in the course of three examinations by Treasury agents (in 1944, 1947 and 1948) there were assessed against the conspirators only comparatively minor tax de-

jas came under intensive investigation in 1951, he submitted a false net worth statement to the Internal Revenue Service which concealed the existence of his prior accumulated "hold-out" receipts, and that as late as January 11, 1952, Seijas made two false oral statements to Treasury agents. (*Supra*, pp. 15–16.) Indeed, it was not until April 15, 1953, when Seijas, in an attempt to avoid prosecution for evasion of taxes in later years, disclosed the "hold-out" scheme to the Internal Revenue Service—that the Government had any knowledge of the $172,000 of unreported income. (*Supra*, pp. 16–18.) The conspiracy was terminated on that date. *Fiswick* v. *United States*, 329 U.S. 211, 217; *United States* v. *Kissel*, 218 U.S. 601, 607–608. The indictment was returned seven months later. (R. 19.)[17]

Petitioner contends (Br. 41–48) that the conspiracy came to an end in 1946, when the false income tax returns for 1945 were filed, and argues that the acts committed in later years were designed only to conceal an already executed crime. Concededly, the substantive offense of wilfully attempting to evade a tax *by filing a false and fraudulent return* is complete when the return is filed, and the cases relied upon by petitioner (Br. 42) go no further than this. But the

fidelities. (*Supra*, p. 15, fn. 11; R. 1327, 1329, 1353–1354, 1962, 1967.)

[17] The indictment was returned on November 19, 1953 (R. 19), and it was necessary, therefore, that the Government prove that an overt act in furtherance of the conspiracy was committed after November 19, 1947. Sec. 3748(a) of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) Sec. 3748(a); *Grunewald* v. *United States*, 353 U.S. 391, 396–397; *Fiswick* v. *United States*, 329 U.S. 211, 216; *Brown* v. *Elliott*, 225 U.S. 392, 401.

proscription in Section 145(b) of the Internal Revenue Code of 1939 (*infra*, pp. 42–43) against wilfully attempting to evade a tax "in any manner" contemplates other means of attempted evasion. As this Court has said, it is "clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income." *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45–46. Accordingly, if such false statements are substantive offenses of tax evasion under Section 145(b), *a fortiori* they qualify as overt acts in furtherance of a tax evasion conspiracy. Cf. *Braverman* v. *United States*, 317 U.S. 49, 53. It follows that the tax evasion conspiracy in the instant case was shown by the proof to have been in existence during the years 1947 through 1951, and at least until January 11, 1952, when Seijas falsely stated to the Treasury agents (overt acts No. 32 and 33–R. 18–19) that he believed his income for the years 1942 through 1945 had been correctly reported on his returns and that he had no idea as to where his excess funds in later years had come from. (*Supra*, p. 16.) In holding that the conspiracy to evade terminated in 1946 (R. 1928), the initial opinion of the Court of Appeals, as it later recognized, was irreconcilable with the rationale of *Beacon Brass*. The Court of Appeals properly corrected its error in its opinions on rehearing.

The Court of Appeals correctly held that prosecution was not barred by limitations, and that the case could properly be retried on the *Beacon Brass* theory. The question whether the overt acts committed by the conspirators after November 19, 1947, were motivated

only by a desire to conceal an already executed crime so as to avoid prosecution, or "were at least partly calculated to further" the objective of the conspiracy alleged in the indictment—tax evasion—(*Grunewald* v. *United States*, 353 U.S. 391, 415) was, of course, a question of fact. But, clearly, the jury could reasonably have found—under proper instructions—that the evasion conspiracy was still alive after November 19, 1947. As shown *supra*, the record demonstrated a consistent course of conduct engaged in by the conspirators continuously from 1942 until 1952, designed and executed for the purpose of evading income taxes.

Petitioner's contention reduces itself to this: that after a false return is filed, the six-year limitation period begins to run, and any affirmative acts of tax evasion committed thereafter cannot serve to show continuation of the tax evasion conspiracy. However, if the subsequent acts constitute new substantive offenses of tax evasion, as this Court held in *Beacon Brass*, it would seem to follow that they can qualify as overt acts evidencing a conspiracy to effectuate an evasion of taxes.

Petitioner's contention that "the making of false statements and submission of false records to Treasury employees * * * [were themselves] the sole objective of the conspiracy and the sole means by which it was to be accomplished" (Br. 49) is clearly erroneous. The objective of the conspiracy was tax evasion, or, to put it another way, to consummate a design or scheme having as its purpose the successful evasion of taxes. The conspiracy was characterized in its earlier years by the keeping of false books and the filing of false returns, all spelled out in the indictment as overt

acts. (R. 6–14.) The making of false statements and the submission of false records, also characterized as overt acts in the indictment, were merely additional means (R. 5–6) by which that conspiracy, in its later phases, was to be carried out. It was unnecessary to allege the means by which the conspiracy was to be carried out at each stage of its existence. *Frohwerk* v. *United States*, 249 U.S. 204, 209. It was sufficient that the evidence clearly demonstrated the precise methods and means employed by the conspirators at the various pertinent times, and that they were all directed toward the central purpose of evading the income taxes of Seijas and his wife.

Petitioner's further contention (Br. 52–68), that the proof failed to show the commission, within the period of limitations, of an overt act in furtherance of the conspiracy to evade, does not require extended refutation. The Government was required to prove only that one such overt act was committed after November 19, 1947 (*supra*, p. 26, fn. 17). There was ample proof of overt acts #24 and #29[18] (R. 15, 17; see

[18] Petitioner urges that since Agent Clodfelter's second examination of the books in 1948 "did not involve any 'official re-examination' of the operating 'hold-out' income which is the subject matter of the alleged conspiracy" (Br. 53), overt act #24 was not in furtherance of the conspiracy. But the Government did not even learn about the "hold-outs" until 1953, when Seijas disclosed the conspiracy and produced his diaries, and the fact that in 1948 Clodfelter was unaware of the $172,000 of unrecorded and unreported partnership income in earlier years bespeaks the success of the conspiracy up to that time. The important fact is that Seijas caused the false partnership books to be presented to Clodfelter in 1948 (*supra*, pp. 14–15), as the indictment alleged (R. 15).

(fn. cont. next page)

supra, pp. 14–15, fn. 10). And surely there can be no question that overt acts #31, #32 and #33 (R. 18–19) were committed in furtherance of the conspiracy to evade. These three overt acts comprise the submission of Seijas' false net worth statement to the Internal Revenue Service on December 29, 1951 (R. 1505), and the two false oral statements made by Seijas to the Treasury agents on January 11, 1952.[19]

The net worth statement, prepared by Whittle from records and information supplied by Seijas, concealed the fact that Seijas had some $150,000 in currency on hand at the end of 1945. (*Supra*, pp. 15–18; R. 659.) If the existence of this asset had been disclosed to the Government in 1951, there would undoubtedly have been an investigation (as

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As for overt act #29, petitioner argues (Br. 54) that since only his own taxes were involved in the agent's examination, he could not possibly have been trying to further the conspiracy to evade Seijas' taxes by concealing the fact that he (petitioner) had received unreported income from the partnerships. The jury was entitled to infer, however, (fn. 15, p. 25, *supra*), that each of the conspirators was protecting the other in order to protect himself, inasmuch as they shared equally in the unreported income.

As to the evidence supporting these two overt acts, see *supra*, pp. 14–15.

[19] Petitioner, treating the three acts as one (Br. 55–69), views the evidence in the light most unfavorable to the verdict, which he may not do at this stage of the case. *Glasser* v. *United States*, 315 U.S. 60, 80; *Martinson* v. *United States*, 322 U.S. 369, 374; *Abrams* v. *United States*, 250 U.S. 616, 619. Moreover, in evaluating the acts, he relies to a substantial degree (Br. 58, 59, 62–67) upon evidence (the transcript of the interview between Seijas and the agents on January 11, 1952) which was never before the jury, having been offered by the Government but rejected on the objection of defense counsel (fn. 12, p. 16, *supra*).

distinguished from the routine audits conducted in 1944, 1947 and 1948 (*supra*, pp. 13–15)) with respect to the income earned by the partnerships in the years 1942 through 1945.[20] The false statements made by Seijas on January 11, 1952, were proved (*supra*, p. 16) as alleged (R. 18–19). The statement that he believed he had correctly reported his income for the years 1942–1945 was plainly false, and Seijas knew it was false when he made it. (R. 659.) Seijas' statement that he had "no recollection and no way of knowing where" (R. 1474) he had obtained the unaccounted for $165,000 which showed up in his visible net worth as of the end of the years 1946 through 1948, was equally false. Seijas knew it was false because his diaries, listing his share of the unreported income from the partnerships in the earlier years, accounted for more than half of the mysterious $165,000. The jury could easily conclude that these false oral statements, as well as the submission of the false net worth statement, were made in furtherance of the conspiracy. And all three acts were, as a matter of law, attributable to petitioner as much as to Seijas. *Pinkerton* v. *United States*, 328 U.S. 640, 646; *Brown* v. *Elliott*, 225 U.S. 392, 400–401; *Fiswick* v. *United States*, 329 U.S. 211, 217.

[20] Although the last overt act shown to have been committed by petitioner took place in 1948 (fn. 18, p. 30, *supra*), he remained a member of the conspiracy until early in 1953. The fact that he took no affirmative action to disassociate himself from the conspiracy (*Pinkerton* v. *United States*, 328 U.S. 640, 646; *Hyde* v. *United States*, 225 U.S. 347, 369) is manifest from his objection to Seijas' disclosure of the diaries, shortly before the conference of April 15, 1953. (*Supra*, p. 18.)

We submit that the evidence amply established what the indictment alleged: that petitioner and Seijas conspired continuously from 1942 until 1953 to attempt to evade the taxes of Seijas and his wife. Had the case been submitted to the jury under proper instructions, therefore, a verdict of guilty could have been validly returned. Accordingly, as we shall now show, the interests of justice call for a new trial, as the Court of Appeals has held.

C. THE REMAND FOR A NEW TRIAL WAS A "JUST" AND "APPROPRIATE" DISPOSITION OF THE APPEAL

Petitioner contends (Br. 36–40): (1) the Court of Appeals' remand of this case for a new trial was not a "just" or "appropriate" disposition within the meaning of Section 2106 of the Judicial Code (28 U.S.C. 2106); and (2) on that issue, this case is distinguishable from *Grunewald* v. *United States*, 353 U.S. 391. Neither contention has merit.

The claim (Br. 37–40) that the order for a new trial was neither "just" nor "appropriate" rests in substance on petitioner's premise that the trial judge should have granted his motion for acquittal. As we have shown, however (*supra*, pp. 23–32), such action would have been entirely unwarranted. We come, therefore, to the question whether, in the circumstances, a new trial would be improper.

We submit that the disposition of the *Grunewald* case by this Court underscores the correctness of the remand for new trial here. In *Grunewald* the indictment charged that the defendants had conspired (1) to "fix" criminal tax cases by means of bribery and

improper influence, and (2) to conceal the acts of the conspirators. Under the three-year statute of limitations there applicable, it was necessary for the Government to prove that the conspiracy "was still in existence on October 25, 1951, and that at least one overt act in furtherance of the conspiracy was performed after that date." (353 U.S. at 396.) Grunewald contended that the object of the conspiracy was a narrow one: to obtain "no prosecution" rulings from the Internal Revenue Service with respect to the two cases in question. Since the last of the rulings was obtained in January 1949, under Grunewald's hypothesis the tax-fixing conspiracy could not have been in existence in October 1951. The Government contended (1) that even if the main object of the conspiracy had been accomplished in 1949, it had charged and proved the existence of a subsidiary conspiracy to conceal the conspiracy to "fix" (to the end that the conspirators would escape detection and punishment), and that overt acts in furtherance of that conspiracy had been performed after October 1951. Alternatively, the Government contended (2) that the main object of the conspiracy was not merely to obtain "no prosecution" rulings from the Internal Revenue Service, but to obtain absolute immunity from criminal tax prosecution for the "clients" of the tax-fixing combine, and that the main object was not accomplished until 1952, when the six-year statute of limitations barred prosecution of those "clients" for attempting to evade their income taxes.

This Court, rejecting the Government's first contention, held that after the central criminal purposes

of a conspiracy have been finally frustrated or attained, the running of the statute of limitations cannot be extended merely by showing—under a "subsidiary conspiracy" theory—that the conspirators subsequently took steps to cover up their crime in order to escape detection and punishment. (353 U.S. at 403–406).[21] However, the Court found the legal theory of the Government's second and alternative contention "unexceptionable" (353 U.S. at 408), and held that there was sufficient allegation and proof to enable the jury to conclude (1) that the "no prosecution" rulings were only the first "installment" of what the conspirators set out to do; (2) that the main object of the conspiracy was not accomplished until 1952, when the six-year statute of limitations barred prosecution of the conspirators' "clients" for evasion of their taxes; and (3) that the overt acts of concealment occurring after 1949 might well have been "motivated at least in part" by the purpose of furthering the main objective of such a conspiracy. (353 U.S. 408–409.) The Court found, however, that this al-

[21] Petitioner quotes from this portion of the *Grunewald* opinion in support of his contention that the holding by the court below in the instant case would "extend the life of a conspiracy indefinitely" (Br. 47). But, as we have shown (*supra*, pp. 20-23), the "subsidiary conspiracy" was not even alleged in this indictment and is wholly irrelevant to this case except insofar as the instruction on the subject tainted the charge to the jury. The statute of limitations applicable here would have barred prosecution after January 11, 1958 (six years after the commission of the last overt act) and no amount of investigation to unearth additional overt acts could have resulted in extending the period of limitations beyond April 15, 1959, because the conspiracy terminated on April 15, 1953.

ternative theory had not been adequately submitted to the jury and, accordingly, remanded for a new trial.

Thus, the following close parallels exist between *Grunewald* and the case at bar: (1) In each case the indictment alleged a continuing conspiracy. (2) In each case there was evidence in the record from which the jury could have found—under proper instructions—that the defendants were guilty. (3) In each case the proof showed the commission, within the period of limitations, of overt acts which may have been designed to further the main objective of the conspiracy. (4) In each case the instructions to the jury were sufficiently ambiguous so as to foreclose the certainty that in reaching their verdict the jury had found that the commission of overt acts within the period of limitations was "motivated at least in part" (353 U.S. at 408–409) by the purpose of furthering the main objective of the conspiracy. (5) In both cases the convictions were reversed and a new trial was ordered.

The case at bar in this aspect is thus indistinguishable from *Grunewald*. Petitioner is no more entitled to a judgment of acquittal here than were the defendants in *Grunewald*. The remand for a new trial here is "just" and "appropriate", for the same reasons that impelled this Court to order a new trial in *Grunewald*.[22]

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[22] Petitioner attempts to distinguish *Grunewald* on the grounds that (1) there the alternative "theory was, in fact, submitted" (Br. 36) to the jury—which is equally true in the case at bar—and (2) Grunewald "requested submission of the alternative theory to the Jury" (Br. 36)—which is not correct. The defendants in *Grunewald* requested no such instruction.

Petitioner contends (Br. 20–36) that, in the circumstances, subjecting him to a new trial would violate his Fifth Amendment protection against double jeopardy. We submit this contention is without merit.

In its original opinion, the Court of Appeals reversed petitioner's conviction on the ground that it was barred by limitations, holding that the tax evasion conspiracy "was consummated, as the court told the jury, on the filing of Seijas' tax returns in March, 1946." (R. 1928, 1932–1934.) The opinion ordered the cause "remanded with directions to enter judgment for the appellant." (R. 1935.) In its second opinion (after the Government's timely filing of a petition for rehearing) the Court of Appeals—explaining that in its original "opinion we accepted the position taken by the court below in its instructions that the conspiracy charged 'was consummated upon the filing of the individual tax returns'" (R. 1936), but that "We now think that the record does not require a conclusion that the conspiracy here was consummated" at that time (R. 1938)—modified its first opinion so as to remand the case for a new trial (R. 1938).

It is settled that a defendant can be tried a second time for an offense when his prior conviction for

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They took the position at the trial, and maintained it through all stages of the appeal, that the conspiracy had terminated more than three years before the indictment was returned and hence that prosecution was barred by the statute of limitations there applicable. *Grunewald* v. *United States* (Nos. 183, 184, 186, October Term, 1956—R. 550, 555–558, 711, 754, 759, 771, 775).

that same offense has been set aside on appeal. Here, petitioner effectively waived his protection against double jeopardy. Petitioner himself generated the trial court's error by requesting the erroneous "subsidiary conspiracy" instruction (*supra*, pp. 5–7), and he also (a) moved for a new trial in the District Court,[23] and (b) appealed from his conviction. In such circumstances, an appellate court's remand for a new trial violates no constitutional protection against double jeopardy. *Bryan* v. *United States*, 338 U.S. 552, 560; *United States* v. *Ball*, 163, U.S. 662, 672, and cases cited; *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 243; cf. *Green* v. *United States*, 355 U.S. 184, 189. In the *Ball* case, the Court stated (163 U.S. at 672):

> * * * it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted * * *.

Petitioner mistakenly treats the Court of Appeals' original judgment directing remand of the case for entry of a judgment for petitioner as if it were equivalent to a verdict of acquittal in the District Court. That judgment, however, was of course subject to revision on rehearing. In taking his appeal from the judgment of conviction, petitioner subjected himself

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[23] The motion alleged, *inter alia*, that the court had erred in instructing the jury and that the prosecution was barred by limitations. (R. 101–102.)

to the power of the "court of appellate jurisdiction * * * [to] affirm, modify, vacate, set aside or reverse * * * [the] judgment * * * and [to] * * * remand the cause and direct the entry of * * * [an] appropriate * * * order, or require such further proceedings to be had as may be just under the circumstances." (28 U.S.C. 2106, Appendix, *infra*, p. 44.)

Under this statute and the established practice in the federal judicial system, this Court and the courts of appeals customarily rehear cases over which they have jurisdiction, and indeed Congress has expressly so recognized. (28 U.S.C. 46.) The Court of Appeals' first opinion was rendered on September 15, 1958. (R. 1923–1935.) The disposition of the case made in that opinion (R. 1935) was interlocutory in the sense that it was subject to further action on rehearing.[24] *Dept. of Banking* v. *Pink*, 317 U.S. 264, 268; *Comm'r* v. *Estate of Bedford*, 325 U.S. 283, 287; *Citizens Bank* v. *Opperman*, 249 U.S. 448, 450. On October 27, 1958, the court amended its earlier opinion (*supra*, pp. 9, 36), and ordered a new trial (R. 1936–1938). On February 26, 1959, the court wrote a third opinion, denying petitioner's petition for a further hearing. (R. 1938–1940.) It was not until that date that the appellate court's judgment "in fact fully adjudicated rights and that that adjudication * * * [was] not subject to [its] further review." *Dept. of Banking*

[24] The timely filing of the Government's petition for rehearing prevented the issuance of a mandate to the District Court, under the Ninth Circuit's Rules 23 and 26. (Appendix, *infra*, pp. 44–45.)

v. *Pink, supra,* p. 268. The filing of the Government's timely petition for rehearing "operate[d] to suspend the finality of the * * * court's [original] judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." (*Id.*, p. 266.)

In contending that retrial here would subject him to double jeopardy, petitioner mainly relies (Br. 23–24) upon *Sapir* v. *United States,* 348 U.S. 373. In *Sapir* (No. 534, October Term, 1954), the defendant was convicted of conspiracy to defraud the United States by wrongfully converting Government property to his own use. There was a total lack of evidence with respect to an essential element of the offense charged. Accordingly, the Court of Appeals for the Tenth Circuit reversed the conviction and ordered the indictment dismissed. Later, after the Government had filed a petition for rehearing setting forth some "newly discovered evidence", the court modified its opinion to provide for a new trial. In his petition for a writ of certiorari the defendant urged (1) that the Government could not rely upon evidence outside the record in urging a new trial; (2) that the Court of Appeals lacked the power to order a new trial because defendant had not requested a new trial, either in the District Court or on appeal; and (3) that a second trial would subject the defendant to double jeopardy. This Court, in a short *per curiam* opinion, vacated the judgment directing a new trial and, because it was "correct", reinstated the appellate court's original judgment remanding the cause with instructions to dismiss the indictment. (348 U.S. at 373.)

The distinctions between *Sapir* and the instant case are apparent. The order for a new trial in *Sapir* was based on evidence outside the record; here, the Government's position rested entirely on evidence in the record. Sapir did not move for a new trial in the District Court (Pet. 6, 10–11—*Sapir* v. *United States*, No. 534, October Term, 1954); here, petitioner did (R. 101–102, *supra*, p. 37, fn. 23).[25] But, more importantly, the *Sapir* case did not rest on any lack of *power* in the Court of Appeals to revise its original judgment on rehearing; rather, this Court's reversal was based on its view as to the merits of the action taken by that court.

We need hardly point out, in conclusion, that acceptance of petitioner's contention would mean the abolition of the power of the courts of appeals and this Court to rehear cases in which they had initially, but erroneously, reversed convictions and remanded with directions to acquit.[26] If petitioner is right, once a court of appeals has entered such a judgment, that is the end of the case, and, like a verdict of acquittal by a jury, it is subject to no further review whatsoever, by rehearing, appeal or certiorari to this Court, or otherwise.

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[25] In a concurring opinion in *Sapir*, Mr. Justice Douglas expressed the view that to retry the defendant would violate his protection against double jeopardy. He went on to say, however (348 U.S. at 374): "If petitioner had asked for a new trial, different considerations would come into play, for then the defendant opens the whole record for such disposition as might be just. See *Bryan* v. *United States*, 338 U.S. 552. * * *"

[26] See Br. 31–36, arguing that the Court of Appeals had no jurisdiction to entertain the Government's petition for rehearing.

CONCLUSION

The judgment of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys.

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APPENDIX

18 U.S.C.:

SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

SEC. 1001. STATEMENTS OR ENTRIES GENERALLY

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure To Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

SEC. 3748. PERIODS OF LIMITATION—(a) CRIMINAL PROSECUTIONS.

No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

* * * * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

* * * * *

For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. * * *

(26 U.S.C. 1952 ed., Sec. 3748(a)(2).)

28 U.S.C.:

SEC. 2106. DETERMINATION.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Rules of the United States Court of Appeals for the Ninth Circuit:

Rule 23. *Rehearing.*—A petition for rehearing may be presented within 30 days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

All petitions for rehearing, and motions for extensions of time to file them, shall be addressed to and be determined by the court as constituted in the original hearing.

Should a majority of the court as so constituted grant a rehearing and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case shall be reheard en banc.

Rule 26. *Mandate.*—In all cases finally determined in this court other than original proceedings, a mandate or other proper process in the nature of a procedendo shall, upon the payment of any costs due in the case, be issued, as of course from this court to the court below,

for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of a Circuit Judge who participated in such decision shall be issued on the expiration of 30 days from the date of such final determination, unless within said time a petition for rehearing be filed, in which case the mandate shall be stayed until 5 days after the determination of such petition.

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In the Supreme Court
of the United States

October Term, 1959

No. 43

WILLIAM R. FORMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD,
Of Counsel,
Public Service Building,
Portland, Oregon.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-59

INDEX

	Page
Preliminary Statement	1
I. Re: Waiver of the Double Jeopardy Clause of the Fifth Amendment	6
Re: Request for Instructions	6
Re: Motion for a New Trial	8
Re: Appeal to the Court of Appeals	9
II. Re: Construction and Application of Section 2106 of Title 28, U.S.C.A.	15
III. Re: Contention That the Case Could Have Been Tried on "One or Both of Two Independent Theories"	17
IV. Re: So-Called Beacon Brass Theory	24
V. Re: Comparision of Alleged Alternative Theory Urged in the Case at Bar with the Alternative Theory in the *Grunewald case*	31
VI. Re: Power of the Court of Appeals on Petition for Re-Hearing	33
VII. Re: Sufficiency of the Evidence to Establish Conspiracy "Continuing until January 1952"	35
Re: Act 24. Revenue Agent Clodfelter's Interview with Seijas on December 1, 1958	38
Re: Overt Act 29	42
Re: Overt Act 30	44
Re: Overt Acts 31, 32 and 33	44
Conclusion	46
Appendix	49

CASES CITED

	Page
Abbate v. U. S., 359 U.S. 187	18, 19
Am. Jur., 3, page 35, Sec. 253	20
53, page 488, Sec. 626	22
page 620, Sec. 844	22
Ball v. U. S., 163 U.S. 662	12
Bryan v. U. S., 338 U.S. 552	12
Carter Carburetor Corp. v. Riley, 186 F. 2d 148	22
Cofer v. U. S., 256 F. 2d 221	24
Dougall v. Spokane P. & S. Ry. Co., 207 F. 2d 843	21
Emspak v. U. S., 349 U.S. at 198	13
Ex Parte United States, 101 F. 2d 870	14
Fanchon & Marco, Inc. v. Paramount Pictures, 215 F. 2d 167	21
Glasser v. U. S., 315 U.S. at 70	13
Green v. U. S., 355 U.S. 184	10, 23
Himmelfarb v. U. S., 175 F. 2d 924 at 931	13
Hoag v. State of New Jersey, 356 U.S. 464	19
Holliday v. Great Atlantic & Pacific Tea Company, 256 F. 2d 297	23
Humes v. U. S., 170 U.S. 210, 18 S. Ct. 602	23
Indiviglio v. U. S., 249 F. 2d 549	20
Inman-Poulsen Lumber Co. v. Commissioner, 219 F. 2d 159	21
Johnson v. U. S., 318 U.S. at 201	19
Johnson v. Zerbst, 304 U.S. at 464	13
Karn v. U. S., 158 F. 2d 568	13, 14
Kirk v. St. Joseph Stock Yards Co., 206 F. 2d 283	21
Kotteakos v. U. S., 328 U.S. 750	15

CASES CITED (Cont.)

	Page
National Surety Corp. v. City of Excelsior Springs, 123 F. 2d 573	21
Smith v. U. S., 337 U.S. at 150	13
U. S. v. Beacon Brass Co., 344 U.S. 43	24
U. S. v. Bridell, unreported	25, and App. 49
U. S. v. Shotwell Mfg. Co., 355 U.S. 233	10
U. S. v. Waechter, 195 F. 2d 963	20
U.S.C.A., Title 28, Section 2106	15
Valley Shoe Corporation v. Stoute, 98 F. 2d 514	21
Weinstock v. U. S., 231 F. 2d 699	44

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PETITIONER'S REPLY BRIEF

PRELIMINARY STATEMENT

1.

The Government's statement of the "question presented" (Br. 2) is incomplete and erroneous

The true question is in substance: when the Court of Appeals reversed the judgment of conviction and remanded for the entry of a judgment of acquittal on the ground that the evidence was insufficient to warrant submission of the case to the Jury, can the Government petition for and the Court of Appeals grant a new trial

because the case "might have been tried upon this alternative theory" projected by the Government, for the first time, in the petition for the new trial?

The true questions are presented at page 4 of Petitioner's former Brief.

In the Modification Opinion, the Court of Appeals said (R. 1937):

> "The Government . . . says that as in the Grunewald case, the indictment here presented an alternative theory."
>
> . . . . . .
>
> "It now appears to us that the case might have been tried upon this alternative theory . . ."

In *Grunewald*, the alternative theory was submitted to the Jury. In the case at bar, the Government did not request submission of the alternative theory to the Jury and did not except to the theory embraced in the instructions as given.

The Court went on to say (R. 1937):

> The ultimate question is, in a criminal case when a defendant has been tried on one theory and the judgment of conviction reversed for lack of evidence, can he be tried again on another theory (not presented to the Court in the first trial) without violating the Double Jeopardy Clause of the Fifth Amendment?

2.

The Government states (Br. 7) that the "subsidiary conspiracy to conceal" instruction was held to be erroneous by the Court of Appeals and that both Petitioner

and the Government agreed that it had no place in the case. This is an erroneous statement. The Court of Appeals did not determine that the instructions, as given, were erroneous.

In the Original Opinion the Court of Appeals decided that it was error to submit the case to the Jury because there was no evidence of an express original agreement to continue to act in concert, etc.

In the Modification Opinion, the Court of Appeals only determined that the case might have been tried on the alleged alternative theory, projected for the first time, in the Government's petition for a new trial.

The accuracy of the instructions, *as given*, was not challenged in the Court of Appeals. On the contrary, the Government defended the instructions as given, contended that the instructions met the requirements of the Supreme Court's Decision in the *Grunewald case*, and only sought to establish that the evidence was sufficient to warrant conviction under the instructions *as given*.

At page 31 of the Government's Brief in the Court of Appeals, in the summary of the argument, it said:

> "This case meets the requirements set forth by the United States Supreme Court in *Grunewald v. United States*."

At page 44 of its Brief in the Court of Appeals, it said:

> "The Government believes that . . . it meets . . . . the requirements set forth by the Supreme Court in *Grunewald v. United States*."

At page 57 of the Government's Brief in the Court of Appeals, it said:

> "The Court met the requirements set forth by the United States Supreme Court in *Grunewald v. United States*, ... The instructions were lengthy and complete, and those pertaining particularly to the question of continuing conspiracy are set out in full in the Appendix, beginning at p. 2a."

Petitioner does not agree that the instructions as given were erroneous. The Petitioner requested those instructions and the Court gave them without objection or exception by the Government and with no request for any other instructions. Petitioner's only complaint in the Court of Appeals in this respect was that there was no evidence of the character found necessary in the *Grunewald case* to warrant submission of the case to the Jury.

3.

The Court of Appeals did not, as the Government asserts (Br. 8), determine

> "that there was an actual subsidiary conspiracy to conceal."

The reference to the statement, at page 1929 of the Record, is taken out of context. This statement was made in the Original Opinion. The Court first reviewed the law as established by the decisions *prior* to the decision of this Court in *Grunewald* and as the Court construed those decisions and measured by its construction of the standards required by the *Krulewitch case*, it was of the opinion that there was evidence of an actual subsidiary conspiracy to conceal

The Court then went on to determine what kind of evidence was required to establish such a subsidiary conspiracy *after the Decision of the Supreme Court in Grunewald* and the standards to be applied to determine the sufficiency of the evidence. The Court went on to say (R. 1932):

> "However, we possess an advantage here that the trial court did not have." (Referring to the Decision of this Court in *Grunewald*).

It then analyzed the elements that must be established to create a subsidiary conspiracy that would prolong the operation of the statute of limitations in criminal cases and *after such analysis of this Court's Decision*, concluded by saying:

> "The policy that blocked the theory stated in Krulewitch blocks this one also. Upon the authority of this decision of the Supreme Court we hold that it was error to permit this case to go to the jury."

In summary, what the Court said was that, while it thought that the evidence might have been held sufficient to establish a subsidiary conspiracy to conceal *prior* to the decision of this Court in Grunewald, the evidence was insufficient when measured by the standards established by the Supreme Court's Decision in *Grunewald*. Under that standard, there had to be evidence of an

> "express original agreement among the conspirators to continue to act in concert in order to cover up for their own self protection, traces of the crime after its commission."

Consequently, the statement that the Court of Appeals determined that there was evidence of an actual

subsidiary conspiracy to conceal is without foundation, and erroneous.

I.

Re: Waiver of the Double Jeopardy Clause of the Fifth Amendment.

The Government contends (Br. 37) that Petitioner waived his constitutional protection against double jeopardy because:

(a) Petitioner "generated the Trial Court's error by requesting the erroneous subsidiary conspiracy instruction";

(b) He "moved for a new trial in the District Court";

(c) He "appealed from his conviction."

The contention is unsound.

1.

Re: Request for Instructions.

It is inconceivable how a request for instructions, made by the defendant and given by the Court (whether right or wrong) for submission of defendant's theory of the case, can operate as a waiver of the protection of the Double Jeopardy Clause of the Fifth Amendment. No authority is cited in support of the contention and it is indefensible in principle.

The instructions requested and given by the Court were not erroneous. The Court of Appeals did not hold, in the Modification Opinion, that the instructions, as given (relating to the statute of limitations), were erroneous. The Court only determined that the case

"might have been submitted to the Jury on the alleged alternative theory" projected by the Government for the first time in its petition for a new trial.

The instructions, as given, were patterned after the decision in the *Grunewald case* and were in strict harmony therewith. They presented the case according to the defendant's theory. If the Government wanted the case submitted on another theory, it should have so requested. The Court of Appeals merely determined, in effect, that the case "might" have been submitted to the Jury on the Government's alleged alternative theory had it requested submission on that theory. The Court of Appeals did not reverse in the first instance by reason of any alleged erroneous instruction. It only reversed, and directed an acquittal, because there was no evidence warranting submission of the case to the Jury and that judgment of acquittal should have been entered in the District Court.

When the Court of Appeals spoke of submission on "an impermissible theory" in the Modification Opinion and in the subsequent Opinion on petition for rehearing, it had reference to the erroneous conclusion of the District Court that the evidence was sufficient for submission to the Jury under the theory of the *Krulewitch* and *Grunewald cases* because, under that theory, the evidence was insufficient. What was "impermissible," was the submission of the case to the Jury at all and *not the particular instructions relating to the application of the statute of limitations as given.*

Moreover, the Government did not, and could not, in the Court of Appeals assign error in the instructions as given and thereby become an appellant in a criminal case. It did not challenge the accuracy of the instructions so far as they were given. As elsewhere pointed out, the instructions as given in a criminal case, unexcepted to, become, so far as the Government is concerned, the law of the case and the test of the sufficiency of the evidence must be determined in accordance with the instructions as given. That is true as to the defendant and with greater force as to the Government.

2.

Re: Motion for a New Trial.

Petitioner did move for a new trial in the District Court, but it was prefaced by the statement (R. 101):

> "In the event that the Court should deny the foregoing motions, (referring to renewal of motion for acquittal) defendant William R. Forman moves for an order setting aside the verdict and granting a new trial on the grounds:"

The renewal of the motion for judgment of acquittal was distinct from the motion for a new trial for errors in the trial. Petitioner did not, in connection with his motion for judgment of acquittal, seek a new trial. He sought only the entry of judgment of acquittal notwithstanding the verdict.

Under the Authorities, hereinafter discussed, the *contingent* motion for a new trial, to be considered only if the motion for judgment of acquittal was denied, does not operate as a waiver of the Petitioner's protection

under the Fifth Amendment. The Court has rejected the idea of an involuntary or unintentional waiver.

3.

Re: Appeal to the Court of Appeals.

In the CONCLUSION to the Brief in the Court of Appeals, Petitioner carefully segregated the relief to be granted in that Court in the event of reversal. The conclusion reads:

> "The judgment should be reversed with directions to enter a judgment of acquittal, if reversal is based on *any one* of the Specifications of Error numbered I, II, III, IV, V and VII.
>
> "If reversal is based on Specifications of Error numbered VI, VIII, IX and X, a new trial should be ordered."

The CONCLUSION clearly sought direction for the entry of judgment of acquittal in the event that reversal was based on the ground of lack of evidence to support the verdict. *It did not seek a new trial if that contention was sustained.*

The Court of Appeals did not pass upon or decide any error infecting the trial.

When the Court of Appeals determined that it was error to submit the case to the Jury for lack of evidence, the only direction it could lawfully make, was the entry of a judgment of acquittal.

No case is cited in which it was held that the Court of Appeals could direct a new trial under the conditions shown by the record in this case on the theory

of "waiver" of the constitutional protection against double jeopardy.

In *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, cited by the Government, the Court of Appeals *reversed* the judgment of conviction *only on the ground that error was committed in denying a motion to suppress evidence* (255 F. 2d 394). It was an error infecting the trial because it permitted the consideration of incompetent evidence. The reversal on that ground could only warrant direction for a new trial. It could not result in the direction of a judgment of acquittal. In the case at bar, the reversal was based on a ground which could only result in direction of a judgment of acquittal and not for error during the course of the trial.

Green v. United States, 355 U.S. 184, does not sustain the Government's contention. On the contrary, it supports Petitioner's contention that the appeal, under the conditions prevailing in this case, was not a waiver of the Double Jeopardy Clause of the Fifth Amendment. The Court said:

> " 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of *voluntary knowing relinquishment of a right* . . . And as Mr. Justice Holmes observed, with regard to this same matter in Kepner v. United States, 195 U. S. 100, . . . 'Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.' . . . .
>
> "Mr. Justice Holmes . . . sharply denounced the notion of 'waiver' as indefensible."

The effect of an appeal on the operation of the Double Jeopardy Clause of the Fifth Amendment depends upon the ground upon which the Appellate Court reverses the conviction. If the reversal is based upon errors infecting the trial, the Double Jeopardy Clause does not preclude the granting of a new trial because the effect of the decision is that there was no legal trial as a matter of law and consequently no former jeopardy.

But an appeal, *based upon the contention that the evidence was insufficient to submit the case to the Jury* and that the defendant was entitled to a judgment of acquittal, cannot be a waiver of the constitutional protection against being tried a second time. On the contrary, it recognizes and affirms that a valid trial has been had at which the defendant became entitled to and should have been granted judgment of acquittal.

No decision has held that an appeal resulting in *a reversal on that ground* constitutes waiver of the constitutional protection against another trial *unless the defendant specifically requested a new trial upon reversal on that ground*. It is only when there is such an affirmative request for a new trial that waiver of the constitutional protection can be imputed.

In the *Green case*, the Court rejected the contention that an appeal by defendant from a judgment of conviction in and of itself operates as a waiver of the Double Jeopardy Clause of the Fifth Amendment. The Court called attention to Justice Holmes' characterization of such a contention as "indefensible" (p. 196) and to Justice McKenna's statement that the exercise of the

right of appeal does not "forfeit . . . great and constitutional rights."

In *Bryan v. United States*, 338 U.S. 552, cited by the Government, the *defendant sought a new trial* or a judgment of acquittal in the alternative. It was this specific request that was construed as a waiver of the Double Jeopardy Clause of the Fifth Amendment.

In *Ball v. United States*, 163 U.S. 662, cited by the Government, the appealing *defendants* sought a writ of error in which they *prayed*

> "that the judgment be reversed and the case remanded *for a new trial.*"

The judgment of conviction was *reversed because the indictment was held to be insufficient*, with directions to quash the indictment "and to take such further proceedings in relation to them as to justice might appertain."

In that case, it was the *defendants* who *sought a new trial*. The defendants' prayer for a new trial constituted the waiver of the Double Jeopardy Clause of the Fifth Amendment. It was *not* a case in which *the Government* seeks a new trial after the Court has concluded that the defendant was entitled to a judgment of acquittal. In the *Ball case*, the Court, in reversing the first conviction, did not do so on the ground that the defendants were entitled to a judgment of acquittal by reason of the insufficiency of the evidence.

The value of the *Ball case* as authority has been greatly impaired, if not dissipated, by the decision in the *Green case*, supra.

In none of the cases cited, did the Court of Appeals remand for a new trial so that the Government could have a new trial *on its motion* to enable it to try defendant on an "alternative theory" which it did not request in the first trial.

It is now well established that there can be no "waiver" of a constitutional protection unless the waiver is made "knowingly" and "intentionally" (*Green case*).

Waiver of the constitutional protection cannot be "inferred." "Every reasonable presumption is against the waiver of a fundamental right" and constitutional rights must be "jealously and vigilantly guarded."

> Emspak v. United States, 349 U.S. at 198;
> Smith v. United States, 337 U.S. at 150;
> Glasser v. United States, 315 U.S. at 70;
> Johnson v. Zerbst, 304 U.S. at 464.

In *Himmelfarb v. United States*, 175 F. 2d 924, at 931 (9th Cir.), on the authority of some of the above cited cases and others, the Court held:

> "A waiver involves the *intentional* relinquishment or abandonment of a known right or privilege. A *strong presumption is raised against the waiver* of fundamental rights by an accused. *His constitutional rights are jealously and vigilantly guarded.*" (Emphasis supplied).

In the case at bar, Petitioner took every precaution to prevent the motion for a new trial and the appeal from being construed as a waiver of his constitutional right to protection under the Double Jeopardy Clause of the Fifth Amendment.

The only case which seems to have squarely presented the question now before the Court is *Karn v.*

United States, 158 F. 2d 568 (9th Cir.), cited in Petitioner's former Brief, p. 26, and pertinent quotation made therefrom. We respectfully submit that the case should be followed, and the conclusion reached by the Court of Appeals, of the Ninth Circuit, should be confirmed by this Court. The reasoning of the Court is unexceptional and it is evident that the decision was rendered after an exhaustive review of many cases in this and other Courts. (See cases cited in footnote 2, p. 573).

The decision in the *Karn case* was influenced in large part by the decision of the Court of Appeals of the Seventh Circuit in *Ex Parte United States*, 101 F. 2d 870, which was affirmed by this Court, in an equally divided Per Curriam Opinion (308 U.S. 519). We cited the case of *Ex Parte United States* (pp. 32 and 33 of Petitioner's former Brief). In that case, the District Court entered a judgment dismissing the indictment after the verdict of guilty was rendered, on a motion for judgment notwithstanding the verdict. The *Government moved for an amendment of the judgment so that it would provide for a new trial instead of a dismissal of the indictment*. The District Court denied this application and a writ of mandamus was sought to compel such modification.

While that case involved the power of the District Court to entertain the Government's motion for a new trial and not the power of the Court of Appeals, the case did involve the important question of the duty of the District Court when confronted with a case in which the evidence was insufficient to support a verdict. The

conclusion was reached that it was the duty, under such circumstances, to direct an acquittal and not discretionary to order a new trial.

The decision of the Court of Appeals of the Ninth Circuit in the *Karn case* has not been impaired by any subsequent decision of that or any other Court.

In the *Sapir case* the question was presented but the per curriam opinion merely held that the original opinion was correct and did not pass upon the question of double jeopardy. Justice Douglas' concurring opinion, however, supports petitioner's contention that when the reversal is on the ground that it was error to submit the case to the jury, a new trial cannot be directed without violating the double jeopardy clause of the fifth amendment.

II.

Re: Construction and Application of Section 2106 of Title 28, U.S.C.A.

In *Kotteakos v. United States*, 328 U.S. 750, at pages 763 and 764, the Court, in construing Section 269 of the Judicial Code (harmless error statute), recognized that a different construction must be given to the statute in *criminal* cases than in civil cases; that when applied in criminal cases, it must not be construed so as to permit *"departure from a constitutional form"* and that it

> "did not make irrelevant the fact that a person is on trial for his life or his liberty. It did not require the same judgment in such a case as in one involving only some question of civil liability."

Section 2106, Title 28, U.S.C.A., in so far as it may

confer discretionary power on the Appellate Courts, is of the same general character as Section 269 of the Judicial Code construed in the *Kotteakos case* and likewise, *must not be construed to permit a "departure from a constitutional norm."*

The Government contends that there is, in fact, evidence in the record supporting the alleged alternative theory and by reason thereof, the defendant was not entitled to judgment of acquittal in the District Court. Assuming the existence of such evidence to support the alleged alternative theory, it only supports the view that the Government could have requested submission of the case to the Jury on that alternative theory in the first trial. It does not follow that it is entitled to try defendant again on the alleged alternative theory. It wants another trial so that it can do what it failed to do in the District Court in the first trial.

Under the circumstances of this case, it is neither "just" nor "appropriate" that the Government should be granted a new trial on its petition so that the case could be tried over again on the alleged alternative theory. If Section 2106 of Title 28, U.S.C.A., is construed to permit this to be done, then it would be void as in conflict with the Double Jeopardy Clause of the Fifth Amendment because it would enable the Government to *try the defendant piece-meal* for the same offense. The Government would be entitled to as many trials as there are theories upon which a conviction could be obtained. It would enable the Government to split up the single offense and indict and try the defendant on one theory and when defeated in the trial or Appellate Court, it

could indict and try him on another theory for the same offense and so on without end.

III.

Re: Contention That the Case Could Have Been Tried on "One or Both of Two Independent Theories."

The Government argues (Br. pp. 20 to 22) that it

> "could, conceivably, have sought to meet this burden by proceeding on one or both of the two independent theories as to the nature of the conspiracy."

It then discusses one theory, denominated as the *"Beacon Brass* theory," and the other, as the *"Grunewald* theory," and says that the case was presented on one only of the two theories, to-wit: *"Beacon Brass* theory."

The record discloses that the case was not submitted to the Jury on any so-called *Beacon Brass* theory. It was submitted to the Jury on the principles of law governing the application of the statute of limitations *in conspiracy cases* as laid down in the *Grunewald case*. The Government defended in the Court of Appeals the instruction as given and insisted that the instructions conformed to the requirements established in *Grunewald*. See Government's contentions set forth in its Brief in the Court of Appeals quoted at pages 3-4 of this brief.

The Government only argued that there was evidence sufficient for submission to the Jury under the *Grunewald* theory embraced in the instructions. This contention was rejected by the Court of Appeals

in its Original Opinion and it did not reverse that conclusion on the Government's petition for a new trial.

Notwithstanding its expres. reliance on the *Grunewald* theory, it then says it "has no place whatever in this case" (Br. 21).

Assuming, without admitting, that the case could have been submitted on the two alleged theories, the fact remains, and it is conceded, that the case was tried on one theory only. The Government conceded that it did not seek submission of the case on the alleged alternative theory. (Petition for a new trial, printed as an appendix to the brief in opposition to the petition for writ of certiorari at page 17). The Government did not request submission of that theory to the Jury and it was not assigned as error in the Court of Appeals in its brief or oral argument.

The constitutional protection against double jeopardy requires that a defendant in a criminal case should be tried on all available theories in one trial. It cannot split up a single offense into a number of theories and try the defendant in separate trials on each of the available theories. The Government cannot try the defendant on one theory and, when defeated, seek an opportunity to try him again on another theory.

In *Abbate v. United States*, 359 U. S. 187, 79 S. Ct. 666, and in *Hoag v. State of New Jersey*, 356 U.S. 464, the view was expressed by Members of the Court that when a single act or transaction violates several criminal provisions, each constituting a separate offense, the defendant *must be tried* for all of the criminal offenses

arising out of the one act or transaction *in a single trial* and to try him in separate trials for each separate offense arising out of a single act, would violate the Double Jeopardy Clause of the Fifth Amendment.

In the *Abbate case*, Justice Brennan said:

> "The accused, although punished separately and cumulatively for various aspects of a single transaction, is *subject to only one prosecution and one trial.*" (Emphasis supplied).

In the *Hoag case*, the Court said:

> "But even if it was constitutionally permissible for New Jersey to *punish* petitioner for each of the four robberies as separate offenses, it does not necessarily follow that the State was free to *prosecute* him for each robbery *at a different trial.*" (Emphasis supplied).

This principle applies with greater force in the case at bar where the act or transaction gives rise to only one criminal offense under one statute and a second trial is sought so that the defendant could be tried on another or alternative theory.

It is now well settled that on appeal, neither the appellant nor the appellee can rely upon a theory not presented in the Trial Court either for reversal or affirmance of the judgment. This principal has been stated in various ways.

Johnson v. United States, 318 U.S. 189 at 201, the Court held:

> "We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that

> the course which he rejected at the trial be reopened to him. . . . .
>
> "The Court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal. The fact that the objection did not appear in the motion for new trial or in the assignments of error makes clear that the point now is a 'mere afterthought.' United States v. Manton, supra, 107 F. 2d page 847."

In the cited case, the *defendant* was held bound by the rules therein set forth. There is no apparent reason why the Government should not be bound thereby. Indeed, the Double Jeopardy Clause of the Fifth Amendment and the law which denies the right to seek a new trial and the right of appeal in criminal cases, makes it mandatory to hold the Government to these rules.

In *United States v. Waechter,* 195 F. 2d 963 (9th Cir.), the Court held:

> "We agree that the government, whatever may be the strength of its present argument, cannot fairly urge as a ground for reversal a theory which it did not present while the case was before the trial court."

In 3 Am. Jur., Title: Appeal and Error, page 35, Section 253, the text says:

> "It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review." (Citing many U.S. Supreme Court Cases).

In *Indiviglio v. United States,* 249 F. 2d 549 (5th Cir.), the Court held:

> "These principles are axiomatic and have, through the ages, guided courts of every rank and jurisdiction: 'The general rule * * * is that an

appellate court will consider only such questions as were raised and reserved in lower court.' It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review . . . .

* * * * * *

"We are without power to grant appellants more than they requested of the court below, or to grant relief upon a different theory from that advanced in the court below and before us."

Other cases stating these rules in the same or similar language are:

Inman-Poulsen Lumber Co. v. Commissioner, 219 F. 2d 159 (9th Cir.);
Fanchon & Marco, Inc. v. Paramount Pictures, 215 F. 2d 167 (9th Cir.);
Valley Shoe Corporation v. Stout, 98 F. 2d 514 (8th Cir.);
Dougall v. Spokane P. & S. Ry. Co., 207 F. 2d 843 (9th Cir.);
Kirk v. St. Joseph Stock Yards Co., 206 F. 2d 283 (8th Cir.).

These principles apply with greater force in *criminal* cases because the Government cannot, in a criminal case, become an appellant, assign error, or seek a new trial on any ground.

It is also well established that the instructions, as given, unexcepted to, *become the law of the case* and that the Appellate Court, in determining whether evidence was sufficient to sustain a verdict, must test the sufficiency by the law as embraced in the instructions.

In *National Surety Corp. v. City of Excelsior Springs*, 123 F. 2d 573 (8th Cir.) the Court held:

"These instructions, not having been excepted to by either party, became the *law of the case*, and in determining whether the evidence was sufficient to sustain a verdict for plaintiff, we must test its sufficiency by the law as announced therein." (Emphasis supplied).

In *Carter Carburetor Corp. v. Riley*, 186 F. 2d 148 (8th Cir.) the Court held:

"The court's instructions, not being excepted to by either party, became the *law of the case* and we must determine the question of the sufficiency of the evidence by the law as so announced." (Emphasis supplied).

In 53 Am. Jur., Section 626, Title: Trial, page 488, the text says:

"However, where the court instructs upon the issues raised by the pleadings and justified by the evidence, its failure to instruct on all theories which may be drawn from the evidence introduced is not error, in the absence of requests for such instructions."

* * * * *

at page 620, Section 844, it says:

"An instruction not objected or excepted to is not before the appellate court for review, but must for the purposes of the case be *taken as the law*. Right or wrong, the instruction becomes the law of the case and is binding upon the jury, except where they are judges of the law, as well as on the court and counsel. The rule applies where the sufficiency of the evidence is sought to be challenged on motion for a new trial. . . .

* * * * *

"The instructions are the *law of the case*, and bind the jury even though they may be erroneous."

This rule applies with greater force in criminal cases

under the principle expressed in *Green v. United States*, 355 U.S. 184, as follows:

> "Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. United States v. Ball, 163 U.S. 662; Peters v. Hobby, 349 U.S. 331."

As a predicate for the availability of the alleged alternative theory, the Government argues that the instructions as given were erroneous notwithstanding the fact that the Government was the appellee, and not appellant, and notwithstanding the fact that it did not object or except to the instructions, as given, and made no request to give other or additional instructions. We submit that the Government could not lawfully urge such errors in the Court of Appeals and seek a new trial based thereon for it is well settled that errors in instructions, not excepted to, cannot be reviewed (Rule 30, Federal Rules of Criminal Procedure) and, particularly so, when urged by the appellee and not by the appellant.

In *Humes v. United States*, 170 U.S. 210, 18 S. Ct. 602, the Court held:

> "We cannot regard as error the omission of the court to give instructions which were not asked. In Isaacs v. U. S., 159 U.S. 487, 491, 16 Sup. Ct. 51, Mr. Justice Brown said: 'It is no ground for reversal that the court omitted to give instructions, where they were not requested by the defendant. . . . Nor are the instructions which were given, but not excepted to, subject to review.' (Cases)."

In *Holliday v. Great Atlantic & Pacific Tea Company*, 256 F. 2d 297 (8th Cir.), the Court held:

"This is an appellate court and before we can properly say that the trial court was in error that court must have been given an opportunity to pass upon the question. Alleged errors cannot for the first time be urged in this court."

In *Cofer v. United States*, 256 F. 2d 221 (8th Cir.) the Court held:

"No objections were made and no exceptions taken to the charge of the court in this regard, and nowhere in the record have we been able to find that what we are now asked to decide was specifically called to the attention of, or ruled upon by, the trial court. The function of this Court is to review only rulings made by a trial court on questions brought to its attention and passed upon by it. Ayers v. United States, 8 Cir., 58 F. 2d 607, 608."

IV.

Re: So-Called Beacon Brass Theory.

The so-called "*Beacon Brass* theory" is an afterthought. It was conceived and projected, for the first time, with the filing of the petition for a new trial after the Court of Appeals had reversed the conviction with directions to enter a judgment of acquittal.

The *Beacon Brass case* did not decide any issues involved in this case. It was not a conspiracy case and the Court did not pass upon the question of the application of the statute of limitations in conspiracy cases. The Court did not, in that case, decide that a single offense of attempt to evade the tax in a single tax year could be split up into several offenses, each predicated on a different theory, and subject the defendant to several trials, each one on a different theory.

As was pointed out in the former brief, the Supreme Court held that it was without jurisdiction to consider the question of the application of the statute of limitations because the indictment did not allege the filing of the false income tax return prior to the making of the alleged false statements.

In the recent case of *United States v. Bridell,* Case No. 58, C. R. 475, United States District Court for the Northern District of Illinois, Eastern Division, Decision by Judge William J. Campbell, rendered November 20, 1958 (unreported), the Court held that the *Beacon Brass* case was not applicable to a case which, in essential particulars, was the same as the case at bar.

Pertinent portions of the Opinion are printed in the Appendix, pages 48 to 55.

The facts were as follows:

On March 14, 1952, defendant filed an individual tax return for the tax year 1951 in which he falsely reported $6,008.00 income from American Carbon Paper Corporation. On June 13, 1952, as President of the Corporation, he caused to be filed a corporate tax return which falsely reported payment to him of the said $6,008.00.

The prosecution was commenced June 13, 1958.

The indictment alleged that the false corporate return was filed "for the purpose of concealing additional unreported income," received by him in the year 1951.

Defendant moved to dismiss the indictment on the ground that the prosecution was barred by the statute of limitations on the theory that the "attempt" to evade

was complete upon the filing of the individual return on March 14, 1952; that the statute of limitations commenced to run from that date; that the subsequent filing of the corporate return (assuming that it was "for the purpose of concealing the said unreported additional income") was merely an *"aggravation" of the offense already committed and not a separate offense which would start the running of the statute of limitations.*

The Government contended (as it does in the case at bar) that the subsequent filing of the corporate return by the defendant constituted a *separate offense* because it was for the purpose of concealing that the individual return did not report all of the income and that the statute of limitations therefore commenced to run from the filing of the corporate return.

The Government relied on the decision in the *Beacon Brass case.*

The Court rejected the Government's contention and held:

(a) that the *Beacon Brass Decision* did not adjudicate that the false statements, described in the indictment in that case, constitute a separate offense of attempted tax evasion from the offense involved in the filing of the false tax return;

(b) that the *Beacon Brass Decision* did not adjudicate the application of the statute of limitations because the Supreme Court held that it had no jurisdiction to consider the question since the indictment did not allege the filing of the false return and, consequently, the *Beacon Brass Case* was not authority for the Government's position;

(c) that the case of *United States v. Sclafani*, 126 F. Supp. 654, was not authority for the Government's position because it was decided upon the erroneous conclusion that the *Beacon Brass Case* adjudicated these issues.

The Court held that the offense of attempted tax evasion was complete upon the filing of the false individual return; that the later filing of the corporate return by the defendant for the *purpose of concealing* the unreported income, *was not a separate offense*, but was merely an *aggravation of the offense already committed*, that the statute of limitations *commenced to run from the date of the filing of the individual tax return*, and being more than six years prior to the indictment, the indictment was dismissed.

It is highly significant that the Government did not appeal from this decision because the Government has been consistently urging the *Beacon Brass Case* as authority for the proposition that separate offenses can be carved out of the attempt to evade the tax liability for a single tax year; by predicating prosecution on different acts of attempted evasion committed at different times and thereby prolong the statute of limitations.

In the case at bar, the record establishes that Seijas filed a false individual return in March of 1946 and the subsequent acts committed by him (assuming they were established by evidence), were merely acts of concealment of the offense already committed and, under the decision in the *Bridell case*, the statute of limitations commenced to run from the filing of Seijas' return in March 1946.

The instruction given in the case at bar that the statute of limitations began to run from the date of the filing of the false return in March 1946 was correct, especially so, because it was coupled with the further instruction that the prosecution would not be barred if the Jury found that the subsidiary conspiracy, as therein described, was entered into.

The Government approaches this contention with the statement (Br. 21) that both parties here agree that the "Grunewald theory" has no place in this case. This is an erroneous statement. The instructions on the application of the statute of limitations were drawn and requested by Petitioner in accordance with the principles laid down in the *Grunewald case*. The only contention made by the Petitioner was that the case should not have been submitted to the Jury at all. He did not contend that the instructions, as given, was improper.

The Government did not seek submission of the case to the Jury upon the so-called *Beacon Brass* theory by any request for an instruction embodying that theory. In did not, in the Court of Appeals, assert the so-called *Beacon Brass* theory in its brief or oral argument. The case was not even mentioned therein. It was referred to for the first time, in the Government's petition for rehearing (new trial).

At the time that the Government's Brief in the Court of Appeals was written, this Court had already decided the *Grunewald case*. The Decision is referred to and discussed in the brief. The principles applicable to the statute of limitations in conspiracy cases were

clearly established. Yet, in writing its brief, the Government did not attempt to avoid the application of the principles laid down in the *Grunewald case* and did not contend that the case was governed by the so-called *Beacon Brass* theory. The Government merely contended that the evidence was sufficient to sustain the conviction upon the theory on which the case was submitted to the Jury.

Indeed, the Government conceded in its petition for a new trial (attached as an Appendix to its brief in opposition to the petition for the writ of certiorari), that the instructions as given were proper. It said (p. 17 of said brief):

> "It must be conceded that the case was not submitted to the jury in accordance with the theory outlined above. As this Court (Court of Appeals) has pointed out, at the time this case was tried the Court of Appeals for the Second Circuit had recently held in *United States v. Grunewald*, 233 F. 2d 556, that the kind of 'subsidiary conspiracy' *instructions given to the jury in the instant case were proper*. Neither the trial judge nor the Government then had the advantage of the principles later established by the Supreme Court in reversing the conviciton in *Grunewald*. Accordingly, the Government made no objection to the trial court's instructions."

The Decision of this Court in *Grunewald* lends no support to the Government's contention that a defendant can be tried in as many separate trials as the number of theories devised by the Government.

In *Grunewald*, this Court clearly established the principle that where acts of concealment are relied on to

prolong the operation of the statute of limitations in conspiracy cases, the evidence must establish that there was

> "an express original agreement among the conspirators to *continue to act* in *concert* in order to cover up, for their own self protection, traces of the crime after its commission."

This was the principle embodied in the District Court's instruction to the Jury in what the Government describes as a "subsidiary conspiracy instruction" and was clearly proper under the decision of the Court of Appeals for the Second Circuit and of this Court in *Grunewald*.

Assuming that the record discloses that the acts of concealment were committed, there is not a shred of evidence that they were committed, pursuant to an antecedent conspiracy that they were to be committed.

Under the cases, cited in the former Brief, (pp. 51-2), evidence of the commission of certain acts of concealment do not constitute evidence of the existence of an antecedent agreement or conspiracy to commit the acts of concealment. The existence of a conspiracy cannot be inferred from the fact that certain acts were committed. That was clearly established in *Grunewald* and *Krulewitch*. What is lacking in the case at bar, is the evidence of the antecedent agreement or conspiracy to conceal or to commit acts of concealment.

V.

Re: Comparison of Alleged Alternative Theory Urged in the Case at Bar with the Alternative Theory in the Grunewald Case.

The Government argues (Br. 34-35) that the alternative theory in the case at bar and the *Grunewald* are parallel, that "in this aspect is thus indistinguishable" and that "petitioner is not more entitled to a judgment of acquittal here than were the defendant in Grunewald." The contention is without foundation:

(1) In *Grunewald,* the alternative theory was submitted to the Jury at the first trial. In the case at bar, the alleged alternative theory was not submitted to the Jury. That was the very basis of the Government's petition for a new trial.

The Court of Appeals based its Modification Opinion on the ground that the case "might have been tried upon this alternative theory." (R. 1937).

The Government now says (Br. 35) that it is equally true in the case at bar that the alternative theory was submitted. That is an incorrect statement. The Government admitted, in its petition for a new trial, that the alleged alternative theory was not submitted to the Jury. It said:

> "It must be conceded that the case was not submitted to the jury in accordance with the theory outlined above." (Referring to the alleged "alternative theory"). (Petition for Re-Hearing attached as Appendix of Brief in Opposition to Petition for a Writ of Certiorari, page 17).

(2) In the *Grunewald case* it was the defendant who assigned error in the instruction submitting the alternative theory and sought a new trial by reason thereof. Defendant took exception to the instruction in the District Court. (Record in *Grunewald case*, 752-753-757). The defendant had the right as appellant to assign the error and to seek a new trial by reason thereof.

In the case at bar, it is the Government that petitioned for a new trial, because the alternative theory had not been submitted.

The law does not give the Government the right to appeal or to assign error in a criminal case or to seek a new trial in a criminal case. The statutes governing appeals in criminal cases, the federal rules of criminal procedure governing applications for a new trial, and the Double Jeopardy Clause of the Fifth Amendment, all preclude the right of the Government in a criminal case to seek a new trial and, particularly so, when it acquiesced in the theory upon which the case was submitted to the Jury.

Petitioner erroneously stated in the former brief that the alternative theory in the *Grunewald case* was submitted on request of the defendant. This statement was an inadvertence. The record does not disclose at whose request the alternative theory was submitted to the Jury. It is immaterial, of course, at whose request the instruction was submitted. The important fact is that the theory was, in fact, submitted for consideration *in the first trial*. This Court reversed the decision of the Court of Appeals in the *Grunewald case* and remanded

for a new trial because of an error in the submission of the alternative theory in that it did not sufficiently distinguish the issues between the primary and alternative theory. Having reversed for error in the instruction, the only relief that could be granted was to remand for a new trial.

In *Grunewald,* the Court did not determine that there was a lack of evidence warranting submission of the case to the Jury on both theories. It determined that there was sufficient evidence warranting submission of both theories to the Jury. It only concluded that in giving the alternative instruction, the Court was not sufficiently specific.

VI.

Re: Power of the Court of Appeals on Petition for Re-Hearing.

The Government advances the contention (Br. 37) that the Court of Appeals has the power to entertain a petition for re-hearing when timely filed and upon such petition, may revise its decision.

Petitioner does not for a moment contend that the Court of Appeals could not entertain a true petition for re-hearing and, on such re-hearing, reverse its former determination of issues erroneously decided by it. Petitioner only claims that the Government's petition, although denominated petition for re-hearing, was not such, as a matter of law, but was, in legal effect, an original proceeding for a new trial under the record of this case.

The Government's petition did not ask that the Court of Appeals reverse its former determination that it was error to submit the case to the Jury on the instructions as given, which was the only issue decided by the Court. The Government did not seek reversal of the decision reversing the judgment of conviction. It only asked that the case be remanded for a new trial so that the alleged alternative theory could be submitted to the Jury.

That petition did not challenge any issue decided by the Court of Appeals in the Original Opinion. It merely presented the issue of the availability of the alleged alternative theory. The petition stated:

> "It must be conceded that the case was not submitted to the jury in accordance with the theories outlined above."

The petition for a new trial was, in effect, the same as the application for a new trial so that the defendant could be tried on *newly discovered evidence* as in the *Sapir case.*

So far as the issue now before the Court is concerned, we see no difference between a petition to the Court of Appeals by the Government for a new trial on newly discovered evidence or to enable it to try defendant a second time on an alternative theory.

Petitioner only contends that under the record in this case, the Court of Appeals had no power to direct a new trial, *either in its Original Opinion, or on the alleged petition for re-hearing* which was, in legal effect, an original proceeding for a new trial.

The fact that the document was called a petition for re-hearing and that it was filed within the time allowed for filing such a petition, does not make it, in legal contemplation, a petition for re-hearing. The Court should construe the document for what it is in legal effect, under the circumstances of this case and so construed, it is merely an original application to the Court of Appeals for a new trial to enable the Government to try the defendant again on a theory other than that on which the case was sent to the Jury.

VII.

Re: Sufficiency of the Evidence to Establish Conspiracy "Continuing until January, 1952."

The Government argues (Br. 23 to 32) that there is sufficient evidence of conspiracy to evade Seijas' tax "which persisted at least until January 1952."

The prolongation of the statute of limitations period is predicated on the specific Overt Acts 24, 26, 29, 30, 31, 32 and 33 (R. 15 to 18). Whatever may be said as to the existence of evidence to establish the *commission* of those acts (we have demonstrated in the former Brief the lack of such evidence, pages 52 to 68), the important fact remains that there is no evidence that Seijas committed those *acts pursuant to antecedent agreement or conspiracy with Forman*, Petitioner, *that he should commit such acts.* Petitioner was on trial for conspiracy and not for the commission of substantive offenses.

The *Grunewald* and *Krulewitch cases* fixed the standards of proof necessary to establish such conspiracy. They were summarized in the statement that there

must be

> "direct evidence . . . to show . . . an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection traces of the crime after its commission."

The evidence of such an agreement is lacking in the case at bar.

The Government does not point to evidence of such an agreement.

In *Grunewald* and *Krulewitch,* the Court held that acts of concealment of the same character as those described in the overt acts in the case at bar, do not establish the existence of the requisite *conspiracy to act in concert, etc.*

The acts, described in the overt acts, were merely acts of concealment of the attempted evasion *already committed* by Seijas by the filing of false returns. They were similar to the acts of concealment considered in the *Grunewald* and *Krulewitch cases* which were held to be insufficient to establish conspiracy to act in concert, etc. to accomplish the unlawful purpose.

The Court of Appeals decided that:

> "The policy that blocked the theory stated in *Krulewitch* blocks this one also. Upon the authority of this decision of the Supreme Court we hold that it was error to permit this case to go to the jury."

The Court of Appeals did not depart from that conclusion in the Modification Opinion. It only held there was evidence in the record which would have warranted submission to the Jury of an alternative theory

had the Government requested instructions embodying such theory.

There is no conflict between the law as embodied in the instructions of the District Court as given and the decision in the *Beacon Brass case*. The *Beacon Brass case* was *not a conspiracy case*. It only established that the *substantive offense* of attempted evasion can be committed by certain acts of concealment. It did not deal with the question of *conspiracy* to evade or *the application of the statute of limitations* to such conspiracy.

The instruction that the conspiracy terminated in March 1946 does not stand alone. The Court instructed that the conspiracy would be terminated as of that date *unless there was an agreement to act in concert* of the kind described in *Krulewitch* and *Grunewald* and the Court of Appeals determined that there was no evidence of such an agreement. From this determination, the Court never departed.

The Government argues (p. 28) that the Jury could reasonably have found—under proper instructions—that the evasion conspiracy was still alive after November 19, 1947.

If that be true, then it was incumbent upon the Government to seek instructions submitting that theory to the Jury. It required additional instructions to submit such a theory. The fact that such a theory could have been submitted, does not establish that the theory upon which the case was submitted, was erroneous.

In any event, there is no evidence in the record to support the alleged alternative theory based on the overt acts numbered 24, 26, 29, 30, 31, 32 and 33. (R. 15 to 18).

The Government has, in effect, abandoned reliance on Acts 26 and 30 (Br. 29). It discusses only Acts 24 and 29, and 31, 32 and 33.

The abandonment of Act 26 also requires rejection of Act 29 because they are identical.

Act 26 relates to the tax years 1944 and 1945 and Act 29 relates to the year 1945 alone, otherwise, the allegations are identical as to date and all other respects.

Re: Act 24. Revenue Agent Clodfelter's Interview with Seijas on December 1, 1958.

The Government's Brief does not establish an interview between Clodfelter and Seijas on or about December 1, 1948. The Brief says:

> "The record does not show the exact dates in 1948 on which Clodfelter talked to Petitioner and Seijas." (Br. 14).

It argues that Revenue Agents' reports are written up within a week or ten days of an interview and reference is made to pages 1327-1331-1332 and 1351 of the Record.

The testimony at these pages is not by the Revenue Agent Clodfelter. It was given by other Agents.

Revenue Agent Carlson had an interview in 1944. His report was dated November 4th, but he testified

that he called in Portland in August 1944 (R. 1331), indicating that his surmise that the interview was shortly before November 4th, was pure speculation.

The testimony at page 1351 of the Record is by the Agent Riedel. He rendered a report dated February 28, 1947. When questioned about the date of the interview, he was unable to give the date, but said it was

> "sometime prior to that. (Reporting). That is within the general time area." (R. 1351).

In any event the practice followed by these two Revenue Agents was not competent evidence to establish the date when Agent Clodfelter had an interview with Seijas. Clodfelter did not testify to any general practice as to the time between interview and report.

The question at issue is the application of the statute of limitations. Consequently, the burden is on the Government to fix the date of an act from which the statutory period is to run. It cannot be left to speculation or surmise. In a criminal case, the date has to be established beyond a reasonable doubt.

This is not a case where the interview on a given subject is admitted and the only issue is the date of the interview.

In this case, there is no evidence of any interview on or about December 1, 1951, in which the subject matter was "re-examination of the information returns" of the pin ball partnerships involving the alleged "hold-out" income or "operating" income for the purpose of ascertaining the "true receipts and income of such partnership" as alleged in Act 24. (R. 15).

The subject matter of the interview, and the only matter within the jurisdiction of Revenue Agent Clodfelter at the time, was the treatment of the sale of a capital asset as a long-term or short-term capital gain, depending upon the existence of a "covenant not to compete."

The specific charge in Act 24 is that Seijas submitted, to a Treasury Agent, false books, etc. which under-stated the true receipts of such partnerships at that particular date. The Government attempted to prove this charge by the testimony of Agent Clodfelter. But he testified that he did not examine any books of the partnership to determine "the true receipts and income of such partnerships." His interview related solely to a single item, to-wit, the treatment of the sale of a capital asset as a long-term or short-term capital gain by reason of an agreement not to compete. It had nothing whatsoever to do with the "true receipts and income of the partnerships."

He testified (R. 1343) that he did not examine the books in reference to the operating income. He made no inquiry in that respect. His report (Exhibit 42) shows that he *was not examining into the partnership returns. He was examining into Seijas' own individual returns.*

The report (Ex. 42, R. 1961) is on Seijas' own tax liability and not on the "information returns" of the partnerships as alleged in overt act 24. There is nothing in the report to indicate any examination into the operating income of the partnerships.

He did, in one of his interviews, examine three partnership returns, but they were not of the pin ball partnerships. They were three separate partnerships which operated theaters, a dock concession and real estate venture, none of which are involved in the case at bar.

He testified that he did not request all of the records of the pin ball partnerships (R. 1343) and that the purpose of the examination was "with respect to the agreement not to compete (R. 1346). He did not ask whether all of the revenue was reported (R. 1348). That was because his examination was limited to "that subject matter," referring to the capital gain transaction.

The sum and substance of his testimony and the report, Exhibits 41 and 42, are that on the date of the report, December 9, 1948, the object of his interview was solely the determination of the question of the treatment of the sale of the capital asset as a long-term or short-term capital gain. He was not investigating the revenue from the pin ball operations to determine whether or not there was any unreported income. He made no inquiries concerning any unreported income and did not examine any books or records in that connection because they were foreign to the subject matter of his investigation.

What is more important, is that there is not a scintilla of evidence by Clodfelter, or in the reports, that any representations were made to him that the books and records, which he did examine, contained a complete and truthful record of the "operating in-

come." He simply was not conducting an audit of the records covering operating income. He was not there for the purpose of ascertaining those facts and nothing was said to him by Seijas or Renstrom, his bookkeeper, that the books, which were submitted (not all), were an accurate record of the operating income.

Consequently, there is a total failure of proof of Overt Act number 24 in every essential particular.

The evidence does not establish that the alleged Overt Act 24 was in furtherance of a conspiracy to evade the tax by submission of false records as alleged therein.

Re: Overt Act 29

This act alleged that on September 1, 1948, *Petitioner concealed* from an officer of the Treasury Department,

> "engaged in an official re-examination of *his* (not Seijas) and his wife's personal income tax returns for the year 1945 that during that year he received income from the aforementioned partnerships with . . . Seijas in addition to the amounts shown on the information returns" (R. 17).

We discussed this alleged act at page 54 of the former Brief. We there pointed out that there is no evidence in the record of any interview between Petitioner and any Revenue Agent on September 1, 1948. The Government's Brief does not point to any evidence establishing an interview between Petitioner and a Revenue Agent in which he concealed his income, or any interview on or about that date.

At page 30, in discussing overt act 29, the brief refers to page 14 and 15 of its Brief for evidence of that interview. Examination of pages 14 and 15 of the Government's Brief does not disclose any reference to any testimony establishing an interview between Forman and a Revenue Agent on or about September 1, 1948.

In the former Brief, page 54, Petitioner also contended that Overt Act 29 relates to an examination of *Petitioner's own tax return* and *not to Seijas' tax return* and, consequently, any false statement by Petitioner, if made, concerning *his own* tax liability, could not possibly be in furtherance of a conspiracy to evade Seijas' tax liability.

The Government meets this contention with the statement that

> "The jury was entitled to infer, . . . that each of the conspirators was protecting the other in order to protect himself, . . ." (Br. 30).

No authority is cited for this unusual statement.

Forman did not make any statements as to Seijas' income at that interview.

According to the allegation, the Revenue Agent was examining into Forman's "personal income" and it is alleged that Forman concealed "his" income, not Seijas' income. His statements concerning his own income could not be evidence of an "attempt," or an overt act on his part, in *furtherance* of a conspiracy to evade Seijas' tax liability.

The relevancy of any statements that Forman may have made, true or false, must be determined by the

subject matter of the Treasury Agent's investigation at that time, especially where the indictment charges the hybrid offense of violation of Section 145(b) of the Internal Revenue Code and Section 1001 of the Criminal Code. (Paragraph D, Record 5).

Weinstock v. United States, 231 F. 2d 699 (Quotation at page 58, former Brief).

Re: Overt Act 30.

We shall not discuss Overt Act 30 because it has, in effect, been abandoned by the Government as heretofore pointed out.

Re: Overt Acts 31, 32 and 33.

These three Acts charge:

(a) submission of a false net worth statement by Seijas on December 29, 1951, to Revenue Agents; and

(b) the making of two false oral statements by Seijas to the Revenue Agents on January 11, 1952, when the net worth statement was being discussed.

These three Acts were discussed in the former Brief at pages 55 to 68.

It was there demonstrated that the net worth statement was submitted and the January 11, 1952, interview was held to discuss Seijas' tax liability for the tax years 1946 to 1948 and not the period 1942 to 1945. The subject matter within the jurisdiction of the Revenue Agents at that time was the tax liability for the 1946-1948 period and, consequently, any statements

that may have been made, true or false, could not be in furtherance of a conspiracy to evade Seijas' tax liability for the period 1942 to 1945.

The Government counters with the statement (Br. 30) that

> "Petitioner, treating the three acts as one . . . , views the evidence in the light most unfavorable to the verdict . . ."

There is an implication in this statement that there was an issue of fact about the subject matter of that interview. The Government does not point to any evidence to contradict the contention that the subject matter of the interview was not the 1946 to 1948 period.

Petitioner's contention, as it is developed in the former brief, is *predicated on the Government's testimony which it produced. It came from the Revenue Agents Oftedal and O'Leary, produced by the Government, and from the exhibits, to-wit, the net worth statement and accompanying letter and the Revenue Agent's reports.* The contention was not predicated upon contradictory evidence. The character of the testimony on which the Petitioner's contention was predicated is illustrated by the following:

Revenue Agent Oftedal described the interview (R. 1510) as

> "a more general type discussion attempting to find out why there was a $165,000 of unreported income in the three year period." (Referring to the 1946 to 1948 period shown in the statement).

Since the subject matter of the interview was Seijas' 1946 to 1948 income, any statement that may have been

made concerning the 1942 to 1945 income was purely incidental and not deceptive, and certainly not in furtherance of a conspiracy to evade Seijas' 1942 to 1945 tax liability.

CONCLUSION

In remanding for a new trial, the Court of Appeals ignored every well established rule applicable to the trial and review of criminal cases:

(a) It undertook to review instructions given when the Government did not object or except thereto in the District Court in violation of Rule 30 of the Federal Rules of Criminal Procedure.

(b) It reviewed the instructions given notwithstanding the fact that the Government, as Appellee, could not, as a matter of law, cross-appeal or assign error on Defendant's appeal, and could not appeal.

(c) It ignored the rule that the instructions, as given and unexcepted to, become the law of the case, especially so in a criminal case.

(d) It reviewed the availability of an alternative theory when the Government did not seek submission of such alternative theory by requesting an appropriate instruction embodying the alleged alternative theory. (Rule 30, F.R.C.P.).

(d) It ignored the principle that in a criminal case the Government must *try the defendant in one trial on all available theories*. It cannot try the defendant on one available theory and when defeated, on appeal, seek to try him in a second trial upon another theory.

(f) It ignored the rule that on appeal, the case must be reviewed upon the theory on which it was tried, as embodied in the instructions, and

the sufficiency of the evidence must be measured thereby.

(g) It ignored the principle that the Government cannot, in a criminal case, seek a new trial.

(h) It failed to recognize that the petition was, in legal effect, an original proceeding for a new trial on a different theory and NOT a petition for re-hearing.

(i) It failed to recognize that reversal was based upon a determination that there was no evidence for submission to the Jury and not a reversal based upon errors infecting the trial.

The failure to give effect to these principles and rules resulted in a decision which, if allowed to stand, will deprive defendant of the protection of the Double Jeopardy Clause of the Fifth Amendment and would undermine, if not dissipate, the fundamental principles and policy established by the Court in the *Krulewitch* and *Grunewald* cases relating to the application of the statute of limitations in conspiracy cases and avoiding of the indefinite prolongation of the statute of limitations in such cases.

The record presents no apparent reason why it is "just" or "appropriate" that all of these principles and rules should be cast aside in order that the Government may have another go at this defendant.

Respectfully submitted,

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD,
Of Counsel
Public Service Building,
Portland, Oregon.

APPENDIX

United States v. Bridell, Opinion by Judge William J. Campbell in Case No. 58 C. R. 475, in the United States District Court for the Northern District of Illinois, Eastern Division, rendered November 20, 1958:

"Defendant has made a motion to dismiss this Count I of the indictment on the grounds that it was not found within six years next after the alleged offenses were committed;

. . . . . .

However, it is the contention of the defendant that the offense charged in the indictment was completed on March 14, 1952, by the filing of a fraudulent income tax return and that, therefore, the complaint instituted before the Commissioner on June 13, 1958, was not within the period limited by the statute of limitations and consequently the indictment returned on July 31, 1958 was not timely.

It is the contention of the Government that the offense charged is separate from the filing of the fraudulent income tax return, namely, the attempt to evade and defeat the taxes owing by the defendant by the filing and causing to be filed of a false corporation income tax return on behalf of the American Carbon Paper Corporation *with the purpose of concealing additional unreported income* of the defendant. Since this act occurred on June 13, 1952, the complaint instituted on June 13, 1958 would be within the period limited by the statute of limitations and consequently the indict-

ment returned on July 31, 1958 would be timely.

A plain reading of the indictment clearly shows that the crime charged in Count I of the indictment is the attempt to evade and defeat the taxes owing by the defendant through the filing and causing to be filed of a false corporation income tax return on behalf of the American Carbon Paper Corporation with the purpose of concealing unreported income of the defendant.

Since this act took place on June 13, 1952, the question presented is whether this act is an offense separate from the filing of the fraudulent income tax return on March 14, 1952 under Title 26 U.S.C.

. . . . . .

Defendant contends that the corporate return on June 13, 1952 was not a separate offense under Sec. 145(b) but was part and parcel of any offense which may have been committed by the defendant upon the filing of his individual tax return on March 14, 1952. In support of this contention, defendant cites *U. S. vs. Johnson*, 319 U. S. 503, 515; *Inholte v. U. S.*, 226 F. 2d, 585; *Cave v. U. S.*, 159 F. 2d 464; *Guzik v. U. S.*, 54 F. 2d 618.

The Government contends that the filing of the corporate return was a separate offense under Sec. 145(b) and cites *U. S. vs. Beacon Brass Inc.*, 344 U. S. 43 and *U. S. v. Sclafani*, 126 F. Supp. 654. The *Beacon* case involved an indictment returned against *Beacon Brass Co.* and its president on September 14, 1951, charging that both the defendants had attempted to evade taxes owing by making fraudulent statements to Treasury

representatives on October 24, 1945, "for the purpose of concealing additional unreported income in violation of Section 145 (b)."

The unreported income apparently should have been included in the corporate return which was filed in January 1945, though no reference was made to such in the indictment.

The District Court dismissed the indictment on the grounds that it failed to charge an offense under Title 26 U.S.C. Section 145 (b) because such making of false statements could be punished only by Sec. 35 (a) (18 U.S.C.A., Sec. 1001) of the Criminal Code, since that section dealt specifically with false statements and the three year limitation of that statute had expired as to statements made in October, 1945. The Supreme Court in reversing the District Court made some statements which to me appear confusing. At Page 45, the Court states:

> 'The purpose to evade taxes is crucial under this section. The language of Sec. 145 (b) which outlaws willful attempts to evade taxes 'in any manner' is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income.'

Then at Pages 46 and 47, in the same opinion, the same Court states:

> 'The appellees contend that the acts charged constitute only one crime of tax evasion which was complete when the allegedly false tax return was filed. On the basis of this contention, appellees seek to sustain the decision below on the grounds that the six-year statute of limitations had run, and that the dismissal of the first indictment is *res adjudicata*

> and a bar to the second indictment for the same offense. We do not consider these questions because our jurisdiction on this appeal is limited to review of the District Court's construction of the statute in the light of the facts alleged in the indictment.'

Then they cited United States v. Borden Co., 308 U.S. 188.

Thus, the Supreme Court is stating on the one hand that false statements to Treasury Agents are offenses, under Sec. 145 (b) and then stating that *they are not deciding whether or not such statements are part and parcel of the one crime of tax evasion which was complete when the allegedly false tax return was filed.*

In the *Sclafani* case, Counts 4 and 5 of information charged that on or about and between June 21, 1950, and on January 12, 1951, the defendant, a married man, willfully and knowingly attempted to defeat and evade part of the income taxes due from him and his wife for the years 1945 and 1946, respectively, by making, filing and causing to be filed with representatives of the United States Treasury Department certain false and fraudulent statements for the purpose of concealing additional unreported income. The returns for the years in question were filed in March 1946 and March 1947, respectively, more than six years prior to the filing of the information, the limitation fixed by Title 26 U.S.C. Sec. 3748 (a), subdivision 2.

The Court denied the defendant's motion to dismiss stating at page 656:

> 'In support of his motion the defendant cites the cases of *Guzik v. United States,* 54 F. 2d, 618, *Cave*

> *v. United States*, 159 F. 2d 464, and *United States v. Ehrlich*, 104 F. Supp. 223, contending that those cases are controlling since the crimes in said counts alleged were completed in March, 1946, and March, 1947. It is correct to say that prosecution for the alleged crime of attempted evasion of taxes *by the filing of false tax returns* was outlawed in 1954, but it was possible for the defendant to violate the statute involved in more than one way and on more than one occasion, and that is precisely what the Government accuses the defendant of doing. Counts 4 and 5 of the instant information charge that the defendant attempted to evade the payment of income taxes for the years 1945 and 1946, respectively, by filing or causing to be filed with representatives of the United States Treasury Department between June 21, 1950 and January 12, 1951, certain false and fraudulent statements for the purpose of concealing additional unreported net income for the years therein mentioned. The case of *United States v. Beacon Brass Co., Inc.*, 344 U. S. 43 appears to be in point. The pertinent facts in that case are substantially similar to those in the instant case . . .

Therefore, the *Beacon* case and *Sclafani* case relied upon by the Government here do not decide whether or not the defendant's act is, in the case at bar, a part and parcel of the offense of March 14, 1952 which was the filing of a fraudulent income tax return since the *Beacon* case expressly states that it is not deciding that question and the *Sclafani* case relies on the *Beacon* case as deciding that in a case of this nature two separate offenses are possible.

In my opinion the answer to this problem lies in the analysis of Sec. 145 (b), the section alleged to have been violated.

In *Spies v. United States*, 317 U.S. 492, the Supreme Court in discussing the difference between Sec. 145 (a) and Sect. 145 (b) made the following statement at pages 498, 499:

> 'The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt' as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law 'attempt.' The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeeds in evading the tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest offenses against the revenues, Congress intended some willful commission in addition to the willful additions that make up the list of misdemeanors. *Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any manner or to defeat it by any means lifts the offense to the degree of felony.*'

It is clear to me from this language, and it has been held by many cases in addition to those cited by defendant, that it is the *same act* which is *aggravated* to the degree of a felony by such conduct which amounts to a 'willful and positive attempt to evade tax in any manner.'

I cite *U. S. vs. Hoover*, 233 F. 2d 870; *Elwert v. U. S.*, 231 F. 2d 928; *Hayes v. U. S.*, 227 F. 2d 540; *Canton v. U. S.*, 226 F. 2d 313; *U. S. v. Barden*, 224 F. 2d 255; *U. S. v. Smith*, 206 F. 2d, 905.

The act which constitutes the offense in the case at bar was the filing by the defendant of a joint income tax return on March 14, 1952 which was aggravated by the subsequent filing by the defendant as a corporate officer of a corporate income tax return on June 13, 1952.

Therefore, the act of the defendant in filing a corporate return on June 13, 1952 is not an offense separate from the offense completed in March 14, 1952 by the filing of his fraudulent income tax return. Therefore, Count I of the indictment, which charges the defendant with a violation of Sec. 145 (b) with reference to his own personal income tax return by such an act must fail.

It is illogical to presume that the true nature of the offense as set out in 145 (b) is contained in the defendant's act of filing a fraudulent corporate return since the evasion, per se, took place when the defendant filed his personal return. Such a construction as urged here by the Government would enable the Government to continue the statute of limitations indefinitely by using any false statement in regard to a past tax evasion as a reviving of the statute of limitations.

The motion to dismiss Count I of the indictment is for the reasons stated granted. And the same is dismissed."

SUPREME COURT, U. S.

FILED
MAR 16 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

October Term, 1959.

No. 43

WILLIAM R. FORMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S PETITION FOR RE-HEARING

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD,
Of Counsel,
Public Service Building,
Portland, Oregon.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-60

INDEX

Page

I The Court erred in holding that "Petitioner concedes that this (remand for a new trial) would have been appropriate if such action had been taken by the Court of Appeals upon original submission" 1

II The Court erred in construing Section 2106, Title 28, U.S.C.A., as conferring power to direct a new trial in criminal cases in which a judgment has been reversed for want of evidence warranting submission of a case to the Jury 7

III The Court erred in holding that it has been heretofore established that the taking of an appeal by the defendant in a criminal case, constitutes, under all circumstances, a waiver of his right to the constitutional protection against double jeopardy and that the Appellate Court may direct a new trial in a case where the reversal is based upon lack of evidence 10

IV The Court over-looked the basic proposition that in a criminal case the Government is precluded from asserting error and seeking a new trial by reason thereof 17

V The Court erred in holding that if the Petitioner had not injected the infected language (subsidiary conspiracy theory) into the charge, the Trial Court would have submitted the "continuing conspiracy" theory 20

VI Justice Harlan erred in his Concurring Opinion in the construction and application of Rule 30 of the Federal Rules of Criminal Procedure to the case at bar 21

VII Justice Harlan erred in stating that the *Sapir* case does not recognize the distinction between reversal on the ground of errors infecting the trial and reversal on the ground of lack of evidence 25

INDEX (Cont.)

	Page
Conclusion	26
Certificate of Good Faith	28

AUTHORITIES CITED

Armstrong v. U. S., 228 F.2d 764	22
Ball v. U. S., 163 U.S. 662	11
Bryan v. U. S., 338 U.S. 552	8, 15
Federal Rules Criminal Procedure, Rule 30	21
Green v. U. S., 355 U.S. 184	11, 13
Independent Wireless Tel. Co. v. Radio Corp. of America, 270 U.S. 84	7
Karn v. U. S., 158 F.2d 568	8, 16
Kepner v. U. S., 194 U.S. 100	17, 18
Palko v. State of Connecticut, 302 U.S. 319	9, 18
Sapir v. U. S., 348 U.S. 373	9
U. S. v. Achilli, 234 F.2d 797, aff'd 353 U.S. 373	7
U.S.C.A., Title 28, Section 2106	10

In the Supreme Court
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No. 43

WILLIAM R. FORMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S PETITION FOR RE-HEARING

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner hereby respectfully petitions for a re-hearing of the above entitled cause, decided February 23, 1960, on the following grounds:

I

The Court erred in holding that

"Petitioner concedes that this (remand for a new trial) would have been appropriate if such action

had been taken by the Court of Appeals upon original submission."

The record establishes that Petitioner did not make such concession. On the contrary, he contended that the Court of Appeals could not lawfully remand for a new trial, either on the original submission or on the alleged petition for re-hearing. Petitioner's Reply Brief, page 34, states:

> ". . . the Court of Appeals had no power to direct a a new trial, *either in its Original Opinion, or on the alleged petition for re-hearing* which was, in legal effect, an original proceeding for a new trial."

Upon oral argument, Petitioner's Counsel made the same contention.

Petitioner's basic contention was, throughout, that Petitioner was entitled to the entry of a judgment of acquittal in the District Court on his motion, made at the close of the entire case, and upon renewal of the motion, after the verdict was rendered, because the evidence was insufficient for submission of the case to the Jury and when the Court of Appeals decided, on original submission, that the case should not have been submitted to the Jury, the *only direction it could lawfully make and did make* was the entry of a judgment of acquittal. It directed the District Court to do what it should have done in the first place (*Sapir case*).

The argument made in Petitioner's Briefs and in the oral argument, insofar as it was based on the action taken by the Court of Appeals on the alleged petition for re-hearing, was *an added reason* why the Modification Opinion should be vacated. Petitioner contended that

under the so-called petition for re-hearing, the Court of Appeals had *no more power* to remand for a new trial *than it had upon the original submission.*

Petitioner did not contend, in brief or oral argument, that the Court of Appeals had no power to entertain a (true) petition for re-hearing and to revise its conclusion if it determined that it had erred. This was conceded (Reply Brief, 33). It was only contended:

(a) that the Court of Appeals did not err in directing judgment of acquittal for lack of evidence; and

(b) the Government's petition was not, in legal effect, for "re-hearing," but was, in effect, an original proceeding for a new trial based on alleged error of the District Court which was not raised in any manner in the District Court or in the Court of Appeals on the original submission.

The alleged error on which it sought direction of a new trial was the submission to the Jury of the "subsidiary conspiracy" theory (not objected to) and failure to instruct on the "continuing conspiracy" theory (Not requested). This alleged error was not presented to or passed upon by the Court of Appeals on the original submission. The government's sole contention was that there was evidence in the record to support the verdict *under the instructions as given.*

It was, and is, Petitioner's contention that the Court of Appeals, being a Court of review only, cannot entertain any proceeding, however it may be labeled, to determine an issue not raised in the District Court or in the Court of Appeals, on the original submission.

When the Court of Appeals was asked to direct a new trial, after decision on the original submission, it was not called on to re-consider an issue theretofore submitted and passed upon, but was asked to try the issue de novo.

The Government did not, on the renewal of the motion for acquittal in the District Court or on the original submission in the Court of Appeals, confess error and seek a new trial.

The petition for a new trial, under these circumstances, *did not invoke appellate jurisdiction.* It called for the exercise of original jurisdiction which the Court of Appeals did not have.

In the District Court, Petitioner contended that prosecution was barred by the Statute of Limitations unless there was, in fact and in law, a subsidiary conspiracy that would toll the operation of the Statute of Limitations and that there was no evidence of such a subsidiary conspiracy.

The District Court denied the motion for acquittal because, in its opinion, there was evidence from which the Jury could find the existence of a "subsidiary conspiracy."

Petitioner had the right to have the issue of the existence of the subsidiary conspiracy submitted to the Jury after the Court ruled that there was evidence thereof in the record. *Petitioner had the right to have his theory of the case submitted to the Jury,* without waiving the contention that there was no evidence. (Rule 29b, Federal Rules of Criminal Procedure).

In submitting that issue, the District Court stated the correct principles of law. The instruction, as given, was clearly in accordance with the decision of the Court of Appeals for the Second Circuit in the *Grunewald case* and was in accordance with the decision of this Court on the subsidiary aspect of the case. *So far as the subsidiary conspiracy was concerned, this Court affirmed the Court of Appeals of the Second Circuit in every respect.*

There was no error in the giving of that instruction so far as the principles of law were concerned if there was, in fact, evidence to sustain the premise that there was a subsidiary conspiracy. If as the court believed there was evidence, it was compelled to submit the issue.

No contention up to that point was made that the case might have been, or should have been submitted on an alternative "continuing conspiracy" theory.

When the appeal was taken and the Government wrote its brief, this Court had already decided the *Grunewald case,* yet it did not make any contention that the instructions, as given, were erroneous. It contended only that there was evidence sufficient to sustain the verdict under the instructions as given.

In its brief, in the Court of Appeals, it did not contend that the case could have, and should have, been submitted on a continuing conspiracy theory. The Government said, in its brief in the Court of Appeals, page 57:

> "The court met the requirements *set forth by the United States Supreme Court in Grunewald v. United States* . . . The instructions were lengthy and complete, and those pertaining particularly to

the question of continuing conspiracy are set out in full in the Appendix, beginning p. 2a."

The instructions, quoted at that point, are the instructions concerning the existence of the subsidiary conspiracy which it now claims were erroneous.

This left, for decision by the Court of Appeals, the sole question whether the evidence was sufficient to sustain the verdict under the instructions as given and it determined that the evidence was not sufficient.

The Court of Appeals, in view of the limited issue, did not consider or pass upon the question whether the case could have been, or should have been, submitted on a "continuing conspiracy" theory. That was not an issue in the case in the Court of Appeals on the original submission and was not determined.

The Court of Appeals did not, in modification opinion, decide that it erred in determining that the evidence was insufficient under the instructions as given.

Consequently, when the Government petitioned for a modification of the decision to remand for a new trial on the ground that the case "might" have been submitted on the alternative continuing conspiracy" theory, it *presented a new issue* to the Court of Appeals. It did not ask the Court of Appeals to re-consider any conclusion or decision theretofore made by it in that respect for the issue was not before it and it expressed no opinion thereon and, indeed, could not have done so even if it had been presented because the issue had not been presented in the District Court.

For these reasons, the document filed by the Government, although denominated "Petition for Re-Hearing," was, in legal effect, an original petition for a new trial in the Court of Appeals so that the case could be tried on a new theory.

We respectfully submit that the Court over-looked this basic contention when considering the power of the Court of Appeals on a true petition for re-hearing.

A true petition for re-hearing presents, for re-consideration, the issues formerly presented and considered or presented and overlooked. It does not present issues which were never raised, considered or passed upon. This Court, as have all Appellate Courts, has stated that new issues cannot be considered when presented, for the first time, by petition for re-hearing. (*Independent Wireless Tel. Co. v. Radio Corp. of America,* 270 U.S. 84; *U. S. v. Achilli,* 234 F.2d 797 (7th Cir.), aff'd 353 U.S. 373. When a new issue is presented, the Court is not called upon to review or reconsider any prior determination and although labeled a petition for "re-hearing," it is not such in legal effect. It invokes original jurisdiction.

II

The Court erred in construing Section 2106, Title 28, U.S.C.A., as conferring power to direct a new trial in *criminal cases* in which a judgment has been *reversed for want of evidence warranting submission of a case to the Jury.*

The precise question has never been decided by this

Court or any Court of Appeals except in the *Karn case* in the Ninth Circuit.

The question was never squarely presented in this Court until the *Sapir case,* but the Court did not expressly pass on the question. It was, however, discussed by Justice Douglas in his Concurring Opinion and we believe that his views, therein expressed, support Petitioner's contention when properly understood.

In a number of cases, cited in the *Bryan case,* some Courts, on reversal, remanded for a new trial under varying conditions. Other Courts, including this Court, directed acquittal. In none of these cases reversed for lack of evidence was the *power* to remand for a new trial challenged, raised, discussed or passed upon. Consequently, these cases are not authority either way on the precise issue.

There are some cases in which the *propriety* of remanding for a new trial was passed upon, but none in which the *power* to do so in a *criminal case when the reversal was for lack of evidence* was passed upon.

No case has considered or passed upon the impact of the double jeopardy clause of the Fifth Amendment on the construction of Section 2106 in criminal cases.

In the case at bar, this Court held, in effect, that the Court of Appeals could, in its discretion, remand for a new trial under Section 2106, but it did not pass upon or decide the power of the Court of Appeals to do so in criminal cases in view of the constitutional guaranty against double jeopardy.

The precise question is, if the District Court erroneously denies a defendant a judgment of acquittal and the Court of Appeals reverses the conviction for lack of evidence, can the Court of Appeals remand for a new trial? Does such remand subject defendant to double jeopardy?

Petitioner contends that when the reversal is for lack of evidence (as distinguished from errors infecting the trial) direction of acquittal is mandatory. The mandate must direct the District Court to enter the judgment that it should have entered in the first place. But, if instead, it directs a new trial, it subjects the defendant to double jeopardy.

In the *Sapir case,* Justice Douglas said:

> "The granting of a new trial after a judgment of acquittal for *lack of evidence* violates the command of the Fifth Amendment that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'
>
> * * * * *
>
> "But an acquittal on the basis of lack of evidence concludes the controversy, as the *Kepner case* holds, and puts it at rest under the protection of the Double Jeopardy Clause, absent a motion by the defendant for a new trial."

Justice Douglas also pointed out the distinction between a reversal for lack of evidence and a reversal on grounds of error that infected the trial and cites the *Palko case,* 302 U.S. 319, in support thereof.

The Court did not pass upon the precise question, to-wit: the impact of the double jeopardy clause of the Fifth Amendment on the construction of Section 2106 when applied to a reversal for lack of evidence in *criminal cases.*

We submit that if Section 2106 is construed as granting discretionary power to remand for a new trial in a criminal case, when the reversal is for lack of evidence, it contravenes the Constitution and is void because it subjects him to another trial when he should have been acquitted.

The Constitution does not leave it to the discretion of any Court whether the guaranty against double jeopardy should be afforded to a defendant. To say that a Court can exercise discretion to grant or withhold the protection against double jeopardy, is to amend, in effect, the Fifth Amendement. The constitutional provision is mandatory and under it, if a defendant becomes entitled to a judgment of acquittal, as a matter of law, no Court should be permitted to deny that protection in the exercise of discretion.

Section 2106 was not designed to determine under what circumstances or conditions any one of the enumerated dispositions is to be made. It is merely a catalog of the powers which the Appellate Court may exercise. But the exercise of the powers depends upon the conditions existing in each case and is *subject* to *constitutional limitations.*

III

The Court erred in holding that it has been heretofore established that the taking of an appeal by the defendant in a criminal case, constitutes, *under all circumstances,* a waiver of his right to the constitutional protection against double jeopardy and that the Appel-

late Court may direct a new trial in a case where the reversal is based upon the lack of evidence.

No case heretofore decided by this Court has so held. The cases of *United States v. Ball* and *Green v. United States* did not pass upon or decide this issue. *Neither of the two cases involved a reversal on the ground of the insufficiency of the evidence to sustain the conviction on the instructions as given.*

In the *Ball case,* the Government did not move for a new trial as in the case at bar. The Supreme Court sustained the defense of double jeopardy as to the defendant Millard F. Ball and in that connection, this Court quoted with approval from the Dissenting Opinion of Justice Livingston in the "leading case", of *People v. Barrett,* 1 Johnson 66 (N.Y.), as follows:

> " 'This case, in short, presents the novel and unheard-of spectacle of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury, on a suggestion of this kind, coming, too, from the officer who drew the indictment, seems not to comport with that universal and humane principle of criminal law that no man shall be brought into danger more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end?"

This observation is applicable to the situation in the case at bar because here, too, the Government, through its representatives, its Attorneys, concedes that it acqui-

esced in the submission of the case to the Jury on the instructions as given *without objection* and omitted to seek submission of the case to the Jury on the alleged "continuing conspiracy" theory. It did not assign this omission as error in its brief in the first submission to the Court of Appeals although this Court had already decided the *Grunewald case. The Government now asserts that it erred in this acquiescence and now seeks a new trial because of its own failure to have the case submitted in the Trial Court upon the theory which it deems to be correct.* Here, too, the Government seeks a new trial by reason of its "own inaccuracy or neglect." In principle, there is no difference between the errors and omissions of the Government's Counsel in this case and the inaccuracy or neglect in the drawing of the indictment in the *Ball case*.

As to the remaining two defendants in the *Ball case*, to-wit, John C. Ball and Robert E. Boutwell, the Court rejected the defense of double jeopardy because the reversal was based on the insufficiency of the indictment. The question of the effect of a reversal for *lack of evidence* was not involved, discussed or passed upon by the Court.

There is no language in the *Ball case* which either directly or indirectly warrants a conclusion that the taking of an appeal by a defendant in a criminal case operates as a waiver of his constitutional protection against double jeopardy under all circumstances and, particularly, when the reversal is based on the *lack of evidence*.

There is a vast and fundamental difference between a reversal based on a defective indictment and a reversal based on lack of evidence. (Justice Douglas in the *Sapir* case.) A reversal on the former ground does not carry with it any implication as to the guilt or innocence of the defendant. It involves merely the question of whether the defendant should have been tried at all because of the insufficiency of the indictment.

On the other hand, a reversal for want of evidence implies, as a matter of law, that although the defendant was tried on a valid indictment and was subjected to a legal trial, he was, as a matter of law, entitled to judgment of acquittal at the conclusion of the entire case. The reversal for want of evidence establishes that the District Court should not have submitted the case to the Jury and that it should have acquitted the defendant. The implications of a reversal for lack of evidence, make it impossible to classify it in the same category as a reversal for errors committed during the trial in the admission or rejection of evidence, or in the giving of erroneous instructions over objections duly taken, or for defective indictment. The consequences of a reversal for lack of evidence make applicable the double jeopardy clause of the Fifth Amendment.

The *Green case* did not involve the question whether the defendant could be retried after a reversal. The case involved only the question whether he could be tried for first degree murder after the implied acquittal for first degree murder and the reversal of conviction for second degree murder. The question whether he could be re-

tried for second degree murder was not raised, discussed or passed upon by the Court. Insofar as the Court discussed generally the subject of double jeopardy, we believe that it sustains Petitioner's contention in this case. The Court held that

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the *hazards of trial and possible conviction* more than once for an alleged offense. . . . .
>
> "Thus it is one of the elemental principles of our criminal law that the *Government cannot secure a new trial* by means of an appeal even though an acquittal may appear erroneous." (Citing the *Ball* case among others). (Emphasis supplied)

The statement in the *Green* case that

> "this Court has also held that a defendant can be tried a second time for an offense when his prior conviction for that same offense had been set aside on appeal."

citing *Ball*, was dicta and was too broad. It is not supported by the *Ball case* as we have heretofore demonstrated.

In *Green*, the Court rejected the theory that an appeal was, itself, a "waiver: of the constitutional defense of former jeopardy. The Court held that waiver

> "connotes some kind of voluntary knowing relinquishment of a right."

The Court adopted Justice Holmes' observation made in the *Kepner case* that

> " 'Usually no such waiver is expressed or thought of. (In taking an appeal from a conviction). Moreover, it cannot be imagined that the law would

> deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.'"

The Court also held "untenable" that an appeal "prolonged his original jeopardy."

The rejection by this Court of the "waiver theory" and the "prolongation of original jeopardy theory," negatives and repels the contention that the taking of an appeal, in all cases and upon all grounds in and of itself, precludes the application of the double jeopardy defense. The true rule must, therefore, be that reversal on the ground of *lack of evidence* makes mandatory the direction of a judgment of acquittal and that a new trial would only be warranted where the reversal is on grounds which, in effect, nullify the trial or, as has been said, infects the validity of the trial.

The *Green case* limits the application of the *Ball case* and supports Petitioner's view that the direction for a new trial, under the circumstances of this case, subjects Petitioner to double jeopardy.

In *Bryan v. United States*, 338 U.S. 552, the Court first considered the question of the *propriety* of remanding with direction for a new trial under Section 2106. That portion of the Opinion did not discuss the impact of the constitutional guaranty against double jeopardy on the construction to be placed on Section 2106 when applied to criminal cases.

The Court cataloged a number of cases in which, under varying circumstances, Courts had remanded

for a new trial and, in others, remanded for the entry of a judgment of acquittal, but in none of them was the question of the impact of the double jeopardy clause of the Fifth Amendment on the construction of Section 2106 raised, discussed or passed upon except in the *Karn case* in the Ninth Circuit.

The Court then considered the question of double jeopardy as applied to a case in which the *defendant requested a new trial* if reversal was based upon insufficiency of the evidence as an alternative to judgment of acquittal.

In that case, it was not the Government who petitioned for a new trial. It was the defendant's alternative request for a new trial which was deemed, in effect, a waiver of the guaranty against double jeopardy.

In the case at bar, the Government petitioned for a new trial and not the defendant. The defendant did not, in connection with his motion for judgment of acquittal in the District Court or in the Court of Appeals, seek a new trial.

In the *Karn case,* 158 F. 2d 568 (9th Cir.) (the only case cited in *Bryan* in which the constitutional question was considered, the Court held:

> "The right of appellant to a verdict of acquittal fully matured when he made his motion. To remand the case with directions to grant new trial would, in our judgment, be a serious invasion of the rights which accrued to him in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind."

The language used by the Court in the *Bryan case*

must be read in connection with and as *relating to the defendant's alternative request for a new trial* upon reversal for lack of evidence.

In the *Kepner case,* the Court was concerned with the validity of a statute giving the Government *the right to appeal in a criminal case* and this Court held that the statute was void because it contravened the constitutional guaranty against double jeopardy. This principle is applicable to Section 2106 if it is construed to authorize the Appellate Court, in its discretion, to remand for a new trial upon reversal for lack of evidence *in a criminal case.*

If a statute, granting the Government the right to appeal in a criminal case contravenes the guaranty against double jeopardy, a statute granting an Appellate Court discretion to grant a new trial in a criminal case when the defendant was, as a matter of law, entitled to a judgment of acquittal, likewise, contravenes the guaranty against double jeopardy and that is *especially true where the Government seeks the new trial* and not the defendant.

Upon the principle applied in *Kepner,* Section 2106 must be construed as precluding the right of an Appellate Court to exercise discretion to remand for a new trial when the reversal is predicated on the ground of lack of evidence.

IV

The Court over-looked the basic proposition that in a criminal case the Government is precluded from asserting error and seeking a new trial by reason thereof.

In the case at bar, it is the Government that asserted error in the instructions and petitioned for a new trial in the Appellate Court based thereon.

Assuming, without admitting, that the instruction, complained of by the Government, is erroneous, it is immaterial so far as the constitutional question is concerned whether the instruction was given by the Court on its own initiative or requested by the defendant. The only relevant question is, can the Government assert the error and seek a new trial by reason thereof?

In *Palko v. State of Connecticut*, 302 U.S. 319, Justice Cardozo said:

> "It (5th Amendment) forbade jeopardy in the same case if the new trial was *at the instance of the government* and not upon defendant's motion." (Emphasis supplied)

In the *Kepner case*, 195 U.S. 100, the Court quoted with approval from the Opinion in the case of *People v. Webb*, 38 Cal 467, as follows:

> "We are entirely satisfied that this court has no authority in criminal cases, under our state Constitution, to order a new trial of a defendant at the instance of the prosecution for mere errors in the ruling of the court during the progress of the trial after the jury have been charged with the case, and have rendered a verdict of not guilty. No case has been called to our attention, and after a most diligent examination of authorities, we have not been able to find a single American case where a retrial has been ordered or sanctioned by an appellate court at the *instance of the prosecution*, after the defendant had been once put upon his trial for an alleged felony, upon a valid indictment before a competent court and jury, and acquitted by the verdict of such jury; but we find a vast number

> of adjudications of the highest judicial tribunals of the different states and many of the Federal courts to the effect that no such retrial is authorized by the common law, and is directly interdicted by the Constitution of the United States and also of most of the several states."

The Federal Rules of Criminal Procedure do not permit the Government to assert error and seek a new trial under any condition and it is denied the right of appeal.

If, upon the renewal of the motion for acquittal, after the verdict was rendered, the Trial Court had sustained the motion and entered judgment of acquittal, the Government could not have appealed from that judgment, whether the decision was right or wrong. The result is the same when the Court of Appeals reverses a criminal case for lack of evidence (*Sapir case*). There is no apparent reason in principle why the Government should be permitted to petition for a new trial based on alleged errors after the determination that judgment of acquittal should have been entered in the Court below.

If there was any error in the instructions, it was the failure to instruct the Jury to determine whether there was a "continuing conspiracy" to evade by making false statements and submitting false financial statements and records as distinguished from the "subsidiary conspiracy" instruction which was given. *The failure to give that instruction is attributable to the Government.* If it deemed such an instruction within the purview of the evidence and indictment, it should have requested such an instruction. Had such a request been made by the

Government, the Court would have submitted both theories with instructions that if the Jury found the "continuing conspiracy," as distinguished from the "subsidiary conspiracy," the statute of limitations would not run.

The petition for the new trial is predicated on the Government's own error.

The Government speculated on going to the Jury on the alleged "subsidiary conspiracy" theory by not objecting thereto and without requesting instruction on the "continuing conspiracy" theory. It sought to sustain the conviction on that theory in the District Court and in the Court of Appeals *even after the decision of this Court in Grunewald*. It was only after the Court of Appeals determined that Petitioner was entitled to acquittal on the theory embraced in the instructions, as given, that it asserted error, *acknowledged its own dereliction* and petitioned for a new trial contrary to the law as embodied in the rules, statutes and decisions precluding the Government from seeking a new trial.

V

The Court erred in holding that if the Petitioner had not injected the infected language (subsidiary conspiracy theory) into the charge, the Trial Court would have submitted the "continuing conspiracy" theory.

We submit that this is pure speculation. There is nothing in the record to indicate what instructions the Court would have given in the absence of the instruction on the "subsidiary conspiracy" theory.

On the contrary, it is quite evident from the record as a whole that the Trial Court would not of its own initiative have given a "continuing conspiracy" instruction. It is, of course, possible that the Trial Court may have given a "continuing conspiracy" instruction *if requested by the Government*. We are left to speculate what the Trial Court would have done had such an instruction been requested. It may be inferred that the Trial Court was disposed to submit to the Jury the theory of each of the parties so that the theory of the prosecution and defense could be presented to the Jury. But it cannot be said that the Court would have given the "continuing conspiracy" instruction in any event if Petitioner had not requested the "subsidiary conspiracy" instruction.

The Government now wants to be relieved from its failure to seek a conviction upon the "continuing conspiracy" theory in violation of the law precluding double jeopardy.

VI

Justice Harlan erred in his Concurring Opinion in the construction and application of Rule 30 of the Federal Rules of Criminal Procedure to the case at bar.

It has been repeatedly said by the Courts that the object of this Rule, like its counterpart Rule 51 of the Federal Rules of Civil Procedure, is

> "to reduce the possibility of error by giving the Trial Judge an adequate opportunity to correct any mistake in his charge, as well as to afford to the opposing party an opportunity to keep error out of

the records." (*Armstrong v. United States*, 228 F.2d 764).

Compliance with this Rule is especially important in criminal cases because of the Double Jeopardy Clause of the Fifth Amendment and it imposes a greater duty on the Government to avoid the submission of the case to the Jury on erroneous instructins given or omitted because of the possibility of subjecting a defendant to a second trial (double jeopardy) by reason thereof.

The Government petitioned for a new trial on the specific ground that it was error to submit the case to the Jury on the "subsidiary conspiracy" theory and that it was error to omit instruction on a "continuing conspiracy" theory.

Had the Government objected to the instruction, as given, and requested instruction on "continuing conspiracy," the Trial Court would have had an opportunity to change the instructions if convinced that the Government was right.

If there was error in the instructions in these respects, Rule 30 in express language precludes the Government from assigning the errors. For this purpose, it is immaterial whether the instructions, as given, were proposed by Petitioner or given by the Trial Court on its own initiative. The only relevant question is, were the instructions erroneous, and if they were, it was incumbent upon the Government to object and to request proper instructions. The Rule precludes the Government from complaining thereafter.

(a) Rule 30 precludes *all parties* from assigning error

unless the objection is made. This, of course, includes the Government.

(b) The Rule precludes assigning error *in the District Court*, as well as *in the Court of Appeals* in the absence of objection. Neither Court could entertain any contention based on the instructions and grant relief based thereon in the absence of objection and request for instructions.

(c) The Rule applies to instructions given and to instructions *omitted* ("or omission"). A party is precluded from complaining that the Court erred in not submitting instructions embodying a different theory unless he requested its submission and was refused. That is the only way one can object to an "omission."

(d) The requirement that the party must state "distinctly the matter to which he objects and the grounds of his objection," emphasizes the requirement.

It was within the power of the Government to avoid the possibility of double jeopardy—a new trial—by interposing the objections to the instructions, as given, and request instructions on "continuing conspiracy" theory. The Rule precludes the Government from assigning these errors and seeking a new trial based thereon.

Justice Harlan erroneously states that the Rule does not apply in this case because "it erred in the Government's favor."

If the instruction, as given, was erroneous and the failure to give a "continuing conspiracy" instruction was erroneous, the errors were adverse to the Government

and required appropriate objection and request in order to enable it to assign the errors and seek relief by reason thereof. The Government contends that the alleged errors were prejudicial to it. That is the basis of its petition for the new trial.

The Government believed that the instructions, as given, were correct. (Government's Petition for Re-Hearing in the Court of Appeals, page 6). It acquiesced in the theory submitted in Petitioner's requested instructions and did not object or request submission of instructions embodying the alleged "Continuing Conspiracy" theory. It was only after the Court of Appeals decided that there was no evidence to support the conviction on the theory of the instructions as given, that the Government concluded that the instructions were erroneous and that an "alternative theory" should have been submitted. It first said the instructions were proper and after being defeated, asserts that the instructions were erroneous and it wants a new trial on that ground.

Rule 30 (Federal Rules of Criminal Procedure) was designed to prevent just such a result in a criminal case. To relieve the Government from compliance with Rule 30 results in subjecting the defendant to the jeopardy of another trial. It gives the Government one or more opportunities to obtain a conviction so that if defeated on one theory, it can try him again on another theory.

The application of Rule 30 to the Government makes it mandatory for the Government to try the defendant on all available theories and to seek submission of the case to the Jury on correct instructions. This requires it to object to erroneous instructions and to request

proper instructions and its failure to do so in a criminal case is an acquiescence in the theory on which the case was submitted.

It is immaterial in a criminal case whether the Government's failure to object and request proper instructions was intentional and deliberate (conceded in this case) or was due to mistake in determining the proper theory for submission. The result is the same. Its failure to object and request instructions deemed proper, is made the basis of a petition for a new trial that will subject defendant to double jeopardy, a result which it could, and should have, avoided.

VII

Justice Harlan erred in stating that the *Sapir case* does not recognize the distinction between reversal on the ground of errors infecting the trial and reversal on the ground of lack of evidence.

Justice Douglas said, in the *Sapir case*:

> "a reversal by the appellate court on grounds of error that infected the trial would also be different," citing the *Palko case*, 320 U.S. 319.

CONCLUSION

Petitioner submits that if the decision rendered herein is allowed to stand, it will result in:

(a) a serious impairment of the protection against double jeopardy guaranteed by the Fifth Amendment because it subjects a defendant to the embarrassment, expense and ordeal of another trial when, at the conclusion of the trial, he was entitled to an acquittal as a matter of law;

(b) The construction placed by this Court on *Section 2106,* so far as it permits the Appellate Court to direct a new trial upon reversal for lack of evidence, results in an impairment of the constitutional guaranty against double jeopardy. In effect, it subjects a defendant to another trial because of the fortuitous circumstance that the Trial Court erroneously failed to enter judgment of acquittal;

(c) The decision results in a serious impairment of *Rule 30 of the Federal Rules of Criminal Procedure* which prohibits the Government, as well as the defendant, from assigning as error, at any time, the giving of an alleged erroneous instruction in the absence of objection and/or the failure to give instructions in the absence of request therefor;

(d) The decision will be construed as authorizing the Court of Appeals to consider and determine issues that were not presented, passed upon or determined in the District Court or in the Court of Appeals on original submission, thereby exercising original jurisdiction to try the new issue de novo instead of exercising the functions of a Court of Review.

Petitioner submits that the Court should re-examine the case with these consequences in view and that it

will, upon such re-examination, conclude that the original Opinion of the Court of Appeals reversing the conviction with direction for the entry of a judgment of acquittal, was correct, should be reinstated and the Modification Opinion vacated.

Respectfully submitted,

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD,
Of Counsel
Public Service Building,
Portland, Oregon.

CERTIFICATE OF GOOD FAITH

I, SOLOMON J. BISCHOFF, Counsel for Petitioner, certify that this Petition for Re-Hearing is presented in good faith; that it is not interposed for delay and that in my judgment it is well founded.

Dated MARCH 10th, 1960.

SOLOMON J. BISCHOFF,
Counsel for Petitioner.